

State environmental agencies' comments on the Clean Power Plan

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INTRODUCTION



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The politics of the Environmental Protection Agency's (EPA) ambitious Clean Power Plan may seem very simple to understand: Democrats (excluding those from coal states) are for it, Republicans are staunchly against it. That's a pretty good first cut, especially to describe the battle lines forming in Washington, D.C. But the Clean Power Plan is a massive and complex undertaking, drawing in many hundreds of different government actors around the country, including attorneys general, governors, state utility regulators, and state environmental agencies.

State environmental agencies are especially important, because implementation of the Clean Power Plan will largely depend on their work. The Clean Air Act, which provides the legal authority for the Clean Power Plan, relies on a structure of cooperative federalism, in which the EPA in Washington sets the requirements for addressing specific emissions from particular source categories while the states are responsible for actually writing and enforcing the operative regulations that will govern the emitters within their borders. Where the EPA finds a state's effort to be totally inadequate, it may reject its implementation plan and impose its own, but in the case of the Clean Power Plan federal legal authority may prove to be rather limited compared to states' possible responses. Consequently, for the plan to realize the potential that the Obama administration insists it has—both to domestic audiences and in ongoing international negotiations—it must have the cooperation of state environmental agencies.

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In this brief study, we analyze the positions of state environmental agencies on the Clean Power Plan expressed in their comments on the EPA's proposed rule. The picture that emerges reinforces casual impressions of partisan divide, but also reveals sources of concern that cut across party lines. Some state environmental agencies working for Republican governors have all guns blazing against the plan, throwing just about every possible objection at it. Other state environmental agencies working for Democratic governors are staunch supporters who want everyone to know that they have EPA's back. There are also plenty of intermediate cases representing degrees of opposition and concern.

We provide a glimpse of these complexities with an original dataset that looks for the following criticisms of the Clean Power Plan in each state environmental agency's comments on the rule:

- It is unfair to early actors
- It threatens grid reliability
- It is unattainable given the current timeline
- It is illegal
- It should be abandoned rather than finalized

After presenting our data through five maps, we offer some analysis and draw a few implications for the immediate future of the Clean Power Plan.

THE MAPS

Each of the five maps shows two variables for 48 states (all but Delaware and Utah whose environmental agencies did not submit comments). First, it shows the party of the state's governor as of late 2014, when the Clean Power Plan proposal was opened to comment. State environmental agencies are directly under governors' control making the partisan identification of a state's governor a key determinant of its environmental agency's positions. In many cases, the environmental agency's comments were prefaced with introductory letters or memoranda coming directly

