Climate Regulation

McConnell Tactic Unlikely to Block Interstate Trading Programs Under Clean Power Plan

A
n obscure provision of the Clean Air Act cited by
Senate Majority Leader Mitch McConnell (R-Ky.)
is unlikely to deter states from joining emissions
trading programs to comply with the Environmental
Protection Agency's proposed Clean Power Plan, legal
experts said.

Section 102(c) of the Clean Air Act, which requires
congressional approval of binding interstate agree-
ments or compacts to address air pollution, is likely not
applicable to the sort of interstate emissions trading
programs envisioned by the EPA as part of its proposed
carbon dioxide emissions limits for existing power
plants, lawyers said.

"This is totally irrelevant. It's not a serious obstacle," 
Michael Livermore, associate professor of law at the
University of Virginia School of Law, told Bloomberg
BNA April 30.

McConnell invoked Section 102(c) as a possible tool
to block interstate emissions trading programs under
the proposed Clean Power Plan during a Senate appro-
priations hearing April 29 (83 DEN A-10, 4/30/15).

That section provides that "No such agreement or
compact shall be binding or obligatory upon any State a
party thereto unless and until it has been approved by
Congress."

"It doesn't seem ambivalent to me," McConnell said
April 29. "I can assure you that as long as I'm majority
leader of the Senate, this body is not going to be sign-
ing off on any back door energy tax."

However, attorneys said not all interstate agreements
would qualify as compacts as defined by Section 102.

"You don't need to have an interstate compact in or-
der for there to be regional cooperation," Livermore
said. "A compact is a very specific form of cooperation
that is legally binding."

The EPA's Clean Power Plan (RIN 2069-AR33), pro-
posed under Section 111(d) of the Clean Air Act, would
establish unique carbon dioxide emissions rates for the
power sector in each state. States would be required to
meet interim targets between 2020 and 2029, with a fi-
nal emissions rate to be achieved in 2030, but would
have flexibility to determine how best to achieve that
target, which could include interstate emissions trading
programs.

Voluntary Programs an Option. However, legal experts
said that language would likely be inapplicable to inter-
state emissions trading programs fashioned to comply
with the Clean Power Plan.

Voluntary agreements between states with no inter-
state enforcement mechanisms would likely not need
congressional approval, Richard Revesz, director of the
Institute for Policy Integrity at the New York University
School of Law, told Bloomberg BNA April 30.

"I don't think this is the only way states could coordi-
nate their actions should they choose to coordinate
their actions," he said.

While Section 102 does require congressional ap-
proval of any binding interstate agreements, Michael
Gerrard, director of the Sabin Center for Climate
Change Law at Columbia Law School, said that provi-
sion is also intended to encourage just that sort of inter-
state collaboration.

"Section 102 affirmatively encourages cooperation
among the states," he told Bloomberg BNA April 30.

Rather than legally binding compacts, states could
simply fashion nonbinding agreements similar to that
used by the Regional Greenhouse Gas Initiative states.
That agreement, which established an emissions trad-
ing program for Northeastern and mid-Atlantic states,
is voluntary, which is what allowed New Jersey to de-
cide to withdraw from the program with no legal conse-
quences.

Brian Potts, a partner at Foley & Lardner LLP, said it
is plausible that some interstate agreements could re-
quire congressional approval, but he agreed that states
could simply structure their Clean Power Plan compli-
ance strategies to avoid triggering that requirement.
While McConnell's latest tactic could delay implemen-
tation of the EPA's proposed rule, it would not Jeopar-
dize it in its entirety, he told Bloomberg BNA April 30.

"It's not going to stop compliance because worst
case, even if a court was to say states can't do a regional
plan because of this provision, they'd have to do state
plans, which would be more expensive," he said.

McConnell Pushes Noncompliance. Invoking Clean Air
Act Section 102(c) is McConnell's latest bid to block
implementation of the EPA's proposed rule. Previously,
McConnell had urged state governors not to submit
their own compliance plans, a strategy dubbed "just say
no." That would instead force the EPA to issue its own
federal plans for states, which would likely be more
time consuming and expensive (54 DEN A-16, 3/20/15).

Livermore said McConnell's latest push would also
appear to run afoul of Republican preference for locally
driven solutions.

"Put aside the legal silliness of what he's saying, he's
so opposed to reducing greenhouse gases that two
states voluntarily deciding they want to get together to
reduce their emissions, that he wants to intervene and
stop that," Livermore said.

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