State Strategy for Responding to President Obama's Carbon Rule

Building on the Successful "Just Say No" Approach in 2015, States Should "Do No Harm" in 2016

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AEA AMERICAN ENERGY ALLIANCE

Executive Summary

On October 23, the U.S. EPA officially finalized its so-called "Clean Power Plan" by publishing the rule in the Federal Register.[1] This global warming regulation requires States to reduce power sector carbon dioxide emissions by an average of 32 percent by 2030.[2] Upon publication, lawsuits were immediately filed challenging the EPA's authority to issue the regulation. More than half of the States filed or joined a lawsuit and requested an immediate stay of the rule.[3] In the meantime, state policymakers, regulators, and industry are considering what to do next.

First and foremost, States should avoid making any binding commitments to implement this costly and intrusive regulation. The best way for States to accomplish this goal is to not submit a state plan by the EPA-imposed deadline of September 2016. Doing so sets States on a potentially irreversible path toward compliance that will saddle families, especially the poor and middle class, with higher electricity costs and lower living standards.

The EPA has admitted that this carbon rule will unambiguously increase the price of electricity.[4] Yet EPA has framed the choice facing States as whether to submit a state plan or to have a federal plan imposed from Washington. We see this as a false choice. Instead, the decision is whether to prematurely implement this costly and intrusive regulation or to wait for the legal process to ripen and until the position of the next presidential administration is known. The best way to protect citizens is for States to pursue a "just say no" / "do no harm" approach. Just as a doctor wouldn't prescribe chemotherapy *before* a cancer diagnosis, States should refrain from saddling their citizens with higher electricity costs *before* it is clear that they have no other choice. Thus, the criteria to best protect citizens and state economies is twofold:

1) Avoid binding commitments before full legal resolution, and
2) Stop premature implementation until legal resolution and the position of the next presidential administration is known.

The "just say no" / "do no harm" approach fulfills both of these criteria. Under this approach, a State should first and foremost avoid any submission of a state plan in September 2016, which requires binding commitments.[5] States contemplating an "initial filing" should be careful that any filing does not include any commitments to implement the regulation before legal resolution. Doing so exposes the State to unnecessary risk and ignores the tremendous uncertainty facing the rule in the years to come:

- Requires swift, drastic changes to State law,
- Imposes irreversible changes,
- Makes State policymakers complicit with federal overreach,
- Expends tremendous State resources,
- Opens the door for a "Sierra Club plan",
- Still leaves the State subject to a federal plan.

Given these severe costs, States should not submit a state plan by EPA's September 2016 deadline. Moreover, any submissions to the EPA in 2016 should be limited to further studying the rule and considering options while avoiding any binding commitments to begin implementation. In multiple forums, the EPA has confirmed that States do not need to make binding commitments in 2016, including court filings, guidance documents, and the final rule (arguably in response to the strength of the request for a stay).[6]

Meanwhile, States should continue to protect their residents from premature implementation. This includes push back on multiple fronts—asserting the Legislature's key role in the process, emphasizing the utilities commission's obligation to provide reliable service at the lowest possible cost, sending clear signals to utilities and state regulators that no steps shall be taken to implement the rule until full legal resolution, and pursuing all legal action available to a State.

The importance of sending clear signals in resisting the carbon rule cannot be overstated. States would be wise to heed the lesson learned from the Mercury rule: implementation at the local level through approval of integrated resource plans (IRPs) prior to legal resolution lead to the premature closure of 40 GW of coal-fired power, enough to power about 30 million U.S. homes.[7] The EPA is relying on the same momentum to develop and approve these plans now before their legal authority is adjudicated. States seeking a middle ground or "dual track" approach need to be extra cautious that they do not send mixed signals that could be interpreted by utilities and PUCs to shut down power plants prematurely.[8]

Consider EPA Administrator Gina McCarthy's comments before the Supreme Court remanded the mercury rule: "But even if we don't [win in court], it was three years ago. Most of [the utilities] are already in compliance, investments have been made, and we'll catch up."[9] In other words, it didn't matter that EPA lost in court because utilities began shutting down low-cost power plants. Those facilities are not coming back, and ratepayers will suffer as a result. States must use every avenue at their disposal to stop implementation before legal resolution.

The stakes are simply too high to prematurely implement this unlawful rule. For the following reasons, the "just say no" / "do no harm" approach is the most prudent course of action for States to adopt:

- Protects ratepayers, especially the poor and middle class, from higher prices,
- Buys time for legal resolution and until the position of the next administration is known,
- Sends the right signal to State policymakers, regulators, and utilities,
- Saves taxpayer and ratepayer resources (note that the rule is regressive and significantly harms low-income and minority populations),
- Preserves options to consider future compliance strategies.

I. Introduction

In October 2015, EPA published the final carbon rule and called on States to submit state plans or an initial filing by September 2016. If implemented by the States, the carbon rule will dramatically raise electricity prices, inflict severe economic burdens on families, and hand over control of each State's electricity system to the federal government.

Fortunately, there is another option that will protect families and preserve options for States willing to stand up to the EPA's unlawful overreach: refuse to make any binding commitments to implement the regulation before full legal resolution. To further assist State policymakers as they consider options, we have laid out recommended criteria that should be used when determining the best policy to protect their citizens and economies from this harmful, illegal regulation.

