

News

Climate Regulation

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

An 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 agreements 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 appropriations 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 signing 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 order 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 2060-AR33), proposed 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 final 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 interstate emissions trading programs fashioned to comply with the Clean Power Plan.

Voluntary agreements between states with no interstate 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 coordinate their actions should they choose to coordinate their actions," he said.

While Section 102 does require congressional approval of any binding interstate agreements, Michael Gerrard, director of the Sabin Center for Climate Change Law at Columbia Law School, said that provision is also intended to encourage just that sort of interstate 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 trading program for Northeastern and mid-Atlantic states, is voluntary, which is what allowed New Jersey to decide to withdraw from the program with no legal consequences.

Brian Potts, a partner at Foley & Lardner LLP, said it is plausible that some interstate agreements could require congressional approval, but he agreed that states could simply structure their Clean Power Plan compliance strategies to avoid triggering that requirement. While McConnell's latest tactic could delay implementation of the EPA's proposed rule, it would not jeopardize 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.

By ANDREW CHILDERS

To contact the reporter on this story: Andrew Childers in Washington at achilders@bna.com

To contact the editor responsible for this story: Larry Pearl at lpearl@bna.com