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GOVERNMENT

Proposed carbon limits on U.S power plants raise legal questions

By Fiona Smith

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Even before the Obama administration released its blockbuster proposal this week to slash carbon dioxide pollution from the nation's fossil fuel power plants it was clear the fate of the controversial plan would likely be decided by the courts.

Now, lawyers poring over the federal Environmental Protection Agency's 645-page rule say that the agency has some strong arguments to support its position, but that the rule's sweeping reach into domestic energy production and its reliance on a rarely-used provision in the Clean Air Act put it into uncharted legal territory.

"I think EPA is clearly trying to thread the needle — put forward a robust greenhouse gas reduction program, provide the states with flexibility, but doing it while taking a significant amount of legal risk," said Robert A. Wyman Jr., a partner at Latham & Watkins LLP who is counsel to several companies, including Boeing Co. and Calpine Corp., that formed the National Climate Coalition to engage in the EPA's rulemaking process.

The plan calls for the states to collectively cut carbon dioxide emissions from coal- and natural gas-fired plants by 30 percent from 2005 levels by 2030. Power plants currently account for roughly one-third of the country's greenhouse gas emissions.

The plan sets individual targets for each state, establishing easier standards for heavily coal-dependent states like North Dakota, while setting a higher bar for states such as Washington that are already moving away from coal.

Because there is no technology to deeply cut carbon dioxide emissions from coal-fired plants, the rule allows states to meet the standard by using renewable energy and energy efficiency to drive down the use of fossil fuels.

States can join forces to create trading programs or other mechanisms to comply. The rule would require states to submit plans by 2016, but gives more time for states creating a joint plan.

The coal industry, the U.S. Chamber of Commerce and others who have sued the EPA over other steps it has taken to curb greenhouse gas emissions under the Clean Air Act have criticized the proposal as too costly and dangerous to energy supply stability. Major environmental groups have supported the move, with some, including Earthjustice, demanding the cuts go deeper.

The state of California, which has moved forward with its own greenhouse gas limits on power plants and other major sources, applauded the plan.

"We don't see it as an onerous task and we need to continue on the path we're on," said Stanley Young, a spokesman for the California Air Resources Board, the agency implementing the 2006 law mandating the state cut its heat-trapping emissions.

The state will be in discussions with the EPA and other states regarding creating a multi-state trading scheme, Young said.

California's aggressive renewable energy and energy efficiency programs helped the EPA integrate such carbon reduction policies into its power plant rule, said Cara A. Horowitz, co-executive director of the Emmett Institute on Climate Change

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and the Environment at the UCLA School of Law. The Clean Air Act requires that the EPA show that actions it orders have been demonstrated, she said.

"California played the classic laboratory role of doing the hard work of showing what policies work," Horowitz said.

Because the 1970 Clean Air Act did not anticipate greenhouse gas regulation, the agency is relying on a rarely-used provision of the law to set forth its plan. The provision requires the agency find the "best system of emission reduction" to achieve the cuts, but what that means has not been tested in the courts, lawyers say.

Lawsuits challenging the finalized rule are a foregone conclusion, and the arguments opponents are likely to wield will center on the flexibility the rule gives the states, said Kevin Poloncarz, partner with Paul Hastings LLP, who represents energy companies in air quality matters.

The agency is taking the stance that the "best system" is not just to look at the power plant's own pollution, but to go "outside the fence line" of the facilities to get cuts, Poloncarz said.

"It recognizes the reality that the electric system is a unified web," he said, and it allows the agency to get deeper cuts than it could if it just focused on what coal- and gas-fired plants could do on-site.



AP Photo

The coal-fired Plant Scherer is shown in Juliette, Ga this spring. The Obama administration has unveiled a plan to cut emissions.

Detractors will likely contend that the EPA can only focus "inside the fence line," meaning emission reductions at the fossil fuel plants themselves.

The EPA pulled a "jiu-jitsu" move by reframing the debate and arguing that any action that decreases emissions from the facility, including alternative sources of power, is "inside the fence line," said Horowitz.

But by including renewable energy and energy efficiency in the rule, "there's increased risk that two judges on the D.C. Circuit will say, 'Hell no — you can't force reductions to occur by non-operation of the sources,'" Poloncarz said.

The EPA is taking comment on the proposed rule for the next four months and is planning to issue a final rule next year. Litigation could quickly follow and eventually reach the Supreme Court, said Wyman. And while the high court has been clear that the EPA has an obligation to regulate greenhouse gas emissions under the Clean Air Act, it could question if the agency overreached here by seeking changes to the entire electric system, he said.

The Supreme Court's recent ruling in another challenge to an EPA regulation could bolster the bold stance the agency took here, Poloncarz said.

In the case, the court deferred to the agency's interpretation of a different part of the Clean Air Act and upheld a complex rule cutting pollution across state borders. *EPA v. EME Homer City Generation*, 12-1182.

Legal fights will also very likely break out around the country as the states and the EPA finalize their implementation plans, said Abigail Dillen, who oversees climate and energy litigation at Earthjustice, a nonprofit law firm that represents environmental groups.

Environmentalists could sue the EPA if it approves a plan they see as flawed, or a state could sue if the agency rejects its plan, among other possibilities, Dillen said.