II. How should states respond?

States are understandably concerned about the impact of handing control over their energy policy to federal bureaucrats and the harm this will bring to their citizens, their environment, and their economies. To make matters worse, they're facing a short time frame to decide how to respond to the EPA's mandates.[10]

EPA's regulatory objective is a mass-based national cap-and-trade system similar to the one President Obama failed to push through a Democratic-controlled Congress in 2009. But they need States to take the first step through a filing or plan that yields authority to the EPA and backs the State into implementing the rule.[11] Ironically, their primary selling point is that such a system would be the "lowest cost option for compliance."

The EPA has admitted that the carbon rule is designed to unambiguously increase the price of electricity.[12] Yet EPA has framed the compliance decision as whether to submit a state plan or to have a federal plan imposed from Washington. We see this as a false choice. Instead, the decision is whether to prematurely implement this costly and intrusive regulation or to wait until the position of the next administration is known and for the legal cases to be resolved.

We call this the "do no harm" approach. Just as a doctor wouldn't prescribe chemotherapy *before* a cancer diagnosis, States should refrain from saddling their citizens with higher electricity costs *before* it is clear that they are out of legal and political remedies. Thus, the criteria to best protect citizens and State economies is twofold:

1) Avoid binding commitments before full legal resolution, and
2) Stop premature implementation until legal challenges are decided and the position of the next presidential administration is known.

Our recommended "do no harm" approach fulfills both of these criteria.

Under the proposed rule, the "just say no" posture of several States was to resist the EPA's mandate by refusing to submit a state plan, as is their legal right under the Clean Air Act.[13] While EPA changed the submittal structure under the final rule, the "just say no" approach remains a viable option to protect citizens. In addition, the new submittal structure allows States to submit an "initial filing" instead of an initial state plan. States that choose this route should be extra cautious to avoid any binding commitments and to refrain from submitting a state plan, which, again, EPA does not require in 2016. The harms attached to filing a state plan in September 2016 are numerous and unnecessary, as detailed below.

III. Avoid binding commitments

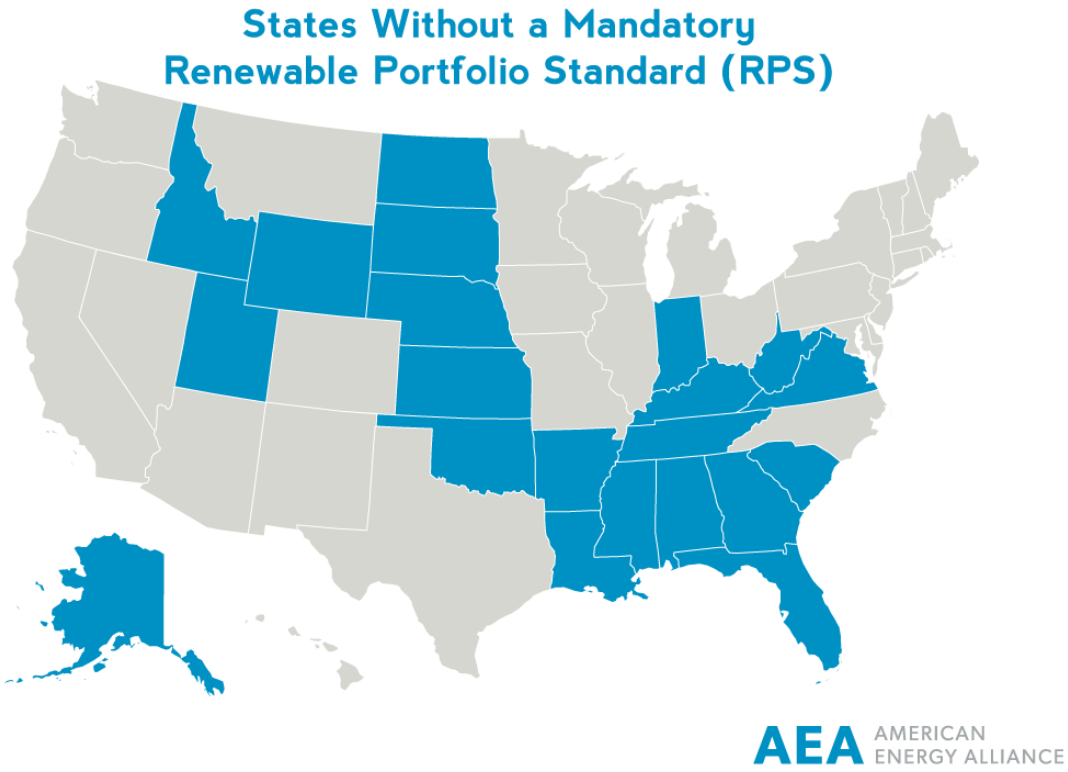
A. The Dangers of a State Plan

The first and most important EPA-imposed deadline is September 2016. EPA has called on States to submit initial state plans outlining how they will comply. Or alternatively, they can submit an "initial filing" which explains how the State is considering compliance options, engaging stakeholders, and identifying any barriers to implementation.[14] If EPA approves of this filing, the agency may allow the State an additional two years to complete a full state plan.[15] Regardless of whether an extension is granted, the compliance period begins in 2022.

The preferred compliance strategy of the Obama Administration, many utilities, and environmental pressure groups is for States to develop and submit initial state plans in 2016. This will place the State on a clear, irreversible path toward implementation. States, in essence, agree to deputize themselves to carry out the wishes of EPA and make binding commitments to implement the rule. Under the final rule, any plan must demonstrate that each emission standard/measure is quantifiable, non-duplicative, permanent, verifiable, and enforceable.[16] As explained below, submitting a compliant state plan commits a State to costly changes and does not protect a State's sovereignty.

