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EPA's New Power Sector Climate Rules: A Brewing Political and Legal Storm

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Proposal commented on: United States Environmental Protection Agency proposal for cutting power plant greenhouse gas emissions.

On June 2, the United States Environmental Protection Agency (EPA) proposed requiring all fifty states to adopt greenhouse gas controls for their existing power plants. And EPA went further, proposing that, together, states would have to cut U.S. power sector emissions by 30% by 2030. (You can see a chart of how much each state would have to cut here.)

These rules face strong political and legal opposition and will not go into action until 2020 at earliest. Their ultimate fate will depend on whether President Obama's administration stands behind them, whether the public elects a new President that supports them, and whether the courts agree that EPA has authority to cap state greenhouse gas emissions. Their immediate impact is twofold: 1) it tells other countries that there's a chance the U.S. could commit to strong greenhouse gas rules at 2015 negotiations in Paris; and 2) it sets the stage for an epic political and legal struggle over energy policy in the United States. Many nations, including Canada, are eager to see what will result.

What happened?

EPA acted under Clean Air Act § 111(d). (The text of § 111(d) is at the bottom of this post.) This provision allows EPA to "establish a procedure" for each state to adopt "standards of performance" for existing sources of air pollutants that would have otherwise slipped through the cracks of the Clean Air Act because they 1) are not *new* sources, subject to new source performance standards, and 2) are not regulated under other existing source regulations in the Clean Air Act.

This section of the Clean Air Act has rarely been used: it's designed for sources that somehow escaped the Act's relatively comprehensive coverage. So there are few precedents for EPA to follow, and the courts that review EPA's rule will not have past cases to go by. There are several ongoing legal disputes about the extent of EPA's authority to adopt greenhouse gas rules under § 111(d), summarized below, and EPA is pushing for maximum authority to reduce greenhouse gas emissions across the power sector.

Can EPA Issue Greenhouse Gas Rules for Coal Power Plants?

Some question if the Clean Air Act requires greenhouse gas controls at all for existing power plants. The published U.S. Code says § 111(d) doesn't apply to sources that EPA already regulates under the "hazardous air pollutants" section of the Clean Air Act, § 112. And EPA already regulates power plants under § 112. So how can EPA regulate power plants under § 111(d)?

Bizarrely, the U.S. Code does not reflect the actual text of the law signed by President George H.W. Bush in 1990, and the signed law, not the Code, controls. The signed law actually included two different § 111(d) that were passed by the U.S. House and Senate, respectively, and never reconciled. (#bicameralism) The House text made it into the U.S. Code, but the Senate version is different: it only says that § 111(d) doesn't apply to *pollutants* that are regulated under § 112. Although power plants are regulated under § 112, greenhouse gases aren't, so this version would allow EPA's greenhouse gas rules.

In 2013, William Haun, writing for the Federalist Society, suggested that the Senate and House versions should be reconciled by applying the plain text of both exclusions, which would negate EPA's standards. Kate Konschnik, Policy Director of the Harvard Environmental Law Program, has countered with several reasons to think that Congress intended to adopt the narrower Senate exclusion, and arguing that, at a minimum, EPA should be given deference on which text to apply. EPA issued a legal memorandum with its proposed power rule, echoing Konschnik's arguments, and noting that a 2011 Supreme Court decision also suggested that EPA can regulate greenhouse gases under § 111(d). (See memo at pp. 20-27).

Can EPA Cap State Power Emissions?

The biggest battle over EPA's power sectors rules will be its scope.

Remember: section 111(d) lets EPA set a "procedure" for states to set "standards of performance for any existing source" that would be subject to standards of performance for new sources. So EPA is proposing § 111(d) standards to accompany the *new* source performance standards it has proposed rules for new coal and natural gas plants.

But EPA isn't suggesting source-by-source standards of performance for existing coal and natural gas plants. Instead it's proposing to cap all greenhouse gas emissions from each state's power sector. How can the agency propose this?

