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Environmental LAW

EPA's Clean Power Plan subject to significant opposition

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On Aug. 3, the United States Environmental Protection Agency issued a rule that sets the first limits on carbon emissions from power plants in the country. While met with fanfare from the Obama Administration and certain environmental groups, the Clean Power Plan rule issued pursuant to the Clean Air Act has already stirred significant opposition from the states, power industry and business.

On Aug. 11, 17 states sued the EPA to rescind the rule as exceeding Clean Air Act authority. However, with a United Nations climate summit slated for December 2015, the chances of EPA and the administration slowing down are virtually nonexistent.

Strikingly, the proposed rule from June 2014 was actually strengthened and the final rule is much more onerous. The rule aims at achieving a 32 percent reduction in emissions from 2005 levels by 2030 (up from a 30 percent reduction in the draft rule). The goal is to reduce carbon dioxide in the power industry, which would be accomplished by reducing coal's share of the electric production pie. Currently it provides 39 percent of the country's power. However, EPA predicts that it will supply 27 percent based on the rule and market forces, including competition from natural gas.

The rule sets up state-specific emission limits based on the greenhouse-gas emissions amount in the state's electricity portfolio. The rule provides that each state will have interim targets that must be met beginning in 2020. States will have one year to develop and submit their individual compliance plans, a regional plan in conjunction with other states, or to seek extensions. Following the submissions, the EPA will have one year to approve or reject the plan. Significantly, the EPA is also developing a federal model for states which they may use or which the EPA may impose if the states fail to comply. The EPA has pointed to cap and trade schemes as a way for states to comply.

In a key departure from the draft rule, the EPA hiked the projected renewable share from 22 percent to 28 percent of the electric generation, suggesting that the cost of renewable energy is decreasing and more projects are being built. Hence, the administration has picked solar and wind power industry segments as "winners" under the Clean Power Plan.

The administration has clearly targeted fossil fuels. Coal tops that list. EPA has reduced the share of coal production to 27 percent by 2030. Aside from administration suggestions that coal's market share is declining because of competition from natural gas and increased costs, the regulations imposed by EPA clearly make it much more expensive.

Similarly, although once a key part of the Clean Power Plan, natural gas has been reduced as a central component. Hence, the administration has indicated that its share of the electricity production in 2030 is now projected to be no more than would otherwise be produced under its normal business. Natural gas producers have argued that since it produces half as much carbon as coal, it should have been a central component in the rule aimed at addressing climate change concerns. Instead, the EPA has attempted to force renewable energy over fossil fuels.

Nuclear power plants do not produce greenhouse gases and account for about 20 percent of the current power portfolio. However, nuclear energy will not count towards the states' goals unless the plants expand. This is noteworthy as several nuclear reactors are set to close, thus requiring the affected states to keep these sources in place or overcome the loss of clean energy with other sources.

The Clean Power Plan is going to force significant changes to the U.S. power system as fossil fuels are targeted for reduction. Projections suggest that the cost of electricity may increase significantly. For example, a 2014 projection from NERA Economic Consulting indicates that if the states administer their own plan, electric prices may rise an average of 12 percent between 2017 and 2031. However, if the EPA plans are implemented, prices may rise an average of 17 percent during that period.

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Regardless of the perspective one has on climate change issues, science and potential actions, it is useful to know if the proposed rules being forced on the U.S. power industry and consumers will have a significant impact. Sadly, that is not the case, particularly considering the global emissions from other developed and developing nations.

According to the "Model for the Assessment of Greenhouse Gas Induced Climate Change," which the EPA assisted in developing, it has been estimated that the climate regulations will reduce a mere 0.018 degree Celsius of warming by 2100. More striking is that the U.S. could cut its entire carbon dioxide emission completely and it would not make a difference in global warming. Based on the UN's Intergovernmental Panel on Climate Change modeling, the world would be a mere .137 degrees Celsius cooler by 2100.

Aside from serious questions about the cost and benefit associated with the Clean Power Plan, electricity providers are concerned about the reliability of the power grid. Simply put, taking large quantities of current electric supplies off the system are likely to create significant strains on the U.S. power grid. Significantly, it has been projected that the rule will cause twice as many coal-fired power plants to retire than would occur without the rule. Power operators across the country have expressed concern about reliability under the rule. New York Independent System Operator wrote to the EPA that "the Clean Power Plan presents potentially serious reliability implications for New York."

Finally, the rule will be subject to serious legal challenge from parties across the spectrum, within the coal industry, power providers and states. There are questions whether the EPA has the constitutional authority and statutory basis under the Clean Air Act to issue the rule. Initially, the EPA has gone from regulating single emission sources (i.e., plants and smokestacks) to a sweeping re-design of the U.S. energy system.

The plan also appears to trample on federalism principles under existing Clean Air Act programs, whereby the EPA sets emission limits and allows states to meet them, by instead commanding states to meet a national model. Another legal concern is whether EPA has double-regulated existing power plants, which is prohibited under the Clean Air Act.

Regardless of one's perspective on the climate change, the Clean Power Plan is a massive rule that will dramatically affect energy, industry and the public in a variety of ways if it goes into effect. The issuance of such sweeping regulation, by the EPA, rather than elected members of Congress, is another cause for concern due to accountability issues. As a result, the Clean Power Plan will be subject to serious challenge on the legislative, judicial and budgetary fronts in coming months.

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