

ENVIRONMENTAL LAW

Expert Analysis

Legal Challenges to Obama Administration's Clean Power Plan

The centerpiece of the Obama administration's efforts to fight climate change is the "Clean Power Plan." The plan would utilize an existing statute—Section 111(d) of the Clean Air Act—to reduce emissions from existing coal-fired power plants, which are by far the largest source of greenhouse gases in the United States.

The Environmental Protection Agency announced its proposed rules on June 2, 2014,¹ and plans to finalize them by June 2015. Three lawsuits have already been filed against them. Far more are expected when the rules become final.

This column discusses the theories and timing of this litigation.

Clean Air Act Structure

First it is necessary to explain a bit about the Clean Air Act, which is the longest and most complex of all the federal environmental statutes. It sets up numerous separate air pollution control programs. Five are especially relevant here.

State Implementation Plan Program. Each state must formulate a plan so that its air meets the National Ambient Air Quality Standards.

New Source Review. The states (or, in some cases, EPA) determine what

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is the best available control technology for various kinds of sources, and require that all new sources or significantly modified sources use that technology or at least get the equivalent emissions reduction. In those places where the air quality meets the national standards, this is called the prevention of significant deterioration program; where it does not, the program is called nonattainment new source review. This is the program that was at issue in a June 23, 2014, Supreme Court decision, *Utility Air Regulatory Group v. EPA*,² which upheld most of EPA's actions on greenhouse gases but overturned EPA's application of the prevention of significant deterioration program to greenhouse gases from sources that are not otherwise regulated.

New Source Performance Standards for New Sources. Under Section 111(b) of the Clean Air Act, EPA sets national standards for emissions from various kinds of sources. The program only applies to newly built sources, or existing sources that are significantly modified. Earlier this year, EPA proposed standards under this program for new fossil fuel power plants. These standards

would basically prohibit a new coal-fired plant unless it had carbon capture and sequestration. Since almost no one is starting construction of new coal-fired plants in the United States anyway, due largely to the low cost of natural gas, this proposed rule in itself is not especially important, but it is a prerequisite to the rule that is the focus of this column.

Performance Standards for Existing Sources. This is the key Section 111(d) program. Under it, EPA sets nationwide guidelines, but it is up to each state to prepare its own plan for meeting these guidelines.

National Emissions Standards for Hazardous Air Pollutants. The programs just mentioned all concern the conventional air pollutants, such as sulfur dioxide, nitrous oxide, particulate matter, and now, carbon dioxide and other greenhouse gases. In contrast, the national emission standards for hazardous air pollutants, under Section 112 of the Clean Air Act, concern a long list of other pollutants that are much more toxic in small quantities.

All of these programs are distinctive with their own statutory bases and regulations. But they interrelate with each other, and that leads to the legal theories that are going to be used to attack the Clean Power Plan.

Theories to Attack Proposal

Three major theories are being advanced by the industries and states that oppose the Clean Power Plan proposal.

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• **Argument that EPA cannot regulate existing fossil fuel plants because they are already regulated under the hazardous air pollutant program.** In February 2012, EPA issued a standard for mercury and certain other air toxins from fossil fuel power plants under the National Emission Standards for Hazardous Air Pollutants program created under Section 112. Section 111(d) allows EPA to mandate standards for emissions that are not “from a source category which is regulated under [Section 112].”³ That poses a problem because the source category of fossil fuel power plants is now regulated under Section 112.

The 1990 amendments to the Clean Air Act may or may not solve this problem. The House and the Senate passed versions that were slightly different in one respect, and the differences were never reconciled. Both versions appear in the Statutes at Large.⁴

Under the House version of Section 111(d), if a source category is regulated under Section 112, other pollutants emitted by that source category cannot be regulated under Section 111(d). Under the Senate version, only the pollutants that are regulated under Section 112 cannot be regulated under Section 111(d). So if the House version governs, the fact that mercury and other hazardous air pollutants from power plants are regulated under Section 112 could be fatal for regulating power plants under Section 111(d). But if the Senate version governs, this is not a problem because the Section 112 rules on power plants do not regulate greenhouse gases, which is what the Section 111(d) rules seek to limit.