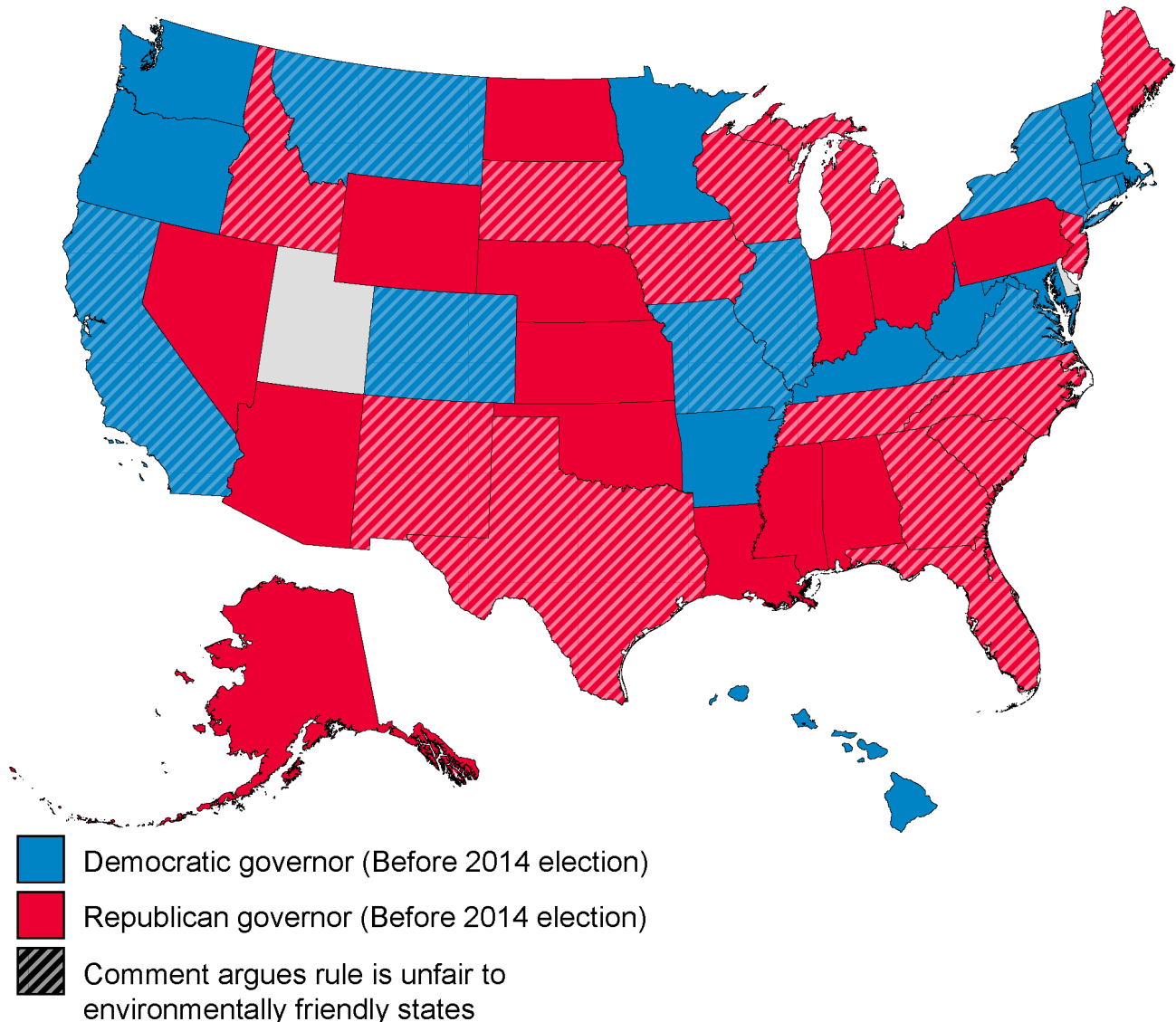
from the governor. Before the 2014 gubernatorial elections, 28 states had Republican governors and 20 had Democratic governors. States with Republican governors are displayed as red and states with Democratic governors are displayed as blue. Second, each map shows its variable of interest with striped diagonal shading.

This portrait of the Clean Power Plan's reception by the state environmental agencies vividly demonstrates what a difficult task the EPA has been given in trying to design a plan that is not only ambitious enough to deliver on President Obama's promises in international negotiations, but also politically sustainable.

SECTION ONE: WITH FRIENDS LIKE THESE...

The first three maps show that state environmental agencies working for governors of both parties share many concerns about the Clean Power Plan: whether the plan treats their state fairly, whether reliable power delivery might be disrupted, and whether the proposed targets are attainable within the proposed timeframe.

Which states argue Clean Power Plan is unfair to early actors?

