Legal Uncertainties Surrounding EPA's Proposed Clean Power Plan

Pennsylvania Coal Caucus

Harrisburg, PA

June 16, 2015

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Section 111(d) in brief

- 111(d) applies to non-hazardous, non-criteria air pollutants.
- EPA has used 111(d) sparingly, mainly for municipal waste incinerators.
- Calls for “best system of emission reduction” that has been adequately demonstrated, allows for subcategorization and consideration of remaining useful life of the source.
- EPA guidelines are to set a “standard of performance” for emissions from “any existing source.”

Two schools of thought and a Supreme Court case

- The legal community is not of one mind on EPA's authority under 111(d).
- 17 state attorneys' general 2014 letter to EPA advocates primary state role, limited EPA authority.
- Some environmental and academic interests see broader EPA discretion to determine controls based on "outside the fence" considerations.
- Supreme Court in *UARG v. EPA* (2014) issued strong caution against EPA overreach of its greenhouse gas authority under *Massachusetts*.

Two avenues of litigation

- Murray Energy and state AGs sought extraordinary writ from DC Circuit seeking nullification of EPA's proposed 111(d) Clean Power Plan, arguing that 111(d) does not apply to sources already subject to section 112 MACT standards (statutory construction issue).
- In June 2015, the DC Circuit dismissed the petitioners claims on ripeness grounds, since EPA has not issued a final rule.
- Subsequent petitions for review of the final rule will restate the statutory construction issue, and challenge the rule on substantive grounds such as EPA's lack of authority to impose renewable energy or energy efficiency requirements "outside the fence,"

April 2015 Survey of 130 Environmental Lawyers & Law Professors

Is The EPA's Clean Power Plan Legal?: Lawyers and Law Professors Disagree.

We polled 130 environmental attorneys and law professors from around the country about the legality of the Environmental Protection Agency's proposed Clean Power Plan. The results might surprise you.

Brian H. Potts[1] and Abigail Barnes[2]

Challengers are also likely to argue that some or all of the EPA's four building blocks do not constitute the "best system of emission reduction," as that term is defined under the Clean Air Act. Since Congress enacted the Act, the EPA has established more than sixty standards under a separate provision for new sources, section 111(b), using the same "best system of emission reduction" (or BSER) determination that is used for setting standards under section 111(d) for existing sources. When setting these BSER standards, the EPA usually determines the best technology for a plant to install to reduce pollution.[13] But the EPA is proposing something quite different with its Clean Power Plan. Instead of looking at what technology is available at the plant level (or "inside the fence-line" of the plant), the EPA is proposing to instead look at what actions the state could take on a state-wide basis to reduce CO_2 emissions from all of the affected sources in the state.

Under section 111(d), the EPA can "establish standards of performance for any existing source . . . ."[14] Section 111(a) then defines "standard of performance" as "a standard . . . which reflects the degree of emission limitation achievable through the application of the best *system* of emission reduction . . ."[15] The EPA is interpreting the word "system" to allow it to set each state's CO_2 emission rate based on the best technology available for the state's entire electric system. But challengers will inevitably argue that the EPA can only do what it has always done before: set BSER standards based on the best technology available that can be installed inside the fence-line of each power plant. After all, when the definition of "standards of performance" is inserted into the section 111(d) language, the statute reads that the EPA can "establish [a standard . . . which reflects the degree of emission limitation achievable through the application of the best system of emission reduction . . .] *for any existing source*."[16]

Poll results

Question 1: Do you believe the Clean Power Plan, as currently written, is legal?	
Response	Count
Total-Yes	59
Total-No	58
Total-Don't Know	13
Private Attorneys-Yes	20
Private Attorneys-No	45
Private Attorneys-DN	8
Professors-Yes	30
Professors-No	4
Professors-DN	4
Utility-Yes	1
Utility-No	5
Nonprofit-Yes	6
Nonprofit-No	1
Government/Other-Yes	2
Government/Other-No	3
Government/Other-DN	1

Question 2: If you think the Clean Power Plan is legal, please go to question (4). If you think the Clean Power Plan is illegal, please identify which of the following parts you believe are illegal (you may select more than one):		
	Count	Percent of Respondents
Total Responses	56	
(a) The entire Clean Power Plan is illegal because it's unconstitutional	10	17.9
(b) The entire Clean Power Plan is illegal because the EPA doesn't have the authority to regulate power plant CO2 emissions under section 111(d)	32	57.1
(c) Building block one (6% reduction at coal plants) is illegal	11	19.6

(d) Building block two (running combined cycle natural gas plants instead of coal plants) is illegal	32	57.1
(e) Building block three (increased renewables and new nuclear) is illegal	42	75.0
(f) Building block four (increased energy efficiency) is illegal	42	75.0

Given these results, building blocks 3 and 4 appear the most susceptible to attack, with building block 2 and the statutory section 111(d) challenge close behind.

UARG v. EPA (S. Ct., 2014)

"…When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' Brown & Williamson, 529 U. S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' Id., at 160; See Also *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994); *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645-646 (1980) (plurality opinion). Slip Op. at 19 (emphasis added.)

Litigation timeline

- Petitions for review to be filed in DC Circuit within 60 days of FR publication of final rule (e.g., late Oct 2015), assuming final rule announced in early August 2015.
- Motions for stay of the rule to be filed immediately on FR publication.
- Stay motions decided by Fall 2015.
- Oral arguments before DC Circuit early 2016.

Timeline, cont.

- Decision from DC Circuit Spring 2016?
- Possible *en banc* rehearing?
- Petitions for *cert* before Supreme Court.
- Supreme Court October Term 2016 likely forum for final arguments and decision.
- Revised final Clean Power Plan in hands of the next Administration in 2017.

UMWA's message

- PA should exercise great caution in the development of its response to the CPP, as the "final" rule may be dramatically different than the rule issued in August 2015.