The world-renowned novelist Paul Coelho notes that “straight roads do not make skillful drivers.” A reflection on this statement appears to capture the diversity of state reactions and responses to the U.S. Environmental Protection Agency’s (EPA) final Clean Power Plan (CPP). The national picture is varied, nuanced, and sometimes contradictory as state representatives—ranging from elected attorneys general, governors, and legislators to appointed environmental regulators—continue to make and refine official pronouncements of their state’s position. This activity is in flux as ever following the U.S. Supreme Court’s February 9 stay of the CPP.
Navigating the Clean Power Plan

Without question, the CPP is challenging states to hone their driving skills. Questions such as how fast they want to drive, who is in the driver’s seat, and whether they will embark on the trip at all are under consideration. As states continue to negotiate the twists and turns associated with their initial responses to the final CPP, they are sure to become more skillful drivers on the road that they, in their discretion, believe is the best route for them to travel.

One point of clarity sets the backdrop for states’ contemplation of how they will road test the CPP: the rule sets ambitious national goals for greenhouse gas (GHG) reductions throughout the nation, aiming to reduce emissions to 32 percent below 2005 levels by 2030. The varying impacts of this target on state economies and energy systems led to rising tensions as states decided whether to officially support or oppose the CPP. While this article cannot capture all the gradations of state views, a broad overview of how different states are responding to the CPP and pursuing stakeholder involvement as they contemplate the CPP journey follows.

Congress intended for the federal government and the states to play equally important implementation roles in major environmental statutes such as the U.S. Clean Air Act (CAA). By enacting statutes protecting the environment, Congress demonstrated a desire to set national goals for a cleaner, healthier environment, while recognizing the crucial role states play as the governing bodies closest to the communities impacted by pollutants. In promulgating regulations to carry out the CAAs goals envisioned by Congress, EPA is charged with promulgating rules that mitigate air pollution within the constitutional limits on the federal government’s authority.

While both states and the federal government are concerned with protecting human health and the environment, and while regulators at the state and federal level often collaborate to implement policies to meet this goal, tensions sometimes arise between states and the federal government. These strained relations can flare up around regular activities such as permit issuance, but are particularly hot when new and far-reaching environmental regulatory programs are proposed and later finalized.

Not surprisingly, within hours of the EPA’s publishing the CPP in the Federal Register on October 23, 2015, the CPP became the most heavily litigated environmental regulation to date. More than 15 lawsuits were filed in just two days after publication, involving states challenging the CPP and other states and the District of Columbia supporting the approach. While four states currently are not involved in any litigation, all states commented on the legality and potential consequences of the CPP on their respective state economies, communities, and the nation as a whole, through the rulemaking and public discourse surrounding the CPP (see Figure 1).
States’ Reactions to the CPP

The CPP challenges are consolidated in the U.S. Court of Appeals for the District of Columbia Circuit. Leading the challenge to the CPP are West Virginia and Texas, joined by Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming. Add to the litigation mix numerous industry groups, environmental non-profits, trade associations, utilities, mining interests, and local governments that have filed suit or intervened—on both sides of the litigation. Note that many of these states and other opposing parties were involved in earlier litigation requesting that the Court of Appeals for the D.C. Circuit stay the CPP’s publication. Those cases were dismissed by the Court, which held that, without final publication of the CPP, the action was premature.

The 27-state coalition challenging the CPP asked the D.C. Circuit again for an emergency stay of the CPP’s implementation while litigation over the legality of the plan is pending. The plaintiffs alleged a stay of the CPP was proper because they “are being immediately and irreparably harmed by EPAs illegal effort to force [states] to reorder their electrical generation systems.” Regarding the merits of the challengers’ case, their primary legal arguments were previewed in the earlier D.C. Circuit litigation seeking to block EPA from finalizing the rule. The states refer to Section 111(d) as a “rarely used” provision and point to recent U.S. Supreme Court decisions, including last year’s cases regarding the Affordable Care Act, as indications that the Court is skeptical of granting agencies deference for economically significant regulations. The D.C. Circuit denied the stay on January 21, 2016, and the challengers went right to the U.S. Supreme Court.

While many states have vowed to vigorously oppose the CPP in court, it is important to note that most states have announced they are considering compliance pathways so they will be prepared for all potential outcomes. In September, for example, North Dakota’s Governor Dalrymple stated that his administration would file a lawsuit to prevent the CPP’s implementation while also working on a compliance mechanism that will best fit North Dakota’s economy and needs.

