

CLEAN POWER PLAN LEGAL STATUS

ACEEE SYMPOSIUM ON MARKET TRANSFORMATION

Avi Zevin
March 21, 2016



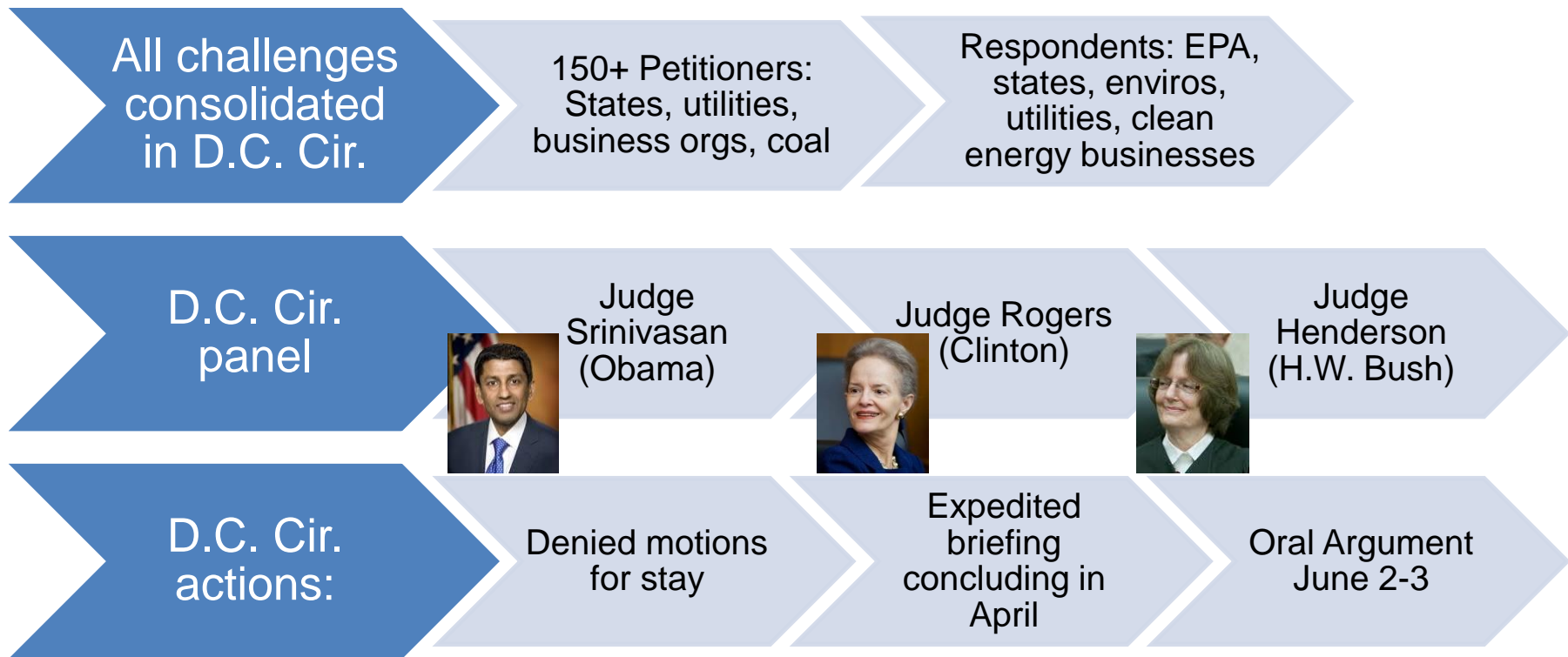
**Van Ness
Feldman** LLP

Overview

- Overview of Clean Power Plan challenges
- Supreme Court stays Clean Power Plan
- How are stakeholders treating stay?
- Litigation timeline
- Possible litigation implications

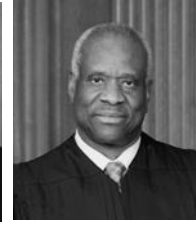
* Timelines and outcomes uncertain. Some initial thoughts/guesses*

Clean Power Plan Challenges



Feb. 9 Supreme Court Order Issuing Stay

- Unusual action
- 5-4 decision
- Standard for decision
 - *Likelihood of success on merits*
 - Irreparable harm
- Signal of future outcome?
 - Passing of Justice Scalia significantly reduces impact



Impact of the Stay



What can EPA still do?

