Legal Sidebar

EPA's Clean Power Plan: Likely Legal Challenges – Part 1

08/11/2015

Part 2 of this two-part Sidebar on likely legal arguments over the Clean Power Plan may be found here.

On August 3, 2015, the Environmental Protection Agency (EPA) announced its controversial Clean Power Plan (CPP) to regulate carbon dioxide (CO_2) emissions from existing fossil-fuel fired power plants, finalizing a rule proposed by the agency in June 2014. This Sidebar is the first of two summarizing the main legal aspects of the controversy over EPA's authority and interpretation of the relevant statutes, particularly Clean Air Act (CAA) section 111(d), under which EPA issued the CPP. As explained in more detail here, the CPP calls on states to submit plans to EPA that achieve state-specific, rate-based or mass-based goals for CO_2 emission reductions from affected electric generating units: existing power plants that use coal, oil, and gas. Under the CPP rule, for states that do not submit plans (or that submit unsatisfactory plans), EPA would establish a federal plan. With that in mind, EPA released its proposed federal plan, using an emissions trading approach, on August 3 as well. Along with and as a prerequisite for the CPP, EPA also finalized its standards for CO_2 emissions from *new, modified, or reconstructed* fossil fuel-fired power plants under CAA section 111(b). CAA section 111(d) requires these "new source performance standards" to be in place for a source category, such as fossil fuel-fired power plants, before EPA can regulate emissions of the same pollutant from existing sources in that source category.

Litigation over the CPP is guaranteed to be vigorous—as previewed by the six lawsuits that were filed against the *proposed* rule. (All of these suits were dismissed on the basis that the CAA restricts judicial review to final agency action.) Most of the legal challenges to the CPP likely will turn on the meaning of CAA section 111(d). Because section 111(d) provides little detail, has limited pertinent legislative history, and has not been construed by a court, a wide range of legal arguments for and against the CPP are plausible. Three arguments appear to be raised most often: (1) the "inconsistent amendments" argument—House language in the 1990 CAA amendments, which arguably bars regulation of CO_2 from fossil fuel-fired power plants because they are already subject to limits on hazardous air pollutants (HAPs), should prevail over more permissive Senate language also enacted in the 1990 CAA amendments; (2) the "beyond the fenceline" argument—the CPP overreaches by considering factors other than technological or operational standards on individual power plants (i.e., within each power plant's "fenceline"); and (3) arguments regarding the interpretation of the term "standards of performance" and whether EPA properly considered all of the mandatory factors in issuing the CPP. The second and third arguments, and others, are discussed in Part 2.

The "inconsistent amendments" argument, discussed in a previous Sidebar, arises from the fact that, in amending the CAA in 1990, the House and Senate enacted inconsistent amendments to section 111(d), apparently an inadvertent oversight. The House amendment specifies that section 111(d) does not apply to any pollutant "emitted from a source category ... regulated under section 112." Read by itself, this language appears to say that pollutants from source categories already regulated under section 112, governing HAPs, cannot be addressed through section 111(d). Since fossil fuel-fired power plants are now regulated under section 112, there is an argument that the CPP is unauthorized under the House amendment. The Senate amendment, which disallows use of section 111(d) only when the pollutant in question is regulated under section 112, poses no obstacle to EPA's proposal because CO_2 is not regulated under section 112. EPA has proposed a way of reconciling the two provisions, giving each some effect, discussed here. In addition, in the preamble to the final CPP, EPA argues that the House amendment is ambiguous and may be interpreted to mean that the section 112 exclusion does not bar the regulation of non-HAP pollutants under section 111(d).

Any argument based on the House amendment may be undercut in the aftermath of the Supreme Court's recent decision in *Michigan v. EPA*, which remanded EPA's section 112 regulation of HAPs from fossil fuel-fired power plants. There, the Court ruled that EPA had impermissibly declined to consider the imposed costs in deciding in the first instance whether to subject power plants to the CAA's HAP requirements. If the D.C. Circuit on remand decides to vacate the HAPs regulation, fossil fuel-fired power plants will no longer be a source category regulated under section 112, at least until EPA promulgates new regulations.

Under CAA section 307(b), challenges to the CPP must be filed in the D.C. Circuit within 60 days of the rule's publication in the Federal Register, likely by early September. Litigants are likely to file motions to stay the CPP until the legal challenges are resolved, but grants of such stays are generally infrequent.

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Legal Sidebar

EPA's Clean Power Plan: Likely Legal Challenges – Part 2

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Part 1 of this two-part Sidebar on likely legal arguments over the Clean Power Plan may be found here.

