The Legal Scrutiny Surrounding §111(d): Will It Survive or Stumble?

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Summary

EPA's Clean Power Plan is the Obama Administration's most important effort to address the challenge of climate change. But it also raises significant legal issues of first impression ranging from unsettled statutory language to EPA's splintered approach under different subsections of CAA §111 to judicial skepticism about EPA's expansive CAA approach using a very narrow statutory provision. Although the courts likely will be inclined to grant EPA significant deference in pursuit of the important goal of curbing greenhouse gas emissions, concerns regarding the precedent-setting nature of EPA's "beyond the fenceline" approach in this rule and future rulemakings for other sectors likely could tip the scales against upholding the rule.

I. Introduction

With barely two years remaining in the Barack Obama Administration, its biggest challenge to cement the flagship element of its environmental legacy lies ahead: finalizing the U.S. Environmental Protection Agency's (EPA's) most ambitious regulation in its history in a manner that avoids making it also the Agency's shortest-lived regulation in the courts.

The president's Climate Action Plan undoubtedly is his tenure's legacy item for the environment. And no element is more critical to the plan than EPA's proposed regulation of existing coal- and natural gas-fired electric generating units (EGUs) under §111(d) of the Clean Air Act (CAA).[1] By the Administration's estimates, the Existing Source Performance Standard (ESPS)[2] would result in a 30% reduction of greenhouse gas (GHG) emissions by 2030, at a critical time when there is not even a glimmer of climate change legislation on the horizon.

In what is likely to be a record-breaking sprint from the start line to the finish line for an EPA regulation of this magnitude, the president has directed the Agency to finalize the rule by June 2015. Other experts have compellingly presented in the *Environmental Law Reporter* the technical, policy, and pragmatic elements of this landmark proposal from a wide range of perspectives. At this stage, however, no question is perhaps more important than this one: Will the courts affirm the precedent-setting regulation, or remand it to the president's successor to develop his or her own legacy?

II. Setting the Stage for Judicial Review

Although there are scores of unanswered questions about the final §111(d) rule, there is one universal and certain truth: Whatever the rule's final form, EPA is going to be sued.

Unlike most EPA rulemakings, the ESPS will offer several opportunities for bites at the proverbial apple for those who seek to challenge it. The first opportunity will be a challenge to the final rule in the U.S. Court of Appeals for

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1. Clean Air Act (CAA), 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
2. The ESPS is published as part of the proposed rulemaking, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (June 18, 2014).

the District of Columbia (D.C.) Circuit within 60 days of EPA publishing it in the *Federal Register*. A second round of challenges are likely to occur years later, when EPA takes action to approve or disapprove state implementation plans needed to implement the rule. A party can challenge those actions in the respective U.S. Circuit Court with jurisdiction over the state whose plan is at issue. (In addition, there likely will be an earlier opportunity to challenge EPA's EGU rule for new sources under §111(b), which could further influence the §111(d) litigation).

Focusing on the imminent D.C. Circuit litigation, which will likely commence less than one year from now, there are a few unique considerations that set the stage for what is certain to be the most contentious environmental litigation of the next several years.

A. Settled Issues

EPA will defend the ESPS on a playing field where several key issues have been resolved in its favor in recent years. We are now past the point of debate on whether EPA can use the CAA to address GHG emissions. That point has been resolved by the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*,[3] as well as more recent decisions in *American Electric Power Co. (AEP) v. Connecticut*[4] and *Utility Air Regulatory Group (UARG) v. EPA*,[5] both of which clarified that EPA has discretion to regulate GHG emissions under certain provisions of the CAA. What remains to be seen, however, is the extent to which the D.C. Circuit and other lower courts will give weight to the Supreme Court's significant rebuke to EPA in the *UARG* decision. In that ruling, the Court denied deference to EPA on a key interpretation and chided the Agency for reading the CAA expansively in its efforts to combat climate change.

B. Unsettled Issues

The ESPS presents numerous significant precedent-setting and legal issues of first impression in the CAA's 40+ year history. Indeed, this may be the first rule in EPA's history where the Agency's lawyers felt compelled to include a separate legal justification document in the record to provide the opening argument in favor of its various pushing-the-envelope positions. There are far more novel issues of first impression presented in the rulemaking than there are settled ones. Importantly, these issues, described below, will have expansive precedent beyond the specific rulemaking; even more importantly, if affirmed, they will fundamentally redefine and reshape EPA's regulatory reach for the next generation of rulemakings in a way typically reserved for legislative amendments. This is effectively the health care law of the environmental and energy universe, but without the U.S. Congress passing a new law authorizing it.

It's true that the Administration, to date, has boasted a relatively successful track record in developing legal arguments to support expanded powers in statutory tools that have not been upgraded since the 1990 CAA Amendments. Yet, the ESPS is unique given the precedent-setting nature of not only the specifics of the rule, but also the new interpretations of EPA's regulatory authority that could be carried over to other CAA provisions in the future. Even a court sympathetic to EPA's efforts to combat climate change is likely to consider how employing the tools in an instant case could create broad new precedent and powers in other contexts.

