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Some of the Parties to the Clean Power Plan Litigation are Defying Expectations

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Recent news has put some fairly unsettling context around the ongoing litigation over the Obama Administration's Clean Power Plan, which would limit greenhouse gas emissions from fossil-fueled power plants.

The National Oceanic and Atmospheric Administration (NOAA) [reported that 2015 was the hottest year on record](#), replacing 2014 at the top of that list. (The top 15 years on the NOAA list include only one year that is *not* in the 21st century.) A study by academic experts in ice-sheet behavior, published in the most recent edition of *Nature*, predicts [a more rapid disintegration of the Antarctic ice sheet than previously anticipated](#), resulting in an eventual sea level rise of 4 to 5 feet.

Meanwhile, the legal challenge to the Clean Power Plan, the

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Administration's signature climate change initiative, is before the D.C. Circuit Court of Appeals. That litigation is in the briefing phase, so states, industries, and NGOs are finally staking out their positions on all the legal issues. Oral arguments are slated for early June.

This is a complex piece of litigation involving a multitude of issues and parties, but two of the briefs filed this week are noteworthy for the way in which they go against expectations.

The first is an [amicus brief](#) filed by former U.S. Environmental Protection Agency (EPA) administrators William Reilly and William Ruckleshaus. As my colleague [David Adelman and I have shown](#) in a recent paper, conflict over the Clean Power Plan tends to break mostly along partisan ideological lines. (That conflict reflects interest group politics as well but to a lesser extent.) The partisan nature of this dispute is further underscored by the fact that a group of 205 senators and congressmen filed their own amicus brief opposing the Clean Power Plan; *only one* of the 205 is a Democrat, from a coal producing state.

What makes the Reilly/Ruckleshaus brief noteworthy is that both men served Republican presidents and both support the Clean Power Plan. Ruckleshaus was Ronald Reagan and Richard Nixon's EPA head, while O'Reilly served in the same capacity under George H. W. Bush. Their brief argues that (1) the Clean Air Act contemplates the kind of broad regulatory response to new problems represented by the Clean Power Plan, without the need for further congressional authorization and (2) the Plan does not trample state sovereignty. Both arguments rebut key points of legal attack advanced by the plaintiffs.

[Another amicus brief](#) that runs contrary to the popular framing of this conflict was filed by a group of electric grid experts. Here in the red states, we hear mostly complaints that the Plan will jeopardize the reliability of the electric grid, and the average person might therefore conclude that those responsible for ensuring the reliability of the electric grid are uniformly opposed to the Plan. Not so, as the electric grid experts' brief illustrates. They argue that the grid can withstand the anticipated changes to the generation mix resulting from the Plan without jeopardizing reliability and that EPA's sector-

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wide approach to emissions reductions is consistent with the way in which the electricity sector operates. That first conclusion is [consistent with the Adelman-Spence paper](#), which explores earlier disagreements among regional grid operators over this question and illustrates that most of the anticipated closures of coal-fired power plants will be in parts of the country with ample power generation reserves (though Texas may be an exception to that generalization).

To be sure, there are many other contested issues in the D.C. Circuit proceeding, some of which are very close calls for the court, and it remains to be seen whether the Clean Power Plan will survive legal challenge. If it does not, that will represent a setback for proponents of action on climate change and a partial reprieve for America's fleet of coal-fired power plants. This is important because the [emissions from coal-fired power are orders of magnitude more deadly than those emitted by other sources](#) and because coal is the electric sector's largest emitter of greenhouse gases.

To borrow a phrase, recent reports of the death of coal-fired power have been greatly exaggerated. Coal-fired generation continues to comprise the lion's share of American electric generation and much of that existing fleet has survived for decades beyond its original design life. The younger coal-fired plants stand ready, willing, and able to continue generating for decades to come, if markets and the law will allow. Indeed, one need look no further than last week's decision by the [Ohio Public Utilities Commission to subsidize seven coal-fired power plants](#) to ensure that the plants remain open and operating despite market and regulatory pressures.

In other words, the stakes in the D.C. Circuit litigation are very high. Many of the combatants are taking the positions we would expect them to take in this politically polarized era. It is therefore that much more interesting to read the amicus briefs submitted by the former EPA administrators and the electric grid experts. Apparently, not everyone follows the expected script when it comes to the legality of the Clean Power Plan.

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