Requires swift, drastic changes to State law: Some argue a state plan helps States keep control over their energy choices. However, this is only the illusion of control, and it comes at a high cost. For example, in response to States concerned about federal enforceability, EPA laid out the "State Measures" approach.[17] First, to qualify, States must choose a mass-based goal. Second, emission reductions from "inside the fence" (e.g., affected power plants) will still be federally enforceable (as well as the requisite backstop requirements in the event the "state measures" are adjusted).[18] Third, and most importantly, any emission reductions stemming from renewable energy will not be counted *unless the renewable generation is mandated by State law.*[19]

In practice, the State Measures approach would very likely require the over 20 States that do not currently mandate electricity sources to pass a Renewable Portfolio Standard (RPS), which would require an aggressive and politically difficult legislative agenda be taken up in 2016 or 2017.[20]



National RPS legislation has repeatedly failed in Congress; this is EPA's attempt to impose a federal energy mandate through the back door, with states doing the dirty work of passing and implementing it.

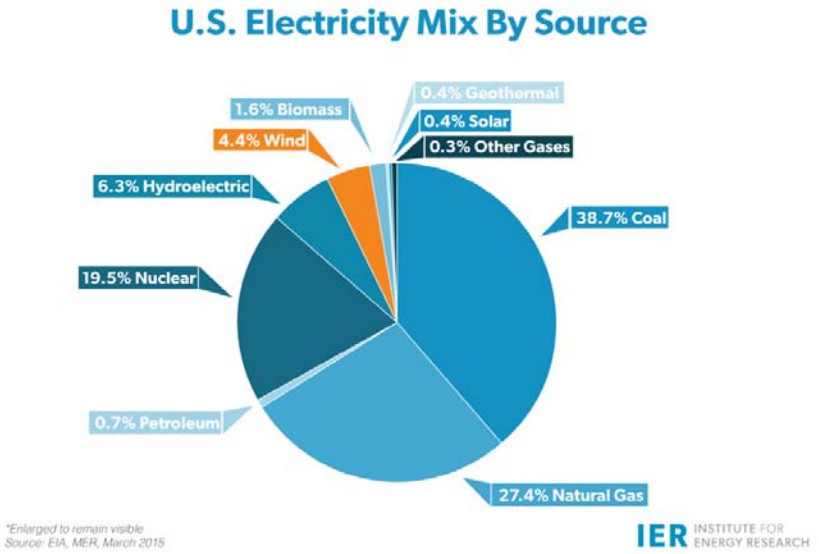
In other words, EPA may let States avoid some federal control, but only if States submit to its demands to swiftly adopt laws that the federal government cannot impose by itself. Once a State submits a plan that is accepted, it must legally follow through.

Imposes irreversible changes: Even States that submit a compliant state plan in 2016 are probably still expected to follow up with a September 2017 interim report, likely adding to the binding commitments initially made.[21] This includes shutting down low-cost power plants and passing laws to mandate more expensive energy (i.e., RPS).

This path will also make it harder to reverse course down the road if the rule is struck down, rewritten in court, or withdrawn by the next administration. For instance, one such decision is the approval of Integrated Resource Plans (IRPs) submitted by utilities that assume implementation of the carbon rule (i.e., closing coal plants). Once approved by the State Public Utility Commission (PUC), utilities may forge irreversible paths toward compliance.[22]

Makes State policymakers complicit with federal overreach: EPA designed the rule so States would submit plans and bear the brunt of the negative consequences resulting from skyrocketing energy prices, lost jobs, and less reliable energy sources. Similarly, the Administration designed Obamacare to offload accountability onto States by calling on

them to set up individual insurance exchanges.[23]

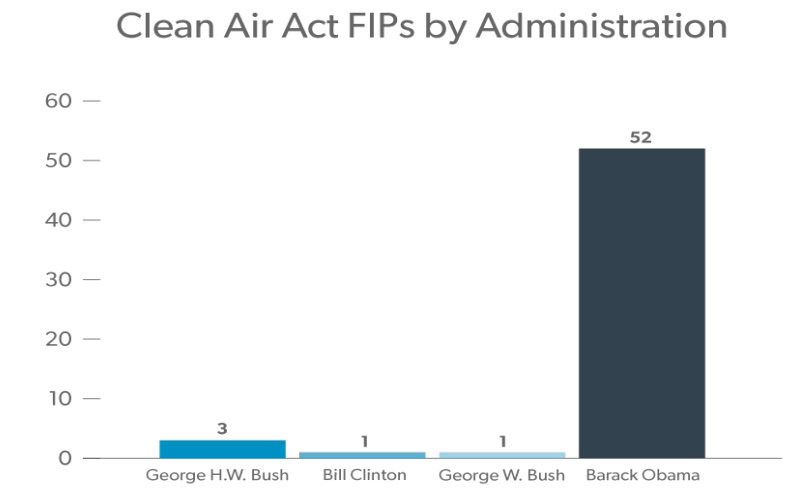


Expends tremendous State resources: Developing and submitting a compliant state plan will require tremendous time and resources from State regulatory agencies. Air regulators, who are not electricity or power-market experts, will have to dedicate a significant portion of their time figuring out how to rework the State electricity grid to prioritize carbon reduction above affordability and reliability.[24] This runs afoul of current laws and regulations in States that prioritize electricity dispatch based on affordability, rather than climate change.[25] Ratepayers will no doubt suffer due to these shifting priorities.