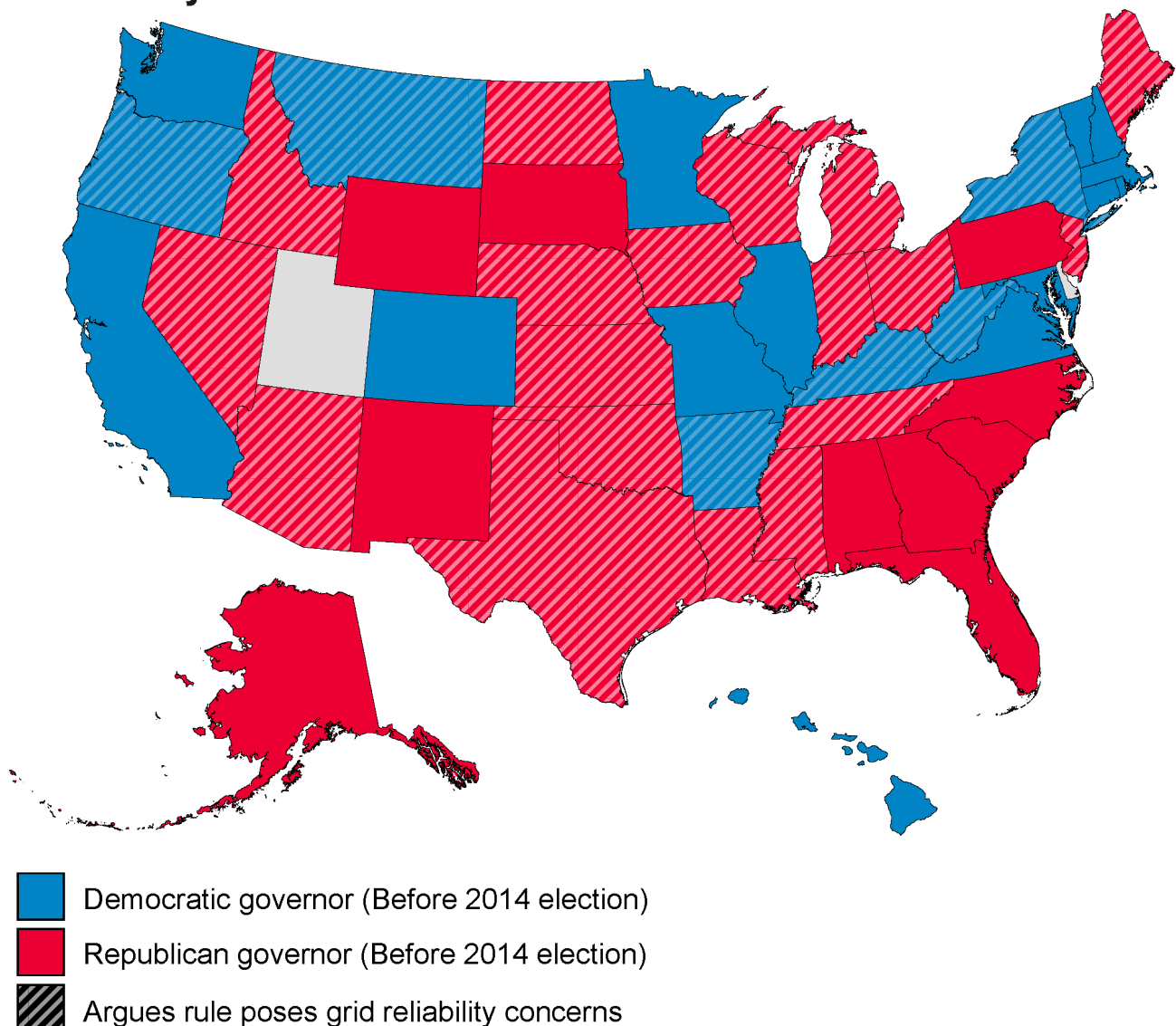


The first question is one of fairness: whether the Clean Power Plan effectively penalizes states for having taken early actions to reduce their carbon intensity. States cited CO₂ reductions secured as early as 2005, resulting from compliance with previous EPA regulations or proactive state initiatives aimed at reducing emissions independently. Due to the rule's 2012 baseline year for calculating each state's reduction goal, these states argue that the demands they face are stricter than those for states that did not make prior improvements. In other words, since they have already picked the low-hanging fruit, any additional investments would either be prohibitively costly or technically

impossible. For states that have not taken early action, however, that low-hanging fruit has not yet been picked, unfairly making the marginal costs of compliance much lower for them.

Partisanship fails to predict whether states make this argument: half of Republican states (14) made the argument, and almost half of Democratic states (9) did as well. Democratic claims tended to focus on proactive state programs that surpassed EPA guidelines, arguing that they should be credited for voluntary actions taken. Republican states highlighted emission reductions that resulted from other EPA regulations, asking that these reductions be considered in goal calculations to prevent punishing states for their past compliance. Regardless of the rationale, 23 states agree that the Clean Power Plan unfairly targets states that have already been making progress, and rewards states for refusing to take action sooner.