EPA's final Clean Power Plan (CPP) rule to regulate CO_2 emissions from fossil fuel-fired power plants, announced on August 3, 2015, is likely to face lawsuits. (Highlights of the rule are discussed here.) Part 1 summarized one legal argument that may be raised in such lawsuits, the "inconsistent amendments" argument. In short, that argument is that, in light of permissive Senate language and potentially more restrictive House language that the Senate and House enacted (apparently inadvertently) in Clean Air Act (CAA) section 111(d) as part of the 1990 CAA amendments, the House amendment should prevail and prevent any regulation of CO_2 from fossil fuel-fired power plants so long as the source category of fossil fuel-fired power plants is subject to regulation of hazardous air pollutants under CAA section 112.

A second legal argument often made against the CPP is the "beyond the fenceline" argument, which contends that even if section 111(d) allows EPA to regulate CO_2 from power plants, the way the CPP is structured exceeds EPA's authority under CAA section 111(d). In the CPP, EPA set the emissions performance rates based on its assessment of the "best system of emissions reduction" that could be achieved under three so-called "building blocks": (1) efficiency improvements at the power plants themselves, (2) greater use of natural gas combined cycle (NGCC) power plants instead of coal-fired power plants, and (3) greater use of renewable-source energy (wind, solar, and biomass). State plans may use any or all of the building blocks, or go beyond the building blocks to adopt other state measures such as demand-side efficiency, to achieve the required reductions. Furthermore, in states that do not submit satisfactory plans, the CPP provides that EPA must establish a federal plan, which EPA has proposed to be an emissions budget trading plan. In the lawsuits challenging the proposed CPP, litigants asserted that CAA section 111(d) did not authorize EPA's use of the second and third building blocks, which go beyond regulating the emissions based on the design or operation of the power plant itself—i.e., the CPP arguably regulates "beyond the fenceline."

CPP opponents likely will continue to point to section 111(d)'s statement that state plans must impose standards of performance "for any existing source," which they argue implies an authority restricted to inside-the-fenceline measures—especially with respect to EPA enforcement of its own federal plan. They may also challenge the CPP's encouragement of emissions trading among states as unauthorized by section 111(d). EPA, on the other hand, likely will argue that section 111(a)(1) says standards of performance (required by section 111(d)) are to reflect the "best system of emission reduction," and that "system" implies more flexibility, including beyond-the-fenceline measures. In the preamble to the rule, EPA has emphasized the unique interconnectedness of the electricity system, and argues that all three building blocks are measures that the owners/operators of the affected power plants can implement. EPA dropped a fourth building block in the proposed CPP, improvements in demand-side energy efficiency, from the emissions reduction calculations, partly to address the beyond-the-fenceline argument.

Third, legal challenges may also hinge on whether, in designing the CPP, EPA properly followed the section 111(a)(1) definition of "standards of performance," which requires EPA to "tak[e] into account the cost of achieving [emission] reduction and any nonair quality health and environmental impact and energy requirements." EPA changed some elements in the final CPP from the proposal to address cost and energy reliability concerns, such as by extending the initial compliance deadline from 2020 to 2022 and adjusting the interim goals after 2022 to demand less abrupt early emission reductions. Nonetheless, CPP opponents are likely to challenge the reasonableness of EPA's consideration of

the statutory factors. In contrast with section 111(d), there is ample case law interpreting the section 111(a)(1) definition, but all in the context of new sources; it cannot be assumed that the factors will be construed in the same way for existing sources.

Other legal arguments against the CPP seem to have less chance of success. For example, it has been asserted that the CPP "commandeers" state action and thus violates the Tenth Amendment's protection of state sovereignty. However, the structure of section 111(d) parallels that of CAA section 110(a), under which states are told to submit plans to EPA for achieving national ambient air quality standards and EPA is instructed to promulgate its own plan for states that fail to comply. Such an arrangement has been expressly approved by the Supreme Court as inoffensive to the Tenth Amendment, and has never been invalidated by a court on any other ground.

Finally, CPP opponents are likely to argue that the CPP is not owed the traditional deference afforded by the courts when an agency construes an ambiguous statute that it administers. An earlier Legal Sidebar post discusses the genesis of this argument in a 2014 Supreme Court decision. That decision's assertion that agency actions of sweeping economic effect require particularly clear statutory support was reaffirmed in 2015 in *King v. Burwell*, an Affordable Care Act case. There, the Court said that where Congress has not provided express authority, the traditional deference to agencies might not apply in cases of federal actions of "deep economic and political significance that [are] central to [the] statutory scheme"—which the CPP arguably is. EPA is likely to avail itself of several counter-arguments; for example, *Burwell* says Congress would not be likely to delegate authority to the IRS for health insurance policy, while Congress certainly would delegate authority to EPA to determine environmental policy.

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