Similarly, in early October, Utah’s Governor Herbert said his Department of Environmental Quality will “play ball with EPA” and submit a compliance plan, and Wyoming’s Governor Mead signaled likewise. Further, in a statement made at the Environmental Council of the States (ECOS) 2015 State Environmental Protection (STEP) Meeting on the CPP, Georgia Environmental Protection Division Director, Jud Turner, indicated that in addition to filing litigation, his direction from the Governor is to develop a plan that “works for Georgia.”

The rationale for this dual approach to the CPP was accurately characterized by former EPA Administrator William K. Reilly at the ECOS 2015 STEP Meeting. During the keynote address, he stated that governors are “partisan, not stupid,” indicating that states are determined to assert their viewpoints when necessary, but will do all they can to design strategies that suit their needs and protect human health and the environment within their borders. States opposing the CPP have said that they are committed to advancing their interests, and to most that includes developing a State Implementation Plan tailored to their needs by the September 2016 deadline. States employing the dual-track approach are shielding their state from a federal plan that will go into effect in non-complying states if the CPP is upheld.

Conversely, 18 states are supporting EPA’s argument that it deserves deference from the courts in choosing how to apply Section 111(d) of the CAA. Those that have joined the faction supporting EPA in court now include the states of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Virginia, Vermont, Washington, and the District of Columbia.
Columbia. The nine northeastern states involved in the Regional Greenhouse Gas Initiative (RGGI) cap-and-trade program have praised the CPP for allowing states to adopt “trading-ready plans” in order to trade emission credits between power plants in multiple states without entering into a formal, inter-state agreement. Even Vermont, exempt from the CPP because there is not a coal-fired power plant within its borders, is supporting the final CPP in court. Many state officials also cite the urgent necessity of achieving GHG reductions and mitigating the serious impacts of climate change in supporting their decision to defend the EPA’s CPP.

Among states not involved in litigation, Pennsylvania and Idaho have announced they are in the process of drafting state plans to meet CPP requirements, while Tennessee and Nevada have praised the increased flexibility under the final CPP. Officials from the state of Alaska, who initially opposed the CPP, have also abstained from litigation after EPA decided to exempt Alaska from regulation given its unique circumstances and separation from the contiguous United States. Hawaii and the territories of Guam and Puerto Rico are also temporarily exempt while EPA develops tools for meeting emissions targets in these non-contiguous areas. Further, the CPP does not apply to Vermont or the District of Columbia, since neither has a fossil fuel-fired power plant located within its borders.

**Stakeholder Involvement**

State environmental regulators are committed to transparency and collaboration as they develop strategies that work for their stakeholders. Since the release of the CPP in August (and in some instances before), at least 20 states—Arkansas, Arizona, Colorado, Delaware, Georgia, Iowa, Indiana, Kansas, North Carolina, Minnesota, Missouri, Nebraska, New Hampshire, Nevada, Pennsylvania, South Carolina, Tennessee, Utah, West Virginia, and Virginia—have held or plan to hold listening sessions to ensure that the perspectives of all those impacted by the CPP are able to provide input on how states will move forward with compliance. It would be hard to imagine a state that would take any CPP planning or evaluation steps without inviting comments from all interested parties. As more states determine how they will approach the September 2016 initial submittal deadline, the number of states engaging stakeholders in a public comment process will increase.

The importance of stakeholder involvement to the states in this process cannot be overstated. The rise in the number of listening sessions scheduled throughout the country recently demonstrates the states’ high level of commitment to thoroughly preparing for all possible contingencies. While many states have raised serious concerns with the CPP, they nonetheless want to be prepared to do so in a way that is sensitive to the needs of their citizens, businesses, economies, and local governments. States have held dozens of listening sessions in the last few months, and more are expected as additional states either pursue dual tracks of finding ways to comply with the CPP notwithstanding the lawsuit or move forward in developing a compliance pathway aimed at meeting the reduction targets set by EPA’s plan while meeting the needs of affected citizens.

Several states have made noteworthy efforts to solicit public feedback on complying with the CPP. Public outreach was required as part of the initial submittal EPA sought by September 6, 2016; however, state governments are only required to provide an opportunity for stakeholders to comment and do not have to respond to those comments. That being said, many states are taking this requirement seriously, and even starting a public process robust enough to be included the states’ final plan submittal.

For example, Pennsylvania, despite not being involved in a CPP lawsuit and having one of the larger emissions reductions targets, held 14 listening sessions in September and October and recently concluded a two-month public comment period during which citizens could provide input on various aspects of the CPP and the state’s plans to meet its goals.