Opens the door for a "Sierra Club plan": Although it's black letter law that the Clean Air Act (CAA) permits third party intervention to enforce state plans (e.g., environmental special interests like Sierra Club, Earthjustice, and NRDC), EPA went out of its way to identify—perhaps encourage—these groups' expected role in this process.[26]

Under this approach, States should count on involvement from national environmental lawyers who have become adept at exploiting the legal system through "sue-and-settle" tactics and whose very explicit goal is to restrict the development and use of a State's affordable, reliable energy sources.[27] In fact, even opting for the State Measures approach requires federally enforceable "backstops" in case those measures fail to achieve the required emission reductions.[28] One way or another, the rule threatens States with full compliance or litigation with anti-energy groups.

Still leaves State subject to a federal plan: Submittal of a compliant state plan does not guarantee acceptance. On 52 occasions, the Obama Administration has rejected state plans, said they are not good enough, and turned them into federal plans—far more than previous administrations,[29] as the following chart shows.



With the segmented timetable, States might actually receive an extension but still have their state plan later rejected in full or in part. Given this Administration's track record, States that think they are protecting themselves by submitting compliant plans in 2016 are actually exposing their citizens to higher energy prices and federal control.

B. Model Extension Request

To avoid binding commitments and prevent premature implementation, the best approach is to not submit a state plan before legal resolution. States considering submitting an extension request should send such request no earlier than September 2016 and limit the request to further studying the rule and considering options while altogether avoiding binding commitments to begin implementation.

The EPA has confirmed this option in multiple forums, including court filings, guidance documents, and the final rule (arguably in response to the strength of the request for a stay).[30] This extension request, a new option EPA added to the final rule, reflects the success of the "just say no" strategy in 2015. Growing momentum in States to not submit a state plan forced EPA to amend the submission schedule.

EPA identifies three requirements to receive an extension:

1) Identification of the final-plan approach or approaches under consideration, including a description of the progress made to date,
2) An appropriate explanation for why the state needs additional time to submit a final plan beyond September 6, 2016, notably the legal and regulatory barriers that must be changed prior to submitting an enforceable state plan in 2018[31], and

3) A demonstration of how the state has been engaging the public, including vulnerable communities, and a description of how it intends to meaningfully engage community stakeholders during the additional time (if an extension is granted).[32]

Assuming EPA's own criteria, a compliant extension request could explain: 1) the State's ongoing review of potential compliance approaches, 2) its consideration of the rule's harmful impact on disadvantaged communities and the overwhelming task of completely reordering the State's electricity system, and 3) its continued engagement with key stakeholders including vulnerable communities—most of whom will face significant job losses, economic disruption, and negative health impacts associated with higher energy prices.[33]

States that submit an extension request should be careful to avoid any binding commitments that could forge a path toward premature implementation. For instance, EPA is enticing States and utilities into implementing the carbon rule early by setting up a "Clean Energy Incentive Program" (CEIP) which States must opt into in their 2016 initial

submittal. Under the final rule, EPA will hand out millions of "free" emission credits to States that make "early investments in wind and solar generation" before the compliance period begins in 2022.[34] For States to be eligible, they must indicate their intention to participate in their 2016 submittals.[35] Note: these are paper credits—they do not reduce emissions in the real world.

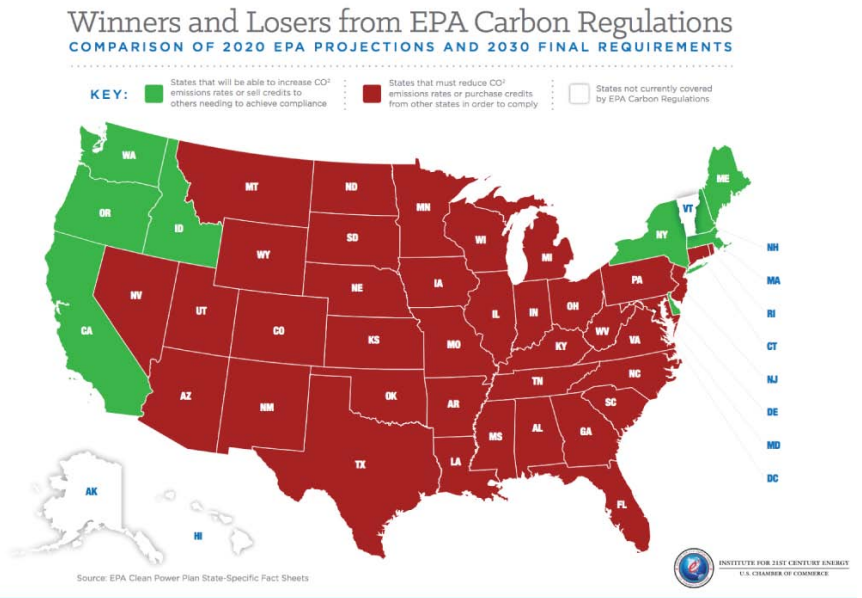
The CEIP is a trap laid by EPA to dupe States into mandating expensive energy. EPA is doling out gifts to eager partners and attempting to bribe States that are on the fence—if states commit to these uneconomic "investments" before legal resolution, they likely won't be able to reverse the damage. States submitting an extension request should be careful that any statement regarding the CEIP does not lead to premature expenditures that will ultimately have to be borne by state residents.

IV. Stop premature implementation

The EPA is relying on momentum at the State level to drive implementation forward while their authority to issue the rule is litigated in court. So avoiding binding commitments in a state plan is only half the battle. States must also protect their residents from premature implementation at the local level.

Guarding against premature implementation requires push back on multiple fronts: asserting the Legislature's key role in the process, emphasizing the PUC's obligation to provide reliable service at the lowest cost, sending clear signals to utilities and state regulators that no steps shall be taken to implement the rule until full legal resolution, and exercising all legal action available to a State.

