



**CITY OF BOULDER
CITY COUNCIL AGENDA ITEM**

MEETING DATE: October 20, 2015

AGENDA TITLE:

Request for Council Direction Regarding City of Boulder Participation in Litigation Concerning the Environmental Protection Agency's Clean Power Plan Rules

PRESENTERS

Jane S. Brautigam, City Manager
Tom Carr, City Attorney
David Driskell, Executive Director, Planning, Housing and Sustainability
Heather Bailey, Executive Director, Energy Strategy and Electric Utility Development
Jonathan Koehn, Regional Sustainability Coordinator

EXECUTIVE SUMMARY

On June 18, 2014, as part of the Federal Government's efforts to tackle global warming, EPA proposed a rule to restrict carbon dioxide emissions from existing coal-fired and natural gas-fired power plants. The plan would require states to develop plans to reduce carbon emissions beginning in 2022. The United States Court of Appeals for the District of Columbia Circuit has already rejected two challenges brought against the rules as premature. The final rules will be published in the Federal Register by the end of October. The purpose of this agenda item is to request council direction regarding whether the City of Boulder should participate in litigation in support of the Clean Power Plan and if so, what level of participation would be appropriate.

STAFF RECOMMENDATION:

Staff requests council consideration of this matter and action in the form of the following motion:

Motion to direct that the City of Boulder participate as an intervenor in any litigation brought to challenge the Environmental Protection Agency's Clean Power Plan Rules.

BACKGROUND & ANALYSIS

On June 18, 2014, EPA proposed a rule to restrict carbon dioxide emissions from existing coal-fired and natural gas-fired power plants. 79 Fed. Reg. 34,830. On August 3, 2015, the EPA released a pre-publication version of the final rule known as the Clean Power Plan. 79 Fed. Reg. 67,406. Each of these publications resulted in a challenge by a coalition of fifteen states¹ and coal companies. The challenge was opposed by the United States Attorney General, eleven states,² the District of Columbia and several non-governmental organizations. The United States Court of Appeals for the District of Columbia Circuit rejected both challenges as premature. When the rules become effective later this month, there is very likely to be another challenge. Staff recommends that Boulder participate in this challenge. There are three potential levels of participation for the city in this litigation: 1) as an intervenor; 2) as a friend of the court (*amicus curiae*), or 3) as a witness. Staff recommends intervention because this is the strongest statement that the city can make in this action. Strong support of the Clean Power Plan is consistent with the city's Climate Action Plan. Each different level of participation is as follows:

- 1) Intervention – The city would join other governments and non-governmental organizations in supporting the federal government and litigating against those seeking to stop the new rules. Even this level of participation is not likely to require extensive work from staff. The city will likely join with other jurisdictions to prepare briefing that is consistent with the city's Climate Action Plan.
- 2) Friend of the Court – A friend of the court is permitted to file a brief supporting on side of the litigation. The work level is not likely to be much different than that necessary for intervention. That is, city staff will likely work with other similarly situated jurisdictions to prepare a friend of the court brief consistent with the Climate Action Plan.
- 3) Witness – The city can participate as a witness. Staff will prepare a declaration for the Mayor to sign that will explain the city's role in working to limit climate change and some of the effects of climate change on our community. The city would submit such a declaration as an intervenor or as a friend of the court.
- 4) No action- Council may decide that it would be best if the city takes no action on this litigation.

Question for Council:

¹ Alabama, Alaska, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, West Virginia, Wisconsin and Wyoming

² California, Connecticut, Delaware, Massachusetts, Maryland, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington.

Should the city participate in litigation against the Clean Power Plan, supporting the EPA's rules and if so, what level of participation would be appropriate?