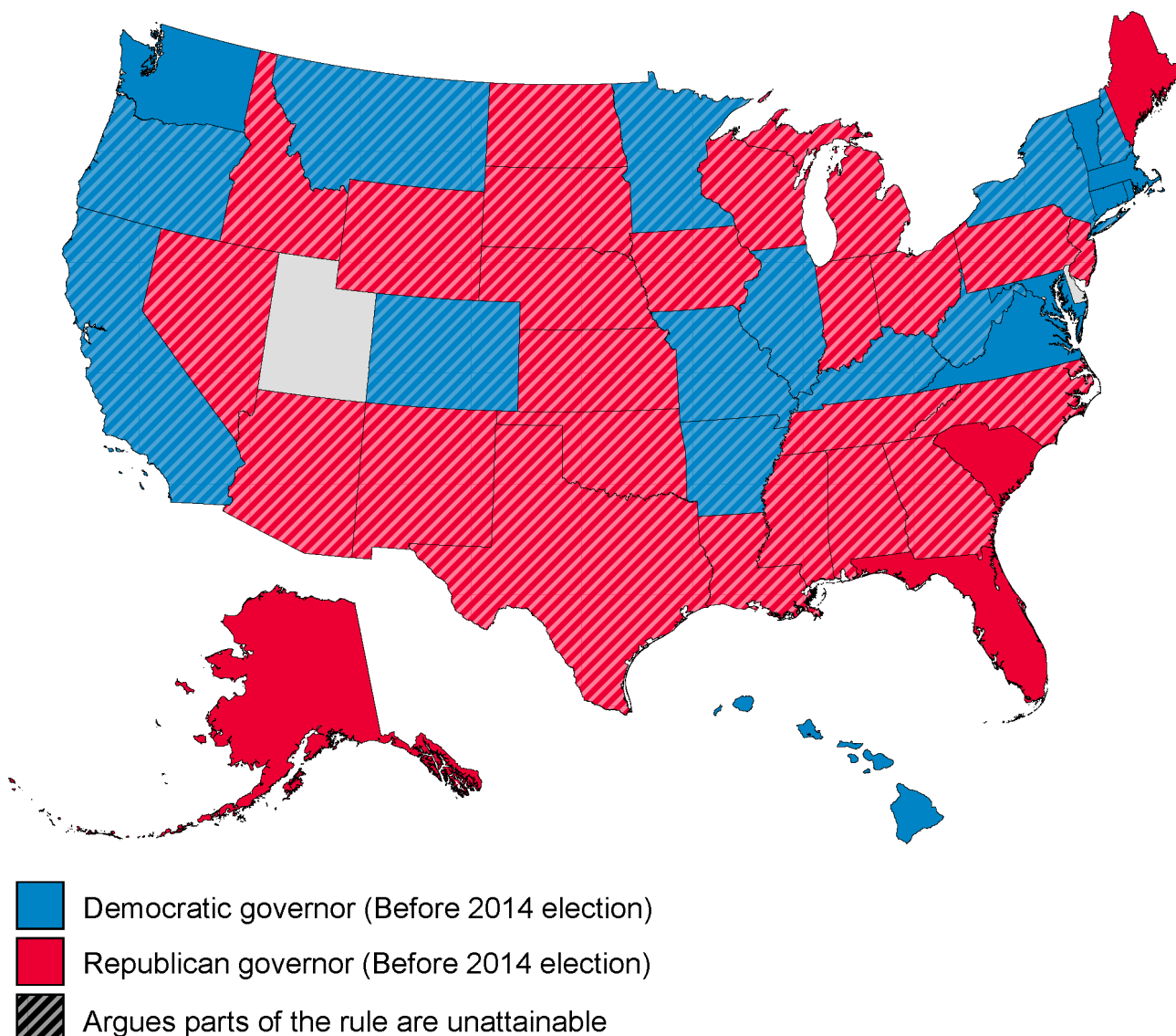
Which states argue Clean Power Plan threatens grid reliability?



Grid reliability, or the capacity of the electrical grid to consistently provide electricity regardless of fluctuations in demand, was a point of concern for 24 states. These states argue that compliance with Clean Power Plan regulations would reduce electric generation and force states to rely on unpredictable sources to meet their energy needs. If these sources do not generate enough electricity to maintain the electric grid at necessary levels, as several states predict, small disruptions could lead to catastrophic rolling blackouts. Many of these states believe that they will be forced to choose between maintaining reliable electricity and complying with CPP regulations. If this is the case, they would fall out of compliance to keep the lights on.

Whether the Clean Power Plan threatens grid reliability has become quite controversial, with dueling expert reports reaching opposite conclusions. In that context, it is unsurprising that partisanship is a strong predictor of making reliability criticisms: environmental agencies from eighteen Republican states (64 percent) made such claims,

Which states argue Clean Power Plan target unattainable?



compared with six Democratic states (30 percent). That said, it is important to note that these concerns are shared across party lines.

Many states suggested that their concerns could be alleviated if EPA includes some sort of “safety valve” provision, which would allow states that are at risk of losing reliability to generate electricity at higher-than-normally-permitted emission rates without being penalized. Additionally, some states’ reliability concerns were more moderate. Nebraska, for example, was concerned that the rule did not adequately address the role that Regional Transmission Organizations play in state implementation plans. Because these organizations are responsible for transmitting electricity and maintaining reliability across state lines, their exclusion from state implementation plans could cause reliability issues.