The legal challenge waged by a majority of States seeking to overturn the carbon rule and request an immediate stay is the tip of the spear. It is perhaps the best forum to contrast the two futures envisioned: on the one hand, EPA's bid for a federal takeover of the electricity system, versus State sovereignty and the right of American families and businesses to affordable, reliable energy.[36] As the following chart shows, EPA's rule amounts to a massive wealth transfer that will harm the vast majority of states.



EPA's carbon rule amounts to a wealth transfer between states. As this map shows, the rule will essentially force States in red to buy carbon credits from States in green, imposing de facto national cap-and-trade.

While legal challenges are necessary, litigation alone will not prevent the harm envisioned by this rule.[37] The importance of State policymakers sending clear signals in resisting the carbon rule

cannot be overstated. In fact, States would be wise to heed the lesson learned from the Mercury rule: implementation at the local level through approval of integrated resource plans (IRPs) prior to legal resolution lead to the premature closure of 50 GW of coal-fired power, enough to power about 40 million homes.[38]

The EPA is relying on the same momentum to develop and approve these plans now before their legal authority is adjudicated. States seeking a middle ground or "dual track" approach should be especially careful not to send mixed signals that could lead to premature implementation by industry and regulators.[39]

Consider EPA Administrator Gina McCarthy's comments before the Supreme Court remanded the mercury rule: "But even if we don't [win in court], it was three years ago. Most of [the utilities] are already in compliance, investments have been made, and we'll catch up."[40] In other words, it didn't matter that EPA lost in court because utilities began shutting down low-cost power plants. Those facilities are not coming back, and ratepayers will suffer as a result.

GENERATOR TYPE	LCOE Existing as found in FERC Form 1 (EIA fleet avg CF) 2012 $/MWh	LCOE New (EIA) as adjusted by the Report (EIA fleet avg CF) 2012 $/MWh
DISPATCHABLE FULL-TIME-CAPABLE RESOURCES		
Conventional Coal[2, 3]	38.4	97.7
Conventional Combined Cycle Gas (CC gas)[3]	48.9	73.4
Nuclear[3]	29.6	92.7
Hydro (seasonal)	34.2	116.8
DISPATCHABLE PEAKING RESOURCES		
Conventional Combustion Turbine Gas (CT gas)	142.8	362.1
INTERMITTENT RESOURCES - AS USED IN PRACTICE		
Wind including cost imposed on CC gas	N/A	112.8 +other costs*

This chart compares the levelized cost of various sources of electrical generation. Existing sources are more affordable than new sources in every source category. Crucially, the cost of existing coal resources is three times less expensive than electricity generated from new wind facilities. Under the carbon rule, States are expected to shut down coal and build new wind and solar.

States should use every tool at their disposal to stop implementation before legal resolution. This extends to the legislature as well. The carbon rule's unwarranted intrusion into a policy area traditionally reserved to States should be a clarion call to State Legislatures to insert themselves into the process at every turn. Several legislative bodies began this discussion in 2014 and some took action in 2015.[41] The upcoming year will be even more crucial. Requiring legislative approval of any state plan is a good first step in preventing unelected state regulators from making binding commitments that will lead to skyrocketing electricity prices for citizens and put States at a competitive disadvantage.

In fact, most state regulators charged with putting together implementation plans likely lack the existing statutory authority necessary to submit a compliant state plan.[42] The Legislature should clarify this point by restating the limitations on state regulators to act within their existing authority (e.g., State Power Accountability and Reliability Charter or "SPARC").[43] Legislatures should also reassert that any carbon-trading scheme requires their explicit approval—not simply their review or option to disapprove.[44] This will ensure legislators remain the voice of the people and accountability rests on those seeking to drive up families' energy bills.

V. Benefits of the "do no harm" approach

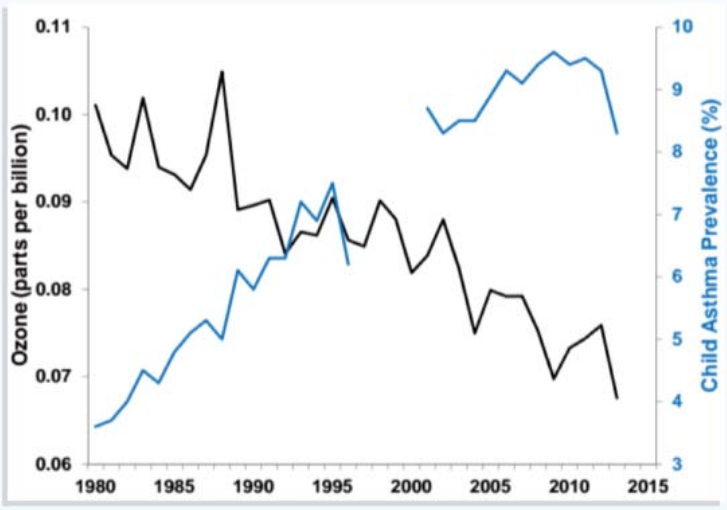
For States skeptical of EPA's regulation, there is little-to-no downside to the "do no harm" approach. As explained below, avoiding binding commitments and stopping premature implementation will best protect a State's citizens from the EPA's unlawful federal takeover of the electricity system:

It buys time for executive and legal resolution: The "do no harm" approach allows States to wait for the outcome of two seminal events: the next presidential administration (short-term) and pending legal challenges (medium-term). Each of these, discussed below, could spell a swift end to the regulation.