• **Argument that EPA cannot regulate beyond the fenceline.** Section 111(d) tells EPA to set its emissions guidelines based on a “standard of performance,” defined as a standard reflecting the “degree of emission limitation achievable” through the “best system of emission reduction” that EPA “determines has been adequately demonstrated.”⁵ What “system” means is hotly debated. Does it apply only to

reductions that can be achieved within the power plant, or does it allow EPA to regulate beyond the fenceline of the power plant? And if the latter, can EPA require not only direct reductions in emissions, but also (as EPA has proposed) indirect measures, such as end-use energy efficiency, renewable energy, and keeping old nuclear power plants open?

Only small reductions can be achieved within the fenceline, such as by upgrading the boiler. Thus if EPA is limited to requiring such measures, the Section 111(d) rules could not lead to anywhere close to the emissions reductions that EPA is seeking. The argument that the statutory language, especially “best system of emission reduction,” does not allow EPA to go beyond the fenceline is closely related to its opponents’ suggestion that the proposed rules would turn EPA into an energy regulator that is inappropriately making broad choices about such matters as fuel choice.

The plan would utilize an existing statute—Section 111(d) of the Clean Air Act—to reduce emissions from existing coal-fired power plants.

• **Argument that the 111(b) rule for new sources, which is a prerequisite to the 111(d) rules, is invalid.** The Section 111(d) authority only applies to existing sources where there are standards of performance for new sources of the same type—the Section 111(b) rules. That is why the proposed Section 111(b) rule for new coal plants is so important, even though almost none are proposed. Opponents of the proposed rule have raised questions about whether carbon capture and sequestration, on which the proposed rule relies, is adequately demonstrated, whether it has a reasonable cost, and whether the fact that the Department of Energy has funded much research on this technology runs afoul

of a particular provision of the Energy Policy Act of 2005.

EPA has also proposed a new source standard under Section 111(b) that would cover modified and reconstructed power plants (as opposed to entirely new power plants). That one does not rely on new technology, so it creates an argument for EPA that this is enough to satisfy the prerequisite. EPA might also avoid this problem by issuing final Section 111(b) rules for new sources that do not rely on new technology, with a pledge to revisit the rule in a few years to see if new technology is available by then.

When the Section 111(d) rule is finally issued, there will no doubt be further theories. EPA must make many decisions in creating the rule, and people may argue with many of them. For example, there will be complaints about how EPA set the targets for emissions reductions by each state; what baseline year is chosen; how various kinds of sources were subcategorized; the way that electricity imports and multistate issues are dealt with; and the selection of strategies and approaches.

Early Lawsuits

Murray Energy Corporation, the largest underground coal mining company in the United States, which is emerging as a major litigant against a variety of federal regulations, has filed two lawsuits in the U.S. Court of Appeals for the D.C. Circuit challenging the proposed 111(d) guidelines.⁶ In the first of these, it has received amicus support from nine states—West Virginia, Alabama, Alaska, Kentucky, Nebraska, Ohio, Oklahoma, South Carolina, and Wyoming. Separately, a group of most of those same states (plus a few more) filed a petition with the same court asking it to review a settlement agreement under which EPA committed to issue the contested rule.⁷ On Sept. 2, a coalition of 11 states (including New York and California), plus the District of Columbia and New York City, moved to intervene in that lawsuit to support EPA’s position.

Ordinarily, the Administrative Pro-

cedure Act only allows challenges to final agency action. Additionally, Section 307(b) of the Clean Air Act sets forth the procedures for challenging EPA rulemaking action, and it, too, requires final action. Murray Energy says the pendency of the proposed rule is disrupting utility decision-making on whether to keep plants open or close them, and it is taking the extraordinary step of relying on the All Writs Act of 1789. A similar effort to overturn a proposed rulemaking before it went final was made two years ago in a challenge to the proposed Section 111(b) rules for new power plants even before they went final; unsurprisingly, it was dismissed as premature.⁸

Timeline for Litigation

Assuming that the proposed rule is not derailed by these early lawsuits (or by those in Congress who are trying to block it), when it goes final in June 2015 there will surely be multiple lawsuits, as there were after the endangerment finding, the motor vehicle rule, and the tailoring rule—the actions that ultimately led to the Supreme Court's decision in *Utility Air Regulatory Group*. If the D.C. Circuit follows here the same pattern it did then, it will not grant a stay that would put the rules on hold while the litigation plays out, and it will hear them all at once.