Under previous EPA regulations, § 111(d) standards must mandate the "best system of emission reduction" for each source. You might think that meant making each coal plant cleaner, but EPA says it also means taking steps to replace coal with other power sources: 1) using natural gas plants instead, 2) using low carbon sources like hydro, nuclear, wind, and solar, and 3) lowering electricity demand through energy efficiency. In other words, the best system of emission reduction for a coal plant is simple: don't turn it on.

EPA recognizes that state-by-state caps are a departure from the usual approach, but it offers several reasons that they might make sense here. First, it notes that a state cap "achieves greater emission reductions at a lower cost"—if EPA limited itself to the coal plants themselves it could only get small greenhouse gas reductions (4-6%) unless it was willing to demand prohibitively expensive carbon capture. Second, a state cap "takes better advantage of the wide range of measures that states, cities, towns and utilities are already using to" cut greenhouse gas

emissions, such as renewable power standards and cap-and-trade systems. Third, EPA says statewide caps "reflect the integrated nature of the electricity system and the diversity of electricity generation technology."

There's a lot of political rhetoric right now about "power grabs" but over the next months you will see others develop careful arguments that EPA has overstepped its authority by transforming a "procedure" for state "source" standards into state greenhouse gas caps. Even before the rule came out, Nathan Richardson, at Resources for the Future, suggested that it might be illegal to cap coal & gas together—much less combine the entire electric sector. On the other, hand, Kate Konschnik and Ari Peskoe of Harvard's Environmental Law Program have defended the broader approach taken by EPA. If EPA's rules ever go into effect, those arguments will have to be resolved in court.

Is EPA's Proposed 30% Cut Reasonable?

EPA also says it decided to include all power sector emissions because states, industry, and interest groups all asked for compliance flexibility. And a state cap is flexible because it allows states to choose any low-carbon path that they like: natural gas or energy efficiency, nuclear or wind.

But calling EPA's statewide caps "compliance flexibility" takes enough *chutzpah* to make you smile when you're reading a 645-page proposed rule. Some states are, of course, delighted by EPA's caps, which validate their pre-existing attempts to lower their greenhouse gas emissions. But the point of EPA's state-wide caps is to force more greenhouse gas emissions: if EPA limited itself to coal plants, it could only cut emissions by 4-6% without shutting them all down. Many states requesting "compliance flexibility" were hoping to use alternate methods to make that 4-6% cut. Instead, EPA is requiring a 30% cut on average.

It's as though you asked for an extension on a ten-page paper and your teacher said, "Sure—and since you have more time, make it twenty pages." So EPA will have to convince the courts not only that it can sweep all power sector emissions into one rule, but also that it can use that wider scope to justify more dramatic reductions.

Will this Administration and Future Administrations Stand Behind This Rule?

This rule will not require states to cut greenhouse gas emissions until 2020, long after President Obama leaves office in 2016. And the proposed rules would run through 2030, by which time there may have been four more presidencies. So the future of EPA's proposal will not turn on any particular politician, it will depend on the political and legal sustainability of the rules.

And EPA's existing carbon rules have long been subject to political winds. In 2010, EPA promised to issue today's proposal by July 2011, and finalize it by May 2012. Then, in the run-up to the 2012 election, it delayed these rules indefinitely. Now the rules are on again, and EPA says it will finalize this rule in June 2015, and will expect state implementing plans from 2016 to 2018, after President Obama has left office. Whether that schedule will stick remains to be seen.

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which

(A) establishes standards of performance for any existing source for any air pollutant

(i) for which air quality criteria have not been issued or which is not included on a list published under section 7408 (a) of this title or emitted from a source category which is regulated under section 7412 of this title but

(ii) to which a standard of performance under this section would apply if such existing source were a new source, and

(B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410 (c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

This post originally appeared on James Coleman's blog Energy Law Prof.