

# **ATTACHMENT 2**

6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 60****[FRL-XXXX-XX-XXX]****Notice of Review of the Clean Power Plan****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) announces that it is reviewing and, if appropriate will initiate proceedings to suspend, revise or rescind the Clean Power Plan, found at 40 CFR Part 60 subpart UUUU.

**DATES:** This document is effective **[Insert date of publication in the Federal Register]**.

**FOR FURTHER INFORMATION CONTACT:** Mr. Peter Tsirigotis, Sector Policies and Programs Division (D205-01), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (888) 627-7764; email address: *airaction@epa.gov*.

**SUPPLEMENTARY INFORMATION:** By this notice, EPA announces it is reviewing the Clean Power Plan, 80 FR 64662 (October 23, 2015) (CPP), including the accompanying Legal Memorandum, and, if appropriate, will as soon as practicable and consistent with law, initiate proceedings to suspend, revise or rescind this rule. The CPP established emission guidelines for state plans to limit carbon dioxide emissions from existing fossil fuel-fired power plants.

**I. Background**

The CPP was promulgated under Section 111 of the Clean Air Act. 42 U.S.C. 7411. Section 111 of the Clean Air Act authorizes the EPA to issue nationally applicable New Source Performance Standards (NSPS) limiting air pollution from “new sources” in source categories

that cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. Section 7411(b)(1). Under this authority, the EPA had long regulated new fossil fuel-fired power plants to limit air pollution other than carbon dioxide, including particulate matter (PM); nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>). See 40 CFR Part 60 subparts D, Da. In 2015, the EPA issued a rule that for the first time set carbon dioxide emission limits for new fossil fuel-fired power plants. Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 80 FR 64510 (October 23, 2015). Under certain circumstances, when the EPA issues standards for new sources under Section 111(b), the EPA has the authority under Section 111(d), to prescribe regulations under which each State is to submit a plan to establish standards for existing sources in the same category. The EPA relied on that authority to issue the CPP, which, for the first time, required States to submit plans specifically designed to limit carbon dioxide emissions from existing fossil fuel-fired power plants. As part of the promulgation of the CPP, EPA prepared a legal memorandum that supplemented the legal analysis provided by the Agency in the preamble to the final CPP.

Due to concerns about EPA's legal authority and record, 27 States and a number of other parties sought judicial review of the CPP in the D.C. Circuit. *State of West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.). On February 9, 2016, the Supreme Court stayed implementation of the CPP pending judicial review. Following full merits briefing, oral argument was held before the D.C. Circuit, sitting *en banc*, on September 27, 2016. That case is currently pending in the D.C. Circuit.

## **II. Initiation of Review of CPP**

On March 28, 2017, President Trump issued an Executive Order establishing a national policy in favor of energy independence, economic growth, and the rule of law. The purpose of that Executive Order is to facilitate the development of U.S. energy resources—including oil and gas—and to reduce unnecessary regulatory burdens associated with the development of those resources. The President has directed agencies to review existing regulations that potentially burden the development of domestic energy resources, and appropriately suspend, revise, or rescind regulations that unduly burden the development of US energy resources beyond what is necessary to protect the public interest or otherwise comply with the law. The Executive Order also directs agencies to take appropriate actions, to the extent permitted by law, to promote clean air and clean water while also respecting the proper roles of Congress and the States. This Executive Order specifically directs EPA to review and, if appropriate, initiate reconsideration proceedings to suspend, revise or rescind this Rule, including the accompanying Legal Memorandum.

Pursuant to the Executive Order, EPA is initiating its review of the CPP, including the accompanying legal memorandum, and providing advanced notice of forthcoming rulemaking proceedings consistent with the President's policies. If EPA's review concludes that suspension, revision or rescission of this Rule may be appropriate, EPA's review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law.

As part of the review of the CPP that EPA is initiating today, EPA will be reviewing the compliance dates that were set in the CPP. Under the Supreme Court's stay of the CPP, states and other interested parties have not been required nor expected to work towards meeting the



compliance dates set in the CPP. Indeed, some compliance dates have passed or will likely pass while the CPP continues to be stayed. For these reasons, the compliance dates in the CPP will need to be re-evaluated. Once EPA completes its review and decides what further action to take on the CPP, EPA will ensure that any and all remaining compliance dates will be reasonable and appropriate in light of the Supreme Court stay of the CPP and other factors.

EPA's ability to revisit existing regulations is well-grounded in the law. Specifically, the agency has inherent authority to reconsider past decisions and to rescind or revise a decision to the extent permitted by law when supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“*Fox*”); *Motor Vehicle Manufacturers Ass’n of the United States, Inc., et al. v. State Farm Mutual Automobile Insurance Co., et al.*, 463 U.S. 29, 42 (1983) (“*State Farm*”). Moreover, the Clean Air Act itself authorizes EPA to reconsider its rulemakings. 42 U.S.C. § 7607(b)(1), (d)(7)(B). The Clean Air Act complements the EPA's inherent authority to reconsider prior rulemakings by providing the agency with broad authority to prescribe regulations as necessary. 42 USC § 7601(a). The authority to reconsider prior decisions exists in part because EPA's interpretations of statutes it administers “are not carved in stone” but must be evaluated “on a continuing basis,” *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 857-58 (1984). This is true when—as is the case here—review is undertaken “in response to . . . a change in administrations.” *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005). Importantly, such a revised decision need not be based upon a change of facts or circumstances. Rather, a revised rulemaking based “on a reevaluation of which policy would be better in light of the facts” is “well within an agency's discretion,” and “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its

programs and regulations.” *National Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-15; quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)).

In conducting this review, EPA will follow each of the principles and policies set forth in the Executive Order, as consistent with EPA’s statutory authority. The Agency will reevaluate whether this Rule and alternative approaches are appropriately grounded in EPA’s statutory authority and consistent with the rule of law. EPA will assess whether this Rule or alternative approaches would appropriately promote cooperative federalism and respect the authority and powers that are reserved to the states. EPA will also examine whether this Rule and alternative approaches effect the Administration’s dual goals of protecting public health and welfare while also supporting economic growth and job creation. EPA will review whether this Rule or alternative approaches appropriately maintain the diversity of reliable energy resources and encourage the production of domestic energy sources to achieve energy independence and security. Additionally, EPA will assess this Rule and alternative approaches to determine whether they will provide benefits that substantially exceed their costs. In taking any actions subsequent to this review, EPA will use its appropriated funds and agency resources wisely by firmly grounding in the statute its actions to protect public health and welfare.

Dated: March 28, 2017.

A handwritten signature in blue ink, appearing to read "E. Scott Pruitt", written over a horizontal line.

E. Scott Pruitt,  
Administrator.