- *Stays enforcement*
 - Cannot enforce initial plan deadline
 - Cannot issue Federal Plan
 - Approve state plans that are submitted?
- EPA has taken position it can still *advise*
 - Technical Support at state request
 - Model Trading Rules?
- CEIP?
 - Original plan to issue new regulation
 - Will stay impact timelines?



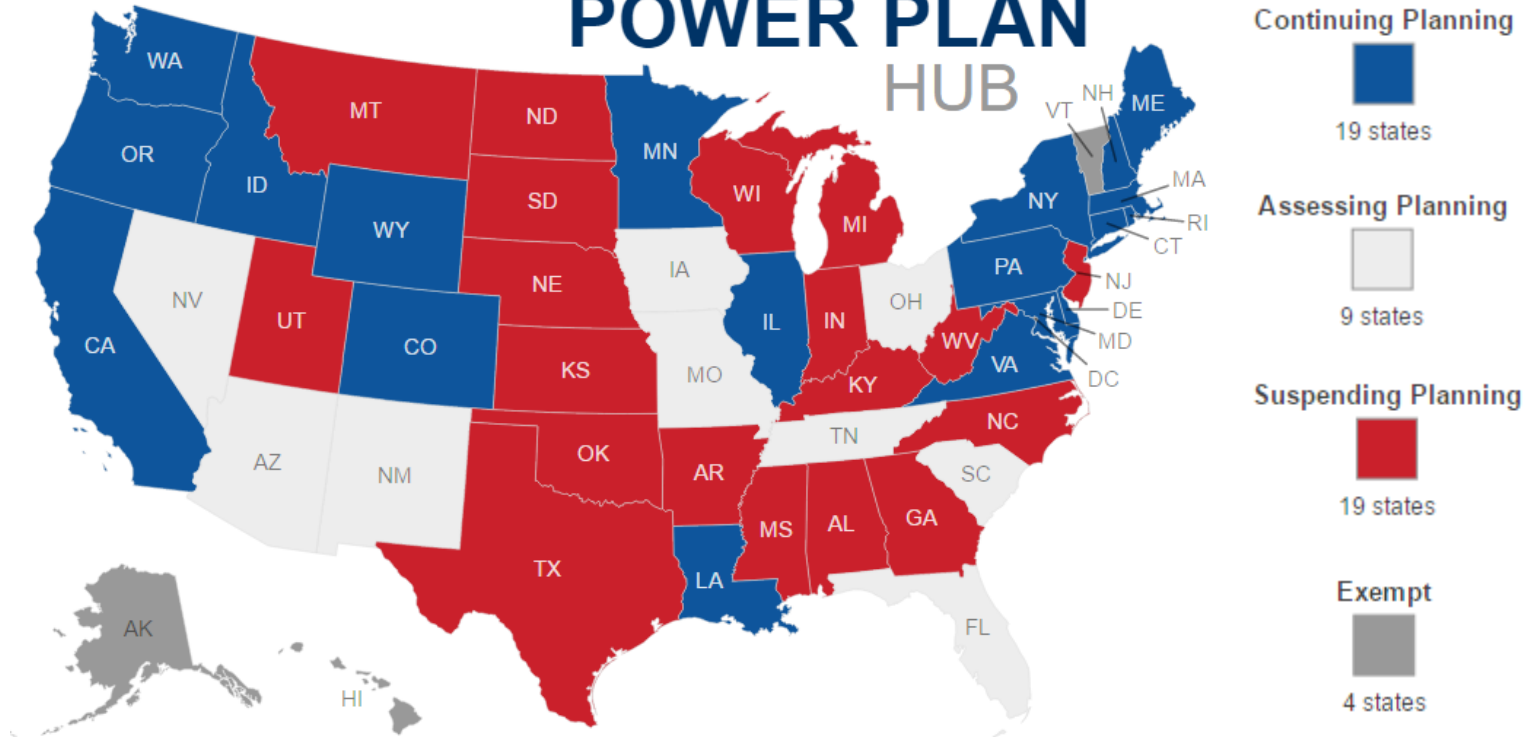
What can States still do?

- Stakeholder processes
- Initial plan submission
- Develop full plan

What are States Doing?

E&E's

POWER PLAN HUB



http://www.eenews.net/interactive/clean_power_plan

Initial Comments from Power Companies

□ AEP

- The court case “doesn’t change our focus on the diversification of our generation fleet,” said spokeswoman Melissa McHenry. Those diversification plans include more natural gas and renewables,” she said.