Fully three-quarters of state environmental agencies (36) criticize the Clean Power Plan’s target carbon intensity reduction for their state as unattainable, at least without adjustment of the EPA’s timeline for compliance. A large majority of states with Republican governors (24 of 28) and majority of states with Democratic governors (12 of 20) made these arguments.

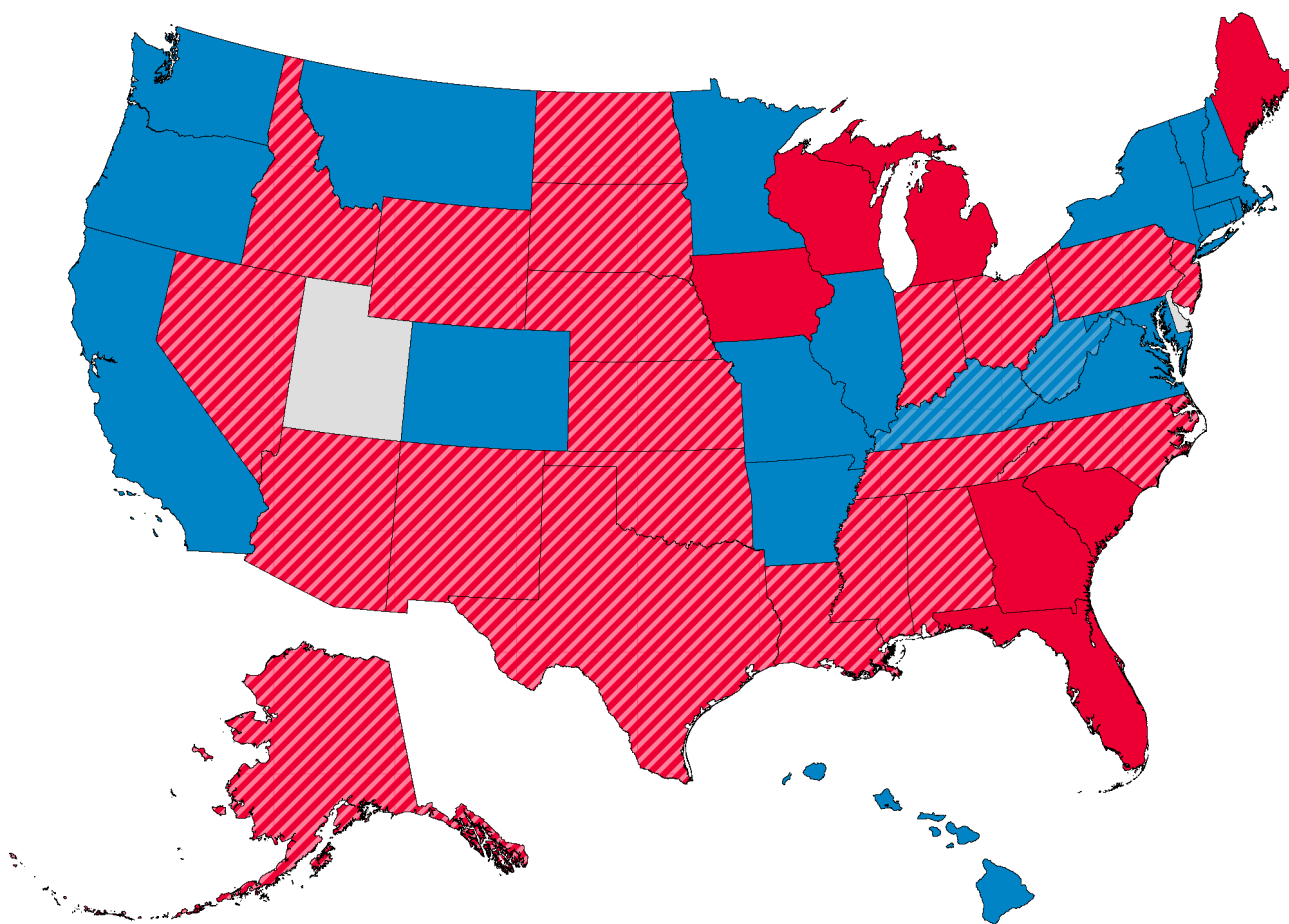
They offered many rationales. For those most sympathetic to the plan, attainability concerns tended to rest on the proposed implementation timeline. As proposed, the Clean Power Plan would require states to submit their implementation plans by 2016, meet their first goal in 2020, and their final goal by 2030. Many states argued that it would be both administratively and legislatively impossible to get an implementation plan created and approved in a year’s time. Also common was the argument that the 2020 goal was too ambitious, asking states to nearly reach their final goal in just four years rather than 14. For these states, several comments suggested a “glide path” approach that would eliminate the 2020 goal and instead allow states to determine their own schedule for reaching the 2030 target. Seven of the 12 states with Democratic governors that made this argument cited timeline constraints as a primary concern.