In the cases challenging the prior rules, 26 months passed between the issuance of the endangerment finding and the oral argument in the D.C. Circuit, and another four months passed before the decision. So if there is a similar 30-month delay between the final Section 111(d) rule and the D.C. Circuit decision, that would take us to December 2017.

Two years passed between when the D.C. Circuit issued its ruling (called *Coalition for Responsible Regulation v. EPA*⁹) in June 2012 and when the Supreme Court ruled (June 2014). If it takes two years between the D.C. Circuit's decision in the Section 111(d) challenge and the Supreme Court's decision on it (should they grant certiorari), that

would be December 2019. Since four members of the current court will be in their 80s by then, it is possible that there will have been some retirements and new justices.

The happenstance of judicial personnel may also be important to the outcome in the D.C. Circuit. In the Supreme Court, of course, all nine justices hear all cases. But in the D.C. Circuit, there are currently 17 judges, and each case is heard by a randomly selected panel of three judges. Various judges on that court differ profoundly on how they tend to rule in suits against EPA, so the composition of the panel may make a big difference.

The program on Performance Standards for Existing Sources is the key Section 111(d) program. Under it, EPA sets nationwide guidelines, but it is up to each state to prepare its own plan for meeting these guidelines.

Since the state plans under Section 111(d) will be due in June 2016, or two years later if part of a multistate plan, it seems likely that the states acting on their own will need to finalize their plans during the pendency of the D.C. Circuit litigation challenging the Section 111(d) rule, and even those entering into multistate plans may need to finish them before the Supreme Court rules.

Moreover, the decisions on the challenges to the final Section 111(d) guidelines will probably not be the end of litigation about this program. When the state plans are issued, they are likely to be subject to state-by-state challenges, as interests in each state argue that they are too stringent or not stringent enough. Those cases will not initially go to the D.C. Circuit. They could be brought in the federal district courts, or in state court, or both.

Once the state plans are in place, their requirements become enforceable in

federal court. There is also the possibility of citizen suits. For example, if the state plan requires a particular fossil fuel plant to install certain equipment by a set date, and the deadline is missed, a neighbor of the plant might be able to go to federal court to seek an injunction.

EPA can issue federal implementation plans in states that do not propose adequate plans, but that presumably will not start happening until at least 2017, when the next president is in office. Any federal implementation plan will be subject to its own set of legal challenges, including some interesting federalism questions about what EPA can and cannot tell the states to do. If some of the states receive federal plans but refuse to implement them, that will be yet another round of litigation.

The year 2017 is two congressional election cycles away, and it is conceivable that by then the congressional deadlock will have broken and we will have a statute that is better designed to deal with the climate change problem. That, alas, is probably the least likely outcome of all.



1. The proposal was published in the Federal Register on June 18, 2014. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (June 18, 2014).

2. 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).

3. 42 U.S.C. §7411(d)(1)(A)(i).

4. Clean Air Act Amendments of 1990, Pub. L. 101-549, §§108(g), 302(a), 104 Stat. 2399, 2467, 2574.

5. 42 U.S.C. §7411(a)(1), (d)(1)(A).

6. *Murray Energy Corp. v. EPA*, No. 14-1112 (D.C. Cir., filed June 18, 2014); *Murray Energy Corp. v. EPA*, No. 14-1151 (D.C. Cir., filed Aug. 15, 2014).

7. *West Virginia v. EPA* (D.C. Cir., filed Aug. 1, 2014).

8. *Las Brisas Energy Ctr. v. EPA*, 2012 U.S. App. Lexis 25535 (D.C. Cir. Dec. 13, 2012).

9. 684 F.3d 102 (D.C. Cir. 2012).