C. Timing

The Administration's schedule for finalizing the rule appears reverse-engineered to get the big news out well ahead of the 2016 elections, and also to ensure that the current Administration will control the defense of the rule in the D.C. Circuit. Given the likelihood that all parties may share an interest in a prompt resolution—industry and states because compliance with the proposed 2020 deadlines will require immediate action, and the federal government to avoid leaving the defense to the next administration—the rule seems like a strong candidate for expedited review in the D.C. Circuit. Thus, there is a real likelihood that the case could be decided as soon as the spring of 2016. However, even with a fast decision, the likelihood of the U.S. Department of Justice under the current Administration seeing the litigation through the end of any Supreme Court proceedings seems remote, meaning that the defense of the rule likely will transition to the next administration.

D. Climate Change in the Courts

Of benefit to EPA is the reality that courts increasingly are playing a supportive role in endorsing efforts of federal regulators and states to fill the void left by Congress by taking action to address climate change. Prior to the Supreme Court's *UARG* decision, the D.C. Circuit issued a number of opinions[6] fully endorsing EPA's GHG regulations, which themselves at the time deployed some novel and precedent-setting legal positions. Recently, the U.S. Court of Appeals for the Ninth Circuit, in affirming California's Low Carbon Fuel Standard against a Com-

3. 549 U.S. 497, 37 ELR 20075 (2007).
4. 131 S. Ct. 2527, 41 ELR 20210 (2011).
5. 134 S. Ct. 2427, 44 ELR 20048 (2014).
6. *See, e.g.*, Coalition for Responsible Reg. v. EPA, 684 F.3d 102, 122, 42 ELR 20141 (D.C. Cir. 2012).

merce Clause challenge, opined that "California should be encouraged to continue to expand its efforts to find a workable solution to lower carbon emissions, or to slow their rise" and that the court "will not . . . block" California from such initiatives.[7] Thus, it would be a bit naïve to assume that reviewing courts will look at the ESPS in isolation from its important stated mission. In addition to providing deference to the Agency's regulations generally, courts may also weigh the significance of what EPA is trying to accomplish in its efforts to address climate change between now and 2030 and the missed opportunities and lack of significant alternatives if the Agency's approach is not endorsed. Here, again, the potential for a change in presidential administration and approach could weigh on the court.

III. Five Key Legal Issues to Watch

Given the 12-month sprint for finalizing the ESPS and the commitment to achieve 30% reductions by 2030, there is little expectation of EPA making significant changes from the proposed rule to the final rule. Instead, all eyes appear to be focused on the legal watch: Comments that are filed by December 1, 2014, largely will be aimed at either preserving arguments to challenge the rule or bolstering EPA's defenses. Among the scores of issues to be presented, there are five key thematic issues that are likely to be the focus of the comments and, accordingly, the litigation.

A. The Interplay Between §111(d) and §112

Walk to your law library and open the CAA in the *United States Code* (or, more likely, look up the CAA online), and you will quickly encounter what appears to be an insurmountable hurdle for EPA at the outset: The plain language of §111(d) does not apply to air pollutants that are emitted from source categories subject to §112. Fossil fuel-fired EGUs, in turn, are subject to the §112 hazardous air pollutant (HAP) standards under EPA's Mercury and Air Toxics Standards rule.[8] Thus, even EPA has agreed that this language forecloses it from regulating existing EGUs under §111(d), stating that "a literal reading of the House language would mean that EPA cannot regulate HAP or non-HAP emitted from a source category regulated under Section 112."[9] The Supreme Court has similarly concluded. After describing generally EPA's authority to regulate existing sources under §111(d), the Court in *AEP* noted that "[t]here is an exception: EPA may not employ §[111(d)] if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§[108-110], or the 'hazardous air pollutants' program, §[112]. See §[111(d)(1)]."[10]

Of course, few things in the law are ever that straightforward, and the analysis is complicated here by the peculiar fact that Congress enacted competing revisions to the same provision, one originating in the U.S. House of Representatives and one in the U.S. Senate. The Senate version reads slightly differently, but different enough, and would preempt from regulation under §111(d) only those pollutants that are actually regulated under §112.

EPA's response to this is to invoke *Chevron*[11] deference in choosing to give full weight to the Senate version while virtually disregarding the House version. In this instance, however, citing *Chevron* may be too simplistic a solution to save the Agency's interpretation. Foremost, EPA itself has recognized that the Senate version was a "drafting error,"[12] and it is hard to see why that version should be given any weight at all, let alone greater weight than the House version. Further, when faced with conflicting provisions, EPA is required "to give effect to both if possible."[13] But reconciling the two versions is not something EPA has done, nor can it do, to realize its policy goals. In the legal battle over the defensibility of the ESPS, this is likely to be Round One. In fact, even prior to finalizing the rule, three separate challenges already have been mounted to the proposal, putting this argument front and center.

B. Reconciling EPA's §111(b) and (d) Rules

Although it is well-established doctrine that courts are inclined to defer to regulatory agencies on technical and scientific issues, there also are well-established exceptions to the rule. Courts offer no deference when an agency takes inconsistent positions across related regulations; instead, courts require that "identical words used in different parts of the same act are intended to have the same meaning."[14]

The CAA contains two provisions governing performance standards. Section 111(b) governs new sources, and §111(d) governs existing sources. There is no debate that §111(b) and (d) are related, if not symbiotic, provisions.

However, