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Memorandum

Why EPA's "Clean Power Plan" Is Legally Invalid

EPA has proposed to require that States submit plans to reduce their power-sector CO_2 emissions by, on a national-average basis, 26-27% by 2020 and 30-32% by 2030, as compared with 2005 levels. The proposal is the type of results-driven regulation – where an agency "creatively" interprets its statutory authority to achieve the agency's own policy agenda – that courts have routinely overturned.

The proposal suffers from two threshold legal flaws that have been extensively discussed elsewhere. First, EPA has no authority *at all* to regulate CO_2 emissions from existing coal-fueled electric generators.[1] Second, even if EPA did have this authority, it lacks authority to dictate to States the level of emission reductions that each State must make.[2]

Beyond these basic threshold flaws, the legal infirmities of EPA's 645-page proposal are too numerous to summarize here. One fault, however, predominates over all others. EPA is requiring States to submit plans that essentially reengineer their electric utility systems. EPA does not remotely have the power to do so.

EPA is acting under Section 111 of the Clean Air Act. Section 111 provides for EPA to create a list of categories of stationary sources that, in EPA's view, emit pollutants that cause or significantly contribute to a public health or welfare danger. Under Section 111(b), EPA then promulgates performance standards that apply to new facilities within the source category. For certain types of facilities and pollutants, EPA, under Section 111(d), can call on States to submit plans under which the State establishes the performance standards for existing sources within the source category.

Although Section 111(d) has rarely been used, Section 111(b) has been used on dozens of occasions over the forty-year history of the program, and so there is a wide body of law, regulation, and precedent as to what Congress meant by a Section 111 performance standard. As EPA's own regulations state, a performance standard is a standard that applies to "designated facilities," meaning facilities within the category of sources that EPA has listed for regulation.

For instance, EPA long ago listed coal-fueled electric generators for regulation, and accordingly it has promulgated performance standards for new coal-fueled electric generators. These standards consist of numerical emission limitations reflective of the best technology (considering cost) for controlling emissions from those facilities. These performance standards have required utilities to install pollution-control equipment like scrubbers to control SO_2 emissions and baghouses to control particulate emissions.

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[1] Haun, "The Clean Air Act as an Obstacle to the Environmental Protection Agency's Anticipated Attempt to Regulate Carbon Dioxide Emissions from Existing Power Plants," The Federalist Society, March 2013.

[2] "Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under Section 111(d) of the Clean Air Act,' available at http://www.nationaljournal.com/free/document/4554.

EPA's proposal to control CO_2 emissions from existing coal-fueled generators, however, is nothing like anything EPA has ever proposed before as a performance standard, either for coal generators or any of the other more than 40 source categories it has regulated. As a CO_2 performance standard for existing coal generators, EPA proposes to require States to fundamentally alter the way electric utilities make power available to serve the needs of electricity consumers consistent with the public interest.

The foundation of EPA's proposal is its claim that it has determined, for each of the 50 states, the "best" mix of electricity generation and energy efficiency resources consistent with the agency's predetermined goals for reducing CO_2. EPA says the "best" mix of resources is for states to require (1) their coal generators to improve efficiency by 6%, (2) their natural gas generators to run their units 70% of the time (a run-rate that EPA says only 10% of gas generators meet now); (3) their utilities to significantly expand their use of renewable resources by EPA-determined amounts; and (4) their customers to cut electricity usage by EPA-determined amounts.

Although EPA says States would be free to formulate their own plans to meet EPA's goals – as by varying the mix of natural gas, renewable and energy efficiency resources – one thing is clear: no State could achieve these goals through technological or operating improvements at facilities within the source category that EPA is ostensibly trying to regulate, meaning coal generators. Instead, any State plan would inevitably require wholesale changes to how the State's utilities provide electricity to the public.

Put simply, EPA does not have the power to dictate to States how to run their electric systems. Under Section 111(d), the maximum extent of EPA's power is to call on States to submit plans that set feasible, cost-effective performance standards that coal generators can achieve. It cannot directly or even indirectly require, in the guise of setting performance standards for coal generators, significant increases in the use of natural gas, renewable, and energy efficiency resources.

Indeed, EPA's proposal directly inserts the agency into matters that are reserved for State regulation. States, through their public service commissions, have exclusive authority over electric resource planning. Not even the Federal Energy Regulatory Commission, much less EPA, has authority to dictate electric resource choices to States. The notion that Congress authorized EPA, through Section 111, to mandate that States restructure their electric systems is far-fetched and not credible.

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