On the other end of the argument spectrum, some argue that the goals themselves, not just the timelines, are impossible to achieve. These states believe that EPA goal calculations are technically flawed, based on incorrect assumptions, and create expectations that, if they were theoretically possible, could only be met at great cost. Some of these costs are monetary, such as investments in new infrastructure and lost investments in existing infrastructure that will be prematurely retired, while others are social, such as the disproportionate burden of higher electricity prices on low- and fixed-income individuals. Furthermore, increased business overhead puts states with high electricity prices at a competitive disadvantage, risking the economic cost of losing businesses to other states or overseas. States identifying these kinds of problems suggested complete technical overhauls of the rule, or suggested that it be scrapped altogether.

SECTION 2: THE MOSTLY PARTISAN WAR OVER THE CLEAN POWER PLAN’S EXISTENCE

While the particular complaints examined in Section 1 cut across party lines, the two maps in Section 2 turn to more generalized objections to the Clean Power Plan’s very existence. Not surprisingly, at this level the battle is a sharply partisan one.

Which states argue Clean Power Plan illegal?

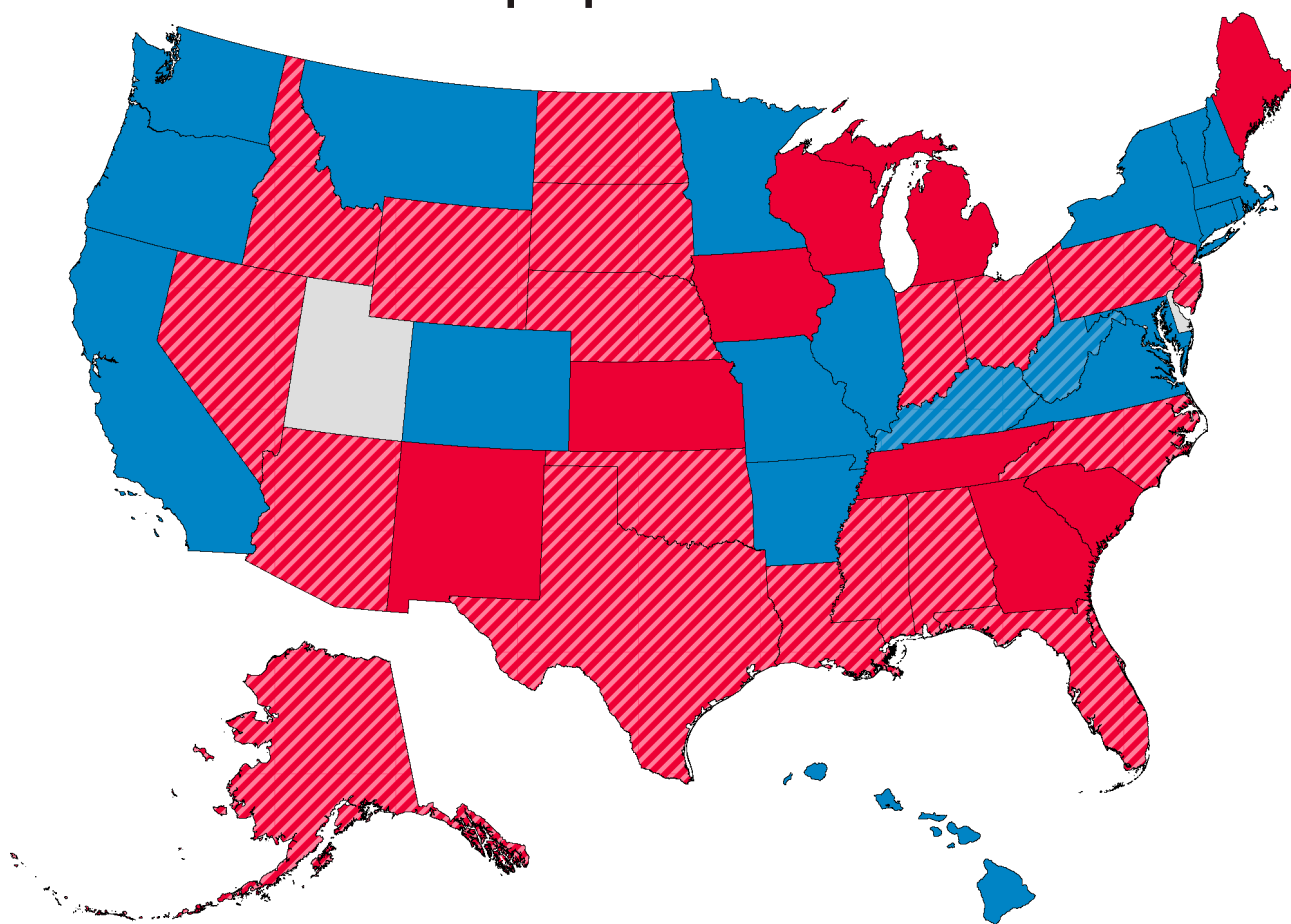


-  Democratic governor (Before 2014 election)
-  Republican governor (Before 2014 election)
-  Argues parts of the rule are illegal

Three-quarters of states with Republican governors (21 of 28) and two coal-dependent states with Democratic governors (Kentucky and West Virginia) argued that at least some part of the Clean Power Plan proposal is beyond the EPA's legal authorities.

Some of these states argue that regulating power plants under § 111(d) of the Clean Air Act is entirely inappropriate because of a provision in the law that precludes double regulation of a source under § 111 and § 112, with the latter section already being used for existing rules. Other states argue that EPA's rulemaking is procedurally unsound under the Clean Air Act's requirements, since it was not preceded by establishment of a performance standard for new power plants under § 111(b). (EPA long ago proposed such a standard but has repeatedly postponed its finalization.) Another common legal objection is that the Clean Air Act does not give the EPA authority to regulate "beyond the fence," referring to parts of the rule that derive part of states' required reduction targets from activities other than at-the-plant emissions controls, including consumer-based demand reduction strategies. A number

Which states argue EPA should abandon Clean Power Plan as proposed?



- Democratic governor (Before 2014 election)
- Republican governor (Before 2014 election)
- Argues the EPA should not enforce the rule

of states also felt that the Clean Power Plan inappropriately usurps state authority and takes for the EPA broad authority not granted by Congress.