First, it makes little sense to submit a state plan by September 2016, when a new administration will be elected two months later and EPA does not even require state plans in 2016. If the new president opposes the regulation, he or she could signal this intent in November 2016 and issue an administrative stay in January 2017.[45] If the new president intends to implement the rule, States would still be able to avoid premature implementation by requesting an extension in 2016 and submitting a state plan in 2018, assuming the regulation survives legal challenge.

Second, even if the next administration continues to implement the rule, the courts could delay or invalidate portions of the regulation and/or the federal plan (i.e., there are at least two bites at the apple). Although it will take a few years before final legal resolution, the "do no harm" approach allows more time for this process to play out, potentially avoiding what happened in response to the mercury rule.[46] In that instance, as explained above, utilities began shutting down power plants to comply with the mercury rule even though the U.S. Supreme Court eventually remanded the rule for failing to consider costs.

Figure 3: Ozone down 33% since 1980, Child Asthma Rate up 131%



EPA claims its carbon rule protects public health, reducing incidences of asthma and other illnesses. However, emissions have been declining for decades, yet asthma rates continue to rise.

It saves taxpayer resources and protects the most vulnerable: "Do no harm" means a State will spend minimal time and money figuring out how to respond to an illegal rule that will lead to higher electricity prices, job losses, and require a restructuring of the electric grid. Crucially, it protects vulnerable low-income, elderly, and minority populations that spend a higher proportion of their income on electricity.[47]

This approach also protects businesses that are vulnerable to electricity price increases. The United States has lower electricity rates than much of the developed world,[48] giving us a competitive advantage. But by intentionally driving up electricity rates, this regulation is designed to reduce our low-electricity price competitive advantage. In a global economy, our government should not work against the interests of American families and businesses.

It sends the right signal to State policymakers and utilities: Crucial to the decision over whether to submit an initial filing is the ongoing duty of utilities and PUCs to revise and approve Integrated Resource Plans (IRPs). These plans, which must be approved several years out, are the nuts and bolts of implementation. They are also the basis for investment decisions that could lead to significant price hikes for ratepayers in the future.[49] If State governments, including Governors, begin making commitments to submit a state plan, utilities will write IRPs that assume a State is serious about implementing the rule sooner rather than later.[50]

States that submit a state plan demonstrate to utilities and PUCs their intent to shut down power plants and accept electricity rate hikes. By contrast, explicitly clarifying that the carbon rule is on hold, pending legal resolution, makes it more likely for State PUCs to oppose any utility plans that seek to prematurely implement the carbon rule (i.e., plan for closing power plants).

State legislators, policymakers, and activists should remember that PUCs have an obligation to protect ratepayers. To that end, PUCs must reject utility requests to recover costs through ratepayers if they are not "prudent" investments. This extends well beyond the IRP process. In many instances, PUCs participate or advise in the development of a state implementation plan. Given that States have the ability to request an extension before making any commitments and wait for legal resolution, PUCs may have an obligation to direct State environmental agencies to forego a 2016 state plan. As we've made clear, any enforceable state plan would bind States to costly and imprudent decisions that would harm ratepayers.

It preserves options: The Clean Air Act provides States the option of submitting a state plan at any point in the process, even after a federal plan has been finalized. This is important for States to know since it should caution against any hasty or premature assent to bind a State, particularly when the option of a non-binding extension request is available. By contrast, submitting a state plan could put a State on an irreversible trajectory towards skyrocketing electricity prices and unnecessarily shuttered power plants.

VI. Conclusion

Now that EPA's carbon dioxide regulation is finalized, States must decide how to respond. President Obama has framed this as a choice between submitting a state plan and having a federal plan imposed from Washington. This is a false choice. The real choice is whether to prematurely implement EPA's costly and intrusive regulation before the legal process ripens and the position of the next administration is known. Alternatively, States can pursue the "do no harm" approach, in which they refrain from submitting a state plan in 2016. This is the most prudent path States can take to protect their citizens from President Obama's promise of skyrocketing electricity prices. It will avoid binding commitments that would place States on an irreversible path toward implementation and stop premature action at the state level that the EPA is counting on to preempt an unfavorable court decision.

[1] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64662 (Oct. 23, 2015) (hereafter "Final Rule").

[2] *Id.* at 64,736.

[3] Ellen M. Gilmer, *Opponents push to block rule while defenders prep for battle*, E&E News, October 26, 2015, http://www.eenews.net/stories/1060026891; *see also*, State of West Virginia, et al. *v*. EPA, U.S. Court of Appeals for the D.C. Circuit, No. 15-1363, http://www.ago.wv.gov/publicresources/epa/Pages/D-C--Circuit%2c-No--15-1363.aspx.

[4] EPA Administrator Gina McCarthy admitted that the agency knew that "low-income minority communities would be hardest hit" by rate increases caused by the rule (https://www.youtube.com/watch?v=B_krtNhukdY); and, on the campaign trail in 2008, President Obama recognized that similar policies would cause electricity rates to "necessarily skyrocket" (https://www.youtube.com/watch?v=HlTxGHn4sH4).

[5] 42 U.S.C. § 7411 (d)(2).

[6] EPA's Response in Opposition to Petition for an Extraordinary Writ of Stay at 25-26; Stephen D. Page, Director, Office of Air Quality Planning and Standards, *Initial Clean Power Plan Submittals under Section 111(d) of the Clean Air Act, Environmental Protection Agency* (Oct. 22, 2015); Final Rule at 64,669.

[7] Institute for Energy Research, *How to Kill the Coal Industry: Implement EPA's "Clean Power Plan"*, May 26, 2015, http://instituteforenergyresearch.org/analysis/how-to-kill-the-coal-industry-implement-epas-clean-power-plan/.