The Arkansas Department of Environmental Quality (ADEQ) has launched its own stakeholder engagement process. During a kick-off meeting led by ADEQ’s Air Quality Office, regulators met with industry representatives, community groups, utilities, and other interested persons to present an overview of the CPP, its implications for the state, and to establish goals for a productive stakeholder process.

Many states engaging in a public comment process are litigating against EPA. The South Carolina Department of Health and Environmental Control has been holding stakeholder sessions throughout the past month and has regularly convened a stakeholder-working group, the South Carolina Energy Coalition, which predates the CPP. The public comment periods in the states of West Virginia and North Carolina are open and are scheduled to carry well into 2016. Many states have made it a priority to work with their stakeholders to plan for meeting their energy and environmental goals, and, state environmental regulators are not waiting to begin developing potential compliance plans that work for their states.

Actions of state legislatures and executives are also impacting states’ ability to prepare compliance plans. Several state governors have sent letters to President Obama expressing concerns about the CPP. Governor Fallin of Oklahoma has issued an executive order barring the state from submitting a state plan.4 State legislatures have considered proposals that would limit or enhance their states’ abilities to comply with EPA’s plan. In the 2015 session, legislatures in 31 states introduced 89 bills or resolutions related to the CPP and power plants’ carbon dioxide emissions regulations.5 In Wyoming, lawmakers considered a measure that would restrict the state’s ability to develop an implementation plan and received a mixture of criticism and applause from interested stakeholders.6
As the 2016 legislative session is now underway, over 40 state legislatures are in session—and many are already looking at CPP legislation. Legislation passed already in states has addressed legislative approval of state plan submissions, restricting the development of state plans pending legal challenges to the CPP, and the scope of plan submissions.

In drafting legislation related to implementing the CPP, lawmakers are balancing their states’ interest in allowing their regulators to effectively respond while preserving their role in managing environmental risks in ways that meet their needs. Their decisions will continue to play a major role in how states respond to the CPP.

Speaking at the ECOS STEP Meeting last October, Texas Commission of Environmental Quality Chairman, Bryan Shaw, said that Texas “has not taken any opportunities off the table”. However, he expressed concerns that the CPP does not align with Congressional intent and stressed the importance of environmental regulators, at both the state and federal levels, acting only in ways that their elected representatives allow. Shaw concluded his comments by stating, “If my legislature doesn’t give me authority, I don’t do it…That’s the rule of law.”

The Road Ahead

On February 9, 2016, the U.S. Supreme Court issued an unprecedented stay of the CPP until the D.C. Circuit Court rules on the CPP’s legality—and until any Supreme Court appeal is decided. We can now say that the CPP road just took a hairpin turn and drivers are flying off the road while others are hanging in for the ride. For example, Montana and Wyoming have cancelled planned stakeholder meetings. Minnesota, Arkansas, and Virginia, are continuing to develop plans, and some—such as Oklahoma—have not yet decided how they will take the turn. EPA has announced that the September 6, 2016, initial submittal deadline is suspended. The D.C. Circuit will hear oral arguments on June 2 and 3, 2016, and a decision may not be rendered until the late summer—with Supreme Court action likely to follow.

While it is too early to predict the outcome of the lawsuits, one thing is certain—states are working tirelessly to become skillful drivers by making informed decisions. States are expected to submit final carbon-cutting plans, or initial plans with two-year extension requests, by September 6, 2016, and a decision on the challenging states’ motion to stay the CPP will not likely be made until first-quarter 2016 at the earliest. Even as some states are challenging the plan, state environmental regulators are working with elected officials and stakeholders within their jurisdictions to prepare for compliance in a way that suits the needs of the communities they serve.

The process for determining the fate of the CPP, like the process for thoroughly evaluating any important paradigm-shifting regulation, will continue to be rigorous and challenging for all parties involved. Many state regulators remain committed to preparing for all possible outcomes and continuing to develop strategies.

As the fate of the CPP is decided by the courts, the conversations between state environmental regulators, economic regulators, federal, state, and local elected officials, and the public will continue. The road to a lower carbon society is twisting as we drive—and full of potholes—but the journey may be one that, ultimately, the courts, legislatures, or the public make impossible to decline.

References

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Acknowledgment:
The authors acknowledge the contributions to this piece of ECOS’ law clerk William F. Davies II (J.D. anticipated 2017, GW Law), and of ECOS Project Manager Kelly Poole and Senior Advisor Andy Teplitzky (on detail from the U.S. Environmental Protection Agency, EPA). The opinions expressed herein, which are based on publicly available information as of February 11, 2016, are those of the authors and do not represent a formal position of ECOS, CDPHE, or EPA.