Finally, a subset of the states alleging legal defects go on to argue explicitly that the EPA should withdraw the proposal entirely, at least as it affects their state. (In addition, while Florida’s environmental agency does not itself allege illegality, it urges withdrawal on the reasoning that policy uncertainty flowing from inevitable legal challenges will make the rule unworkable). Twenty-one states in total asked the EPA to stop, offering as justification some combination of the four previous arguments.

Several states made state-specific arguments for their own exemption. Alaska, for example, argued that it should be exempted from the rule because its energy grid is so substantially different from that of the continental United States. Idaho also argued for an exemption, claiming that its carbon emission rates were already so low that the goals of

the Clean Power Plan had been accomplished. Kentucky and West Virginia (the only two states with Democratic governors arguing for withdrawal) cited the rule's potentially devastating impact on their local economies.

Notably, a number of states with Republican governors did not ask for the plan's abandonment. In particular, Iowa, Kansas, Maine, Michigan, New Mexico, Tennessee, and Wisconsin all requested technical adjustments to baseline calculations and greater flexibility for states to decide how to meet emission reduction goals.

SECTION 3: ANALYSIS AND CONCLUSIONS

As the three maps in Section 1 indicate, complaints about the Clean Power Plan go well beyond the Republican Party. Environmental agencies from states with governors of both parties find much to criticize when they consider how the proposed rule would affect their electric grid. On the other hand, as the two maps in Section 2 show, environmental agencies from states with Republican governors are far more likely to go beyond specific concerns to more confrontational claims that the Clean Power Plan is without legal basis and must be abandoned.

State environmental agencies exhibit a full range of opinion in their comments on the Clean Power Plan. On the one side are three states that made each of the five arguments against the EPA's proposal: Idaho, New Jersey, and Texas. Eleven other states criticized the EPA for everything except penalizing early actors: Arizona, Indiana, Kentucky, Louisiana, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, and West Virginia. These states represent the hardline opposition to the Clean Power Plan, and there is every reason to expect that they will pursue their criticisms in litigation and in some cases refuse to have their state environmental agencies participate in the rule's implementation process. Indeed, Oklahoma's Governor Mary Fallin has now promised as much. Her neighbors to the south in Texas will almost certainly do the same, with its attorney general [promising](#) to "fight this ill-conceived effort that threatens the livelihood and quality of life of all Texans." Across-the-board resistance is the strategy openly encouraged by Senate Majority Leader Mitch McConnell (R-KY).