[8] For example, Wyoming and North Dakota are considering compliance options while also legally contesting the rule. *See*, E&E's Power Plan Hub, http://www.eenews.net/interactive/clean_power_plan/states/wyoming; and http://www.eenews.net/interactive/clean_power_plan/states/north_dakota.

[9] Timothy Cama and Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, The Hill, June 2015.

[10] In addition to the rule's unprecedented mandate to reorder State's electricity systems, the EPA waited a significant amount of time after announcing the rule on August 3, 2015 before finally publishing it in the Federal Register on October 23, 2015. This 81-day delay only exacerbated the arbitrary and politically driven September 6, 2016 initial deadline on States to submit a filing to the EPA. See: Mark Drajem and Catherine Traywick, *Avalanche of Lawsuits to Be Triggered by Carbon Rule Publication*, Bloomberg Business, October 23, 2015, http://www.bloomberg.com/news/articles/2015-10-23/avalanche-of-lawsuits-to-be-triggered-by-carbon-rule-publication.

[11] For instance, the EPA clearly states, "[T]he EPA believes that it is reasonable to anticipate that a virtually nationwide emissions trading market for compliance will emerge, and that ERCs will be effectively available to any affected EGU wherever located, as long as its state plan authorizes emissions trading among affected EGUs." Final Rule at 64,732.

[12] EPA Administrator Gina McCarthy admitted that the agency knew that "low-income minority communities would be hardest hit" by rate increases caused by the rule (https://www.youtube.com/watch?v=B_krtNhukdY); and, on the campaign trail in 2008, President Obama recognized that similar policies would cause electricity rates to "necessarily skyrocket" (https://www.youtube.com/watch?v=HlTxGHn4sH4).

[13] The EPA's sole remedy for failure to submit a state plan is to issue a federal plan. 42 U.S.C. § 7411(d)(2)(A). EPA also acknowledges that federal sanctions, such as withholding highway funds, are not permitted in the event a State does not submit, implement, or enforce an approvable state plan. 40 CFR § 60.5736 ("Will the EPA impose any sanctions?").

[14] *Id.*

[15] *Id.*

[16] *Id* at 64,708 and 64,843.

[17] *Id* at 64,843-44.

[18] *Id* at 64,836.

[19] Raymond L. Gifford, Gregory E. Sopkin, and Matthew S. Larson, *The New Building Block 3 and the Final Rule*, Wilkinson Barker Knauer, LLP, August 2015, http://www.wbklaw.com/uploads//Gifford,%20Sopkin,%20Larson%20EPA%20Building%20Block%203%20Assumptions%20Aug15.pdf.

[20] These include States with no standard and States with voluntary targets. *See*, National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals*, updated October 2015, http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx.

[21] Regulation under Section 111 and the novel submittal structure laid out in the Final Rule presents state policymakers and regulators with uncertainty as to the extent and nature of commitments required in 2017. For instance, the final rule requires "the 2017 update [to] include a commitment to the type of plan approach the state will take in the final plan submittal." Final Rule at 64,859.

[22] In the context of EPA's Mercury and Air Toxics Standards, utilities made irreversible decisions to retire coal-fired power plants before the Supreme Court's decision. *See* Mark Drajem, *Obama May Win by Losing in Quirk of Supreme Court EPA Review*, Bloomberg Business, June 24, 2015, http://www.bloomberg.com/news/articles/2015-06-24/obama-may-win-by-losing-in-quirk-of-supreme-court-epa-review; and, Institute for Energy Research, *SCOTUS Mercury Ruling is a Wake Up Call for EPA*, July 2, 2015, http://instituteforenergyresearch.org/analysis/supreme-court-rules-against-epa-in-mercury-rule/.

[23] Karen Lugo, *The EPA's Costly 'Clean Power Plan' Power Grab*, Forbes, August 22, 2014, http://www.forbes.com/sites/realspin/2014/08/22/the-epas-costly-clean-power-plan-power-grab/.

[24] *Motion to Stay and to Expedite Consideration by State of West Virginia, et al.*, October 23, 2015, p. 5, http://www.ago.wv.gov/publicresources/epa/Documents/StatePetrsMotionForStay.pdf; and, State Declarations included in Stay Addendum Part II, http://www.ago.wv.gov/publicresources/epa/Documents/StatePetrsAddendum2.pdf (e.g., Ohio from pp. 58–62).

[25] Several States have requirements that utilities deploy the lowest cost sources when providing power to their customers. *See, e.g*., Neb. Rev. Stat. - Chapter 70.

[26] Final rule at 64,850.

[27] Dan Byers, *The EPA's Dirty Clean Power Plan Secret*, RealClearEnergy, March 16, 2015, http://www.realclearenergy.org/articles/2015/03/16/the_epas_dirty_clean_power_plan_secret_108353.html

[28] Final rule at 64,836; *see also*, *Id.* at 64,852.

[29] William Yeatman, *EPA's 52nd Takeover of State Regulatory Program Provides Perfect Segue to New Paper on Cooperative Federalism in the Obama Age*, GlobalWarming, September 4, 2014, http://www.globalwarming.org/2014/09/04/epas-52nd-takeover-of-State-regulatory-program-provides-perfect-segue-to-new-paper-on-cooperative-federalism-in-the-obama-age/.

[30] EPA's Response in Opposition to Petition for an Extraordinary Writ of Stay at 25-26; Stephen D. Page, Director, Office of Air Quality Planning and Standards, *Initial Clean Power Plan Submittals under Section 111(d) of the Clean Air Act, Environmental Protection Agency* (Oct. 22, 2015); Final Rule at 64,669.

