

Climate Daily News

McConnell Urges States To Withhold ESPS Plans But Some See Risks

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Senate Majority Leader Mitch McConnell (R-KY) is urging states to refuse to participate in EPA's greenhouse gas (GHG) rule for existing power plants, providing the highest-profile push for the tactic to date, though his pitch comes as industry and other sources are also outlining risks for states that "just say no" to writing compliance plans.

McConnell's push comes in a [March 4 opinion article](#) in the *Lexington Herald-Leader* that says states should not craft plans under EPA's existing source performance standards (ESPS) in order to undermine the rule.

"Think twice before submitting a state plan – which could lock you in to federal enforcement and expose you to lawsuits – when the administration is standing on shaky legal ground and when, without your support, it won't be able to demonstrate the capacity to carry out such political extremism," he wrote.

States refusing to submit plans "would give the courts time to figure out if it is even legal, and it would give Congress more time to fight back. We're devising strategies now to do just that," McConnell added.

McConnell's argument echoes calls by industry and other critics of EPA's rule, who have urged states to withhold their compliance plans as a way to test the reach of EPA's authority to force states to comply and pressure the agency to overhaul the rule.

For example, Mike McKenna, a former Virginia state official, urged states "to do either nothing or very nearly nothing" in order to force EPA to overhaul the proposed ESPS. "If you have reservations about the proposed rule, the best and simplest way to compel a rewrite is to alert the agency that they will have to impose a federal implementation plan on your State," he [wrote in a memo](#).

McKenna and others say that because EPA has uncertain authority to impose federal requirements on recalcitrant states, they should use that uncertainty as leverage to force the agency to back off. For example, the Federalist Society, a group of conservative lawyers, noted in [a paper](#) last year that "The outcome of a State's refusal to comply cannot be predicted, but it would leave the State no worse off than if the State begrudgingly agreed to become EPA's partner in producing potentially disastrous consequences for the State."

Kentucky's legislature has even approved legislation, among the first in the country, requiring regulators to submit any state compliance plan to the legislature for approval before submitting it to EPA.

But officials in the administration of term-limited Gov. Steve Beshear (D) recently indicated they are crafting the [early outlines](#) of a plan that they believe can meet EPA's proposed GHG reduction target, echoing similar efforts by other Democratic leaders in coal-dependent states.

Many industry officials have also [resisted efforts](#) for states to withhold their plans, charging that generators in states that are subject to federal plans will likely enjoy significantly less flexibility than those in states that develop their own plans.

One industry source adds that states that develop their own plans retain those flexibilities and are still able to challenge the rule's lawfulness. "Just because a state adopts a plan doesn't mean the state can't still challenge the Clean Power Plan in court," the source says.

'Tremendous Dialogue'

Speaking to reporters after a March 4 hearing of the Senate Environment & Public Works Committee, EPA Administrator Gina McCarthy declined to comment directly on McConnell's article. But she indicated that the agency continues to work closely with states, even if they are reluctant to participate.

"EPA has been working with the states well before we put pen to paper on the rule. That will not change. We continue to have tremendous dialogue with the states, including the state of Kentucky," she said.

During her testimony at the hearing, the administrator also pushed back on the notion -- raised in McConnell's article and by other ESPS critics -- that implementation of the rule should be stayed in order to allow courts to resolve legal challenges to the rule. "We see no reason for a stay in the rule," she said in response to a question from committee Chairman James Inhofe (R-OK). "We're moving ahead and finalizing the rules."

The Capitol Hill debate comes as two new papers are urging states and utilities to engage with the ESPS, in part to ensure they have a backup strategy in case the rule survives legal challenges.

One of the new studies, by a professor at the Sabine Center for Climate Change Law at Columbia University, urges states to submit plans and criticizes the "just-say-no school of thought." A second paper, by industry attorneys at VanNess Feldman, urges the power industry to engage with states as they develop their plans, saying that could be a "hedging strategy" in case the rule survives in the courts.

The [March 3 Sabine Center paper](#), by Daniel Selmi, says states should think carefully before saying "no" and refusing to submit a compliance plan. The paper says consequences of not participating, including that EPA will impose a federal implementation plan (FIP) on such states, include that they would "cede regulatory control to the federal government; ratepayers will likely fare worse under a FIP than a state-crafted plan."

It also says that developing a plan now will avoid later delays in extricating a state from a FIP down the road, and warns that late compliers "may lose important opportunities for efficient compliance and informational benefits that accrue from the outset."

Finally, the paper says, "Saying no to avoid a predicted political backlash is unnecessary" because the backlash is "dubious." He compares the state compliance plans to states implementing the federal health care law and notes that those states do not take the blame from those opposed to the Affordable Care Act, "and here very few are likely to mistake the source of the clean power rules." Also states are free to "publicize that they are complying with a federal mandate for which they are not responsible."

Selmi references states that have enacted or are considering legislation to hobble adoption of state plans, including the Kentucky law requiring state environmental regulators to adopt separate requirements for coal plants and gas plants, potentially prohibiting the state from adopting an approvable plan.

Kentucky's law is supported by McConnell and other Republican lawmakers, and is in response to a more conciliatory approach adopted by Beshear's administration.

Selmi's paper also warns that states refusing to participate could cede regulatory control to the federal government. "That consequence is not one that most states would welcome, particularly when they can avoid it," he writes.

Also he says states refusing to write a plan could suffer adverse impacts on electricity rates because state regulators would maximize flexibility and are more familiar with the sources in their jurisdiction. "EPA is simply not in as good a position as a state to identify and adopt a mix of responsive measures that would minimize costs."

Further, the paper urges states opposed to the ESPS that think it will fail legally or be rejected by a new president to nonetheless continue to work on a compliance plan. "[T]he ultimate question actually extends beyond whether the rules are upheld and take effect. The question is whether the issue of controlling carbon dioxide from power plants is likely to disappear so that a state can continue on its present energy path" and "the odds are quite high that it will not disappear, for the tide on this point has turned."

Similarly, the March 2 [VanNess Feldman paper](#), by Kyle Danish, Doug Smith and Avi Zeven, urges a hedging strategy if the ESPS is upheld. Power plant owners and other industry stakeholders "can ill afford to wait to see what happens in the last act," it says. "The planning process is too complicated, and the stakes are too high, to sit on the sidelines. Even for stakeholders planning to file or support legal challenges, early and active engagement in the development of state compliance plans will be an optimal hedging strategy." -- Dawn Reeves(dreeves@iwpnews.com) & David LaRoss (dlaross@iwpnews.com)

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