On the other end of things are states that express enthusiastic support for EPA's proposal. The state environmental agencies in Hawaii, Maryland, Massachusetts, Rhode Island, Vermont, and Washington made none of the five criticisms surveyed in this paper, confining any criticism to more technical issues. It is worth noting that gubernatorial control in two of these states (Maryland and Massachusetts) switched over to Republicans in the 2014 election, potentially leading those two states to moderate their support. But at least in late 2014, these states' environmental agencies represented EPA's staunchest allies.

In between there are many gradations of support and opposition. A number of environmental agencies from states with Republican governors strongly objected to certain parts of the Clean Power Plan, including on legal grounds, but stopped short of saying that EPA should scrap the rule entirely (e.g., Kansas, New Mexico, and Tennessee).

On the other hand, a majority of states environmental agencies reporting to Democratic governors offered support for the plan but nevertheless voiced serious reservations about its effects on their states. For example, along with a four page letter voicing strong support for the rule, Connecticut submitted 28 pages of additional technical comments. While these comments maintained Connecticut's position that the rule was necessary and generally enforceable, they insisted that EPA should alter its final rule to acknowledge that "leading states, like Connecticut, have already picked the low-hanging fruit and that efforts to achieve further energy efficiency will be further up the supply curve."

As we await the Clean Power Plan's finalization, which is expected to come in late summer 2015 (so that states' one-year turnaround period for drafting state implementation plans will end during the Obama administration), this survey of state environmental agencies' comments ought to make us confident of two things. First, it is impossible to imagine that any political changes in the next year, or even after the elections of 2016, will eliminate a hard core of opposition to the Clean Power Plan. Enough states entered 2015 dead-set against the plan that we can be sure that some will remain irreconcilable even if some are placated by changes to the final rule. Some states will be satisfied only if the EPA commits to a total retreat.

Second, it is far too simplistic to see opposition to the Clean Power Plan as an outgrowth of hyper-partisanship. Concerns transcend party lines, and we can be certain that states led by governors of both parties will find elements of the plan unfair to their citizens or threatening to their electric grids. That is the entirely predictable (and, indeed, [predicted](#)) result of choosing different efficiency targets for each state. Fairness concerns will persist no matter what

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This portrait of the Clean Power Plan's reception by the state environmental agencies vividly demonstrates what a difficult task the EPA has been given in trying to design a plan that is not only ambitious enough to deliver on President Obama's promises in international negotiations,

but also politically sustainable. The Clean Power Plan received a mind-boggling 4.3 million comments, and while many of these are largely congratulatory, it gives a sense of the diversity of concerns that EPA must reckon with. It sometimes seems that the agency's approach is to downplay or to ignore the legal and political challenges that the rule faces—and perhaps it has few practical alternatives. But, given the range of concerns expressed by state environmental agencies, there is every reason to expect that serious difficulties await the final rule.

METHODOLOGICAL APPENDIX

We collected the comments from each state's environmental agency. For 46 states, we were pointed to the appropriate file by the Bipartisan Policy Center's helpful [Clean Power Plan comments map](#). For Minnesota and Oregon, more complete comments were taken from the state agency's website. We found no substantive comments by the state environmental agencies of Utah or Delaware, so these two states were coded as no data. Where state environmental agencies submitted more than one comment, we included all available in our analysis (while continuing to treat each state as a single unit of analysis).

We derived our five categories through a combination of prior expectations about the arguments states would be making and an inductive examination of which arguments recurred. Some arguments, such as the legal concerns, were readily apparent from following the public dialogue on the Clean Power Plan. Others, such as concerns about fairness to early-acting states, were determined after reading through several comments and recognizing common themes. Once we determined our categories, we coded each state's comment(s) for the presence of the five kinds of arguments. In addition to noting an argument's presence, we also recorded the page number and brief description

of the rationale. Although some subjective judgment was necessarily involved in determining whether states' arguments (which of course were non-uniform in terms of length, style, and language) should be grouped together in some of our categories, we believe another coder's results would deviate only slightly.

Since the comment submission deadline was December 1, 2014, we recorded the party identity of each state's governor during the time period when comments were being written—i.e., before the winners of 2014 gubernatorial elections took office.

Our dataset also includes the identity of the agency or agencies that each state environmental agency collaborated with in submitting their comments, the date the comment was submitted, and the number of pages contained in the comment. The original coding file, including links to the comments and page citations for each argument, is available upon request.

GOVERNANCE STUDIES

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