[31] These include several dramatic changes to state law. For example, creating or substantially increasing RPS mandates will be a contentious policy to pass in the majority of legislatures across the country. On the regulatory front, the PUC's obligation to maintain low rates for consumers will almost certainly have to be adjusted given the rule's mandated replacement of low-cost energy for low-carbon energy.

[32] Final Rule at 64,856.

[33] Institute for Energy Research, *Lesson For EPA: Higher Energy Prices Harm People*, August 20, 2015, http://instituteforenergyresearch.org/analysis/lesson-for-epa-higher-energy-prices-harm-people/; *see also*, Robert P. Murphy, *The Wealth-Health Connection: Costly Regulations Take Lives*, Institute for Energy Research, September 14, 2015, http://instituteforenergyresearch.org/analysis/the-wealth-health-connection-costly-regulations-take-lives/.

[34] Elizabeth Harball, *EPA confirms wind, solar only renewables to receive early credit*, E&E News, November 12, 2015, http://www.eenews.net/climatewire/stories/1060027856.

[35] Final Rule at 64,669.

[36] State of West Virginia, et al. *v*. EPA, U.S. Court of Appeals for the D.C. Circuit, No. 15-1363 (October 23, 2015) http://www.ago.wv.gov/publicresources/epa/Pages/D-C--Circuit%2c-No--15-1363.aspx.

[37] Thomas Pyle, *Letter to Public Utility Commissions*, Institute for Energy Research, July 8, 2015, http://instituteforenergyresearch.org/wp-content/uploads/2015/07/PUC-Letter.pdf.

[38] EPA's Mercury and Air Toxic Standards is included in EIA's reference case and is a major reason for 40 gigawatts of coal-fired power plants retiring between 2014–2040 in that forecast. *See*, U.S. Energy Information Administration, *Analysis of the Impacts of the Clean Power Plan*, May 22, 2015, pp. 16–17, http://www.eia.gov/analysis/requests/powerplants/cleanplan/. *See also*, EIA, *Scheduled 2015 capacity additions mostly wind and natural gas; retirements mostly coal*, March 10, 2015, http://www.eia.gov/todayinenergy/detail.cfm?id=20292; and, Institute for Energy Research, *How to Kill the Coal Industry: Implement EPA's "Clean Power Plan"*, May 26, 2015, http://instituteforenergyresearch.org/analysis/how-to-kill-the-coal-industry-implement-epas-clean-power-plan/. Finally, our calculations are based on 40 GW divided by average power use per resident (1.248 kW) yielding 32,051,282 (i.e., 32 million homes). Source for average residential power use data: http://www.eia.gov/tools/faqs/faq.cfm?id=97&t=3.

[39] For example, Wyoming and North Dakota are considering compliance options while also legally contesting the rule. *See,* E&E's Power Plan Hub, http://www.eenews.net/interactive/clean_power_plan/states/wyoming; http://www.eenews.net/interactive/clean_power_plan/states/north_dakota.

[40] Timothy Cama and Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, The Hill, June 2015.

[41] American Energy Alliance, *State Tracker*, Smart Power Plan, http://www.smartpowerplan.org/state-tracker/.

[42] Raymond L. Gifford, Gregory E. Sopkin, and Matthew S. Larson, *The Clean Power Plan: Carbon Trading, State Legislation and the Political Economy Issue*, Wilkinson Barker Knauer, LLP, October 2015, http://www.wbklaw.com/uploads//White%20Paper%20%20Carbon%20Trading%20State%20Legislation%20and%20the%20Political%20Economy%20Issue%20Oct15.pdf.

[43] American Legislative Exchange Council, *Model Policy*, State Power Accountability and Reliability Charter (SPARC), http://www.alec.org/model-legislation/state-power-accountability-and-reliability-charter-sparc/.

[44] American Energy Alliance, *State Tracker*, Smart Power Plan.

[45] Emma Margolin and Tony Dokoupil, *GOP Presidential Candidates Pounce on Climate Plan*, MSNBC, August 3, 2015, http://www.msnbc.com/msnbc/gop-presidential-candidates-pounce-climate-plan.

[46] Pyle, *Letter to Public Utility Commissions*.

[47] American Energy Alliance, *For Minorities, Obama's Carbon Plan is Justice Denied*, August 21, 2015, http://americanenergyalliance.org/2015/08/21/for-minorities-obamas-clean-power-plan-is-justice-denied/; *see also*, Eugene M. Trisko, *Energy Cost Impacts on American Families, 2001-2014*, prepared for the American Coalition for Clean Coal Electricity, February 2014, http://americaspower.org/sites/default/files/Trisko_2014_1.pdf.

[48] For instance, the U.S. has historically had lower electricity prices than most European countries, and the gap is only increasing. *See*, U.S. Energy Information Administration, *European residential electricity prices increasing faster than prices in United States*, Today In Energy, November 18, 2014, http://www.eia.gov/todayinenergy/detail.cfm?id=18851.

[49] Rebecca Smith, *Utilities' Profit Recipe: Spend More*, The Wall Street Journal, April 20, 2015.

[50] In fact, several utilities have already begun writing and submitting plans that seek to shutter coal-fired power plants in order to reduce carbon emissions, specifically, in response to the carbon rule. *See, e.g.*, Elizabeth Harball, *Kan. Clean Power Plan opponents steamed over coal unit retirements*, E&E News, October 19, 2015, http://www.eenews.net/climatewire/stories/1060026470/.