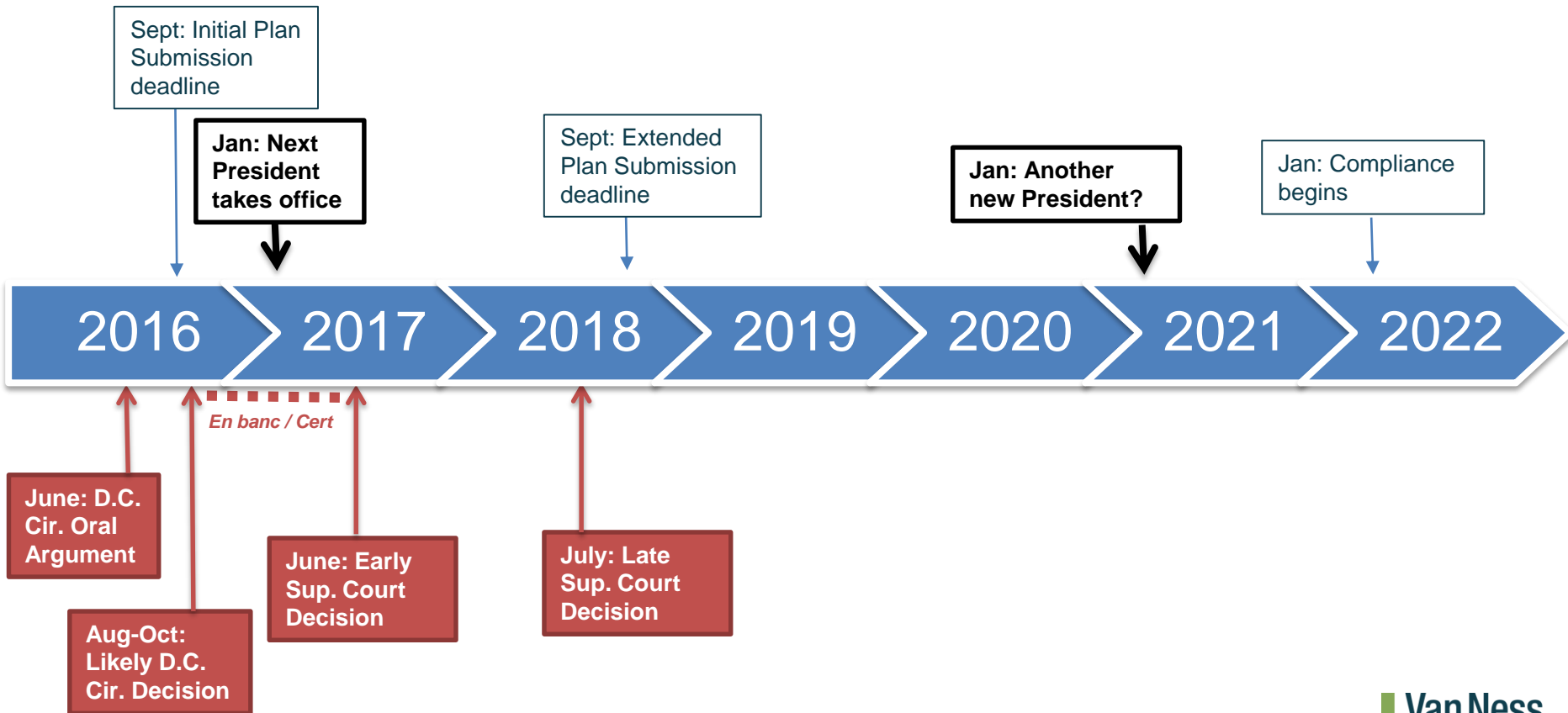
□ Duke

- CEO Lynn Good: “As I look at this five-year plan, whether there's a stay on the Clean Power Plan or not, we believe the plan that we're on is one that makes sense for our customers and our communities and our states.”

□ American Public Power Association

- "With the caveat that we don't 'advise' our members per se, but if asked, our suggestion would be to continue to participate in the state's process if they intend to continue with it."

