

Paris Goals In Reach Even If Courts Kill Clean Power Plan

By **Juan Carlos Rodriguez**

Law360, New York (March 3, 2016, 9:46 PM ET) -- A high-powered legal challenge to the Clean Power Plan has cast doubt on the United States' commitment to cut greenhouse gas emissions under the recent Paris climate change accord, but experts say the U.S. could still honor the pledges it made in Paris even if courts decide to strike down the CPP.

In December, 195 nations joined together in the French capital and signed an accord to combat climate change and invest in low-carbon technologies, with the U.S. pledging to cut its greenhouse gas emissions by 26 percent to 28 percent from 2005 levels by 2030.

President Barack Obama's administration placed much of its hope for meeting those goals on an ambitious plan to slash carbon dioxide emissions from existing power plants. That plan is now in legal limbo after the U.S. Supreme Court — in one of late Justice Antonin Scalia's last votes — stayed the rule until litigation over its legitimacy is concluded.

The Clean Power Plan's future is unclear after Justice Scalia's death, as many observers assumed he'd look critically on it. But even if it does fail to pass muster in the courts, there are a variety of approaches the Obama administration — and possibly the next presidential administration — can employ to reach its climate objectives.

Chief among those is a legal shift in regulating power plants from Section 111(d) of the Clean Air Act, which authorizes a state-based program for regulating existing power plants, to Section 115, **which authorizes** the regulation of a much bigger set of business sectors to meet international pollution control goals, said Michael Gerrard, a law professor at Columbia Law School and director of the Sabin Center for Climate Change Law.

"Section 115 is not vulnerable to several of the problems that 111(d) allegedly has," Gerrard said.

He said a legal issue that has plagued the Section 111(d) approach is that the House and Senate passed different versions of the provision in 1990 amendments to the Clean Air Act. The U.S. Environmental Protection Agency favors the Senate version, while plan opponents favor the House version — which is the version that made it into the U.S. Code, even though the two were never reconciled. Section 115 doesn't have that problem, Gerrard said.

Another issue that CPP critics have seized on is that the rule attempts to control emissions "beyond the fence line" of power plants by compelling owners or operators to invest in renewables like wind or solar power. Again, Gerrard said Section 115 doesn't have that problem.

Apart from carbon dioxide, which the CPP targets, the federal government has a lot of room to force dramatic reductions in methane emissions, a powerful greenhouse gas about 25 times more potent than carbon dioxide, said Victor Flatt, a law professor at the University of North Carolina. The Obama administration has already proposed **new regulations** to reduce methane emissions

from the oil and gas sector, including by hydraulic fracturing wells, as part of a broader effort to reduce methane emissions by up to 45 percent by 2025.

But that proposed rule only targets new or modified sources, leaving the largest source of leaks — existing sites — as a prime target for future regulation.

“The EPA’s done several studies about this, and the last one showed that the emissions from the oil and gas sector were probably 17 to 18 percent higher than they had anticipated. When you couple that with studies they did a year ago, noting that most of the emissions are coming from a few bad sites, it looks like there are ways to tighten that up fairly efficiently,” Flatt said.

And Erika Rosenthal, a staff attorney with Earthjustice’s international program, pointed out that aside from federal regulations, the market is pushing states and providers toward renewable energy sources anyway.

“You look at economics, you look at the policy momentum, the transition to clean energy in the U.S. is really unstoppable. There’s a question as to how quickly it’s going to happen, but the direction and the momentum is really pretty extraordinary,” Rosenthal said.

She said that renewable energy represents a consistently growing segment of the U.S. energy market, and that its cost has correspondingly decreased. At the same time, the federal government has made extracting fossil fuels more difficult, instituting a moratorium on coal leases on federal land, for example.

And on Wednesday, Oregon state lawmakers **passed sweeping legislation** that would phase out coal-fired power in the state by 2035 and require that half its electricity come from renewable sources by 2040. Oregon’s plan comes approximately two months after New York Gov. Andrew Cuomo pledged his state would phase out coal-fired power by 2020.

“States are way out ahead,” Rosenthal said.

Gerrard also noted that there are significant emissions controls that could be imposed on the aviation and shipping industries.

“Both aviation and shipping have largely escaped control,” he said. “On a global basis, if you add up emissions from shipping and aviation industries, it would be the fifth-largest country in the world. And it’s growing rapidly.”

The EPA has said it was waiting for the International Civil Aviation Organization to issue new greenhouse gas emissions limits before crafting its own. The ICAO released its proposal in February, so there is speculation the EPA’s proposal could come soon.

And a sometimes overlooked source of emissions reductions is in increasing the efficiency of the electricity delivery system through the use of smart grids and smart meters, Flatt said.

“Texas and California have both introduced meters that allow the customer and the utility to price the power based on the time of day or day of year,” he said. “Once you’re able to control consumer demand — like buy power when it’s cheaper or when the wind’s blowing or when the sun’s out, and then don’t buy so much power when there’s a huge demand — you reduce the need for capital investments in more and bigger power plants, and you justify and make cheaper renewables.”

--Editing by Mark Lebetkin and Philip Shea.