

THE  
NATIONAL LAW REVIEW

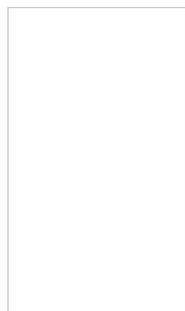
---

## Another Unexpected Fork in Road to Clean Power Plan

---

Wednesday, May 18, 2016

The **Clean Power Plan** continues its surprising path to becoming the law of the land. On May 16, the D.C. Circuit Court of Appeals on its motion issued an order to delay oral argument in the Clean Power Plan rulemaking and hear the case *en banc*. The oral arguments were scheduled for June 2 and 3, and are now set to begin on September 27. Presumably the argument will be allotted two days, but the court notes that it will issue further orders regarding the allotment of time for oral argument.



The CPP continues its path of “unusual” steps. The Obama Administration views the CPP as the key regulation to address climate change by lowering fossil-fuel-fired power plant carbon dioxide emissions. [See [‘EPA’s Clean Power Plan Published in the Federal Register.’](#)] In the recent past, the court had only issued an order for *en banc* hearing in the Microsoft antitrust case in 2001. The Watergate cases back in the 1970s were the

next oldest cases identified for *en banc* argument. Putting the Clean Power Plan in the company of these judicially important cases highlights the significant administrative law principles that are presented in this rulemaking appeal.

There are 11 sitting judges on the D.C. Circuit and two members of the 11 have recused themselves, Judges Garland and Pillard, so whether six-members will be required for a “majority” holding is unknown.

The timing of the argument puts into more significant doubt whether the Appeals Court will rule on the many issues raised by the parties before the end of the Obama Administration

© 2019 Schiff Hardin LLP

**Source URL:** <https://www.natlawreview.com/article/another-unexpected-fork-road-to-clean-power-plan>

Article By [Schiff Hardin LLP](#)  
[Jane E. Montgomery](#)  
[Energy and Environmental Law Adviser](#)

[Environmental, Energy & Resources](#)  
[All Federal](#)  
[D.C. Circuit \(incl. bankruptcy\)](#)