Litigation Timeline



Issues in the Litigation

- Section 112 Exclusion
- “Best System of Emission Reduction” determination
- Constitutional issues
- “Record-based” Challenges
- Interaction with Carbon Pollution Standards Rule

Possible Implications of Petitioner Success

Issue	CPP Outcome	Possible Remand	Additional Implications
Section 112 Exclusion	Fully vacated	No	No section 111(d) rules for major GHG source categories
BSER determination	Fully / largely vacated	Yes, but BSER limited to at-the-unit measures	Potential limits on “trading” and flexibility under section 111
Constitutional Issues	Fully vacated	Dependent on Court’s reasoning	Potential implications for all cooperative federalism programs
Record-based Issues	Partially vacated or remand w/o vacatur	Yes	
Interaction w/ CPS Rule	Fully vacated	Not until new CPS rule	

Possible Implication of EPA Success

- General agreement that plan submission deadlines will be delayed
- Uncertainty regarding whether compliance dates (e.g., 2022-2030) delayed
 - Petitioners arguing (1) Supreme Court Stay already delayed, (2) legal precedent points to delay
 - Others argue (1) Supreme Court order does not specifically address timeline, (2) legal precedent supports courts decide timeline after litigation is resolved
 - EPA: “too early to tell”

For more information:

Avi Zevin

202-298-1953

abz@vnf.com

 @azevin

Issues in the Litigation

- Section 112 Exclusion
- “Best System of Emission Reduction” determination
- Constitutional issues
- “Record-based” Challenges
- Interaction with Carbon Pollution Standards Rule

Section 112 Exclusion

- Before 1990
 - Section 111 authorizes regulation of any *pollutant* not regulated under Section 108 or Section 112
- Unreconciled 1990 Amendments to Clean Air Act
 - Senate amendment: preserves status quo
 - House amendment: one reading precludes regulation of *source categories* regulated under Section 112
- 2012: EPA promulgated Section 112 regulation for power plants.
- EPA interpretation
 - Read together, Senate and House amendments do *not* exclude regulation

Section 112 Exclusion Issues

- Two enrolled amendments
 - Unreconciled amendments result in ambiguity – does EPA benefit from deferential standard of review; or
 - Primacy of House amendment
- Meaning of House amendment
 - Ambiguous; or
 - Clearly exclusionary
- Reasonableness of exclusionary interpretation
 - Congress could not have intended to leave gap; or
 - Reasonable in light of 1990 expansion of coverage of Section 112

Issues in the Litigation

- Section 112 Exclusion
- “Best System of Emission Reduction” determination
- Constitutional issues
- “Record-based” Challenges
- Interaction with Carbon Pollution Standards Rule

Best System of Emission Reduction Determination

- Section 111 authorizes EPA to set standard of performance based on “best system of emission reduction” (BSER) that has been adequately demonstrated.
- CPP BSER is based on emission reductions from:
 - Heat rate improvements at coal-fired power plants
 - Substituting gas-fired generation for coal-fired generation
 - Substituting renewable generation for fossil fuel-fired generation
- CPP authorizes compliance through purchasing of emission reduction credits

Petitioner BSER Arguments

- ❑ BSER for standard of performance must be based on *emission performance* not reduced generation (i.e., non-performance)
- ❑ BSER has to be achievable through measures *at a* regulated source; yet CPP relies on combinations of actions at multiple plants and also non-regulated plants (renewables).
- ❑ Unreasonable for BSER for existing plants to be more stringent than standard for new plants

EPA BSER Arguments

- “System” is an expansive term; CPP interpretation is reasonable given interconnected nature of grid
- The 3 BSER measures are widely deployed for pollution control in the sector
- Limiting BSER to inside-the-fence measures would not be the “best” system
- BSER is achievable by a regulated plant through direct investments or credit purchases
- New source standard is a different type of standard

Issues in the Litigation

- Section 112 Exclusion
- “Best System of Emission Reduction” determination
- Constitutional issues
- “Record-based” Challenges
- Interaction with Carbon Pollution Standards Rule

Issues in the Litigation

- Section 112 Exclusion
- “Best System of Emission Reduction” determination
- Constitutional issues
- “Record-based” Challenges
- Interaction with Carbon Pollution Standards Rule

Issues in the Litigation

- Section 112 Exclusion
- “Best System of Emission Reduction” determination
- Constitutional issues
- “Record-based” Challenges
- Interaction with Carbon Pollution Standards Rule

Interaction with Carbon Pollution Standards Rule

- Section 111(d) authority to establish standards
 - “for any pollutant to which a standard of performance under [Section 111] would apply **if such existing source were a new source.**”
 - “New source” defined to include new and modified sources
- Implication:
 - *Authority to regulate under Section 111(d) conditioned on valid Section 111(b) regulation*
- Issue in Carbon Pollution Standards Rule
 - BSER for *new* sources is based on partial carbon capture and sequestration
 - **Is CCS “adequately demonstrated”?**
 - Is valid BSER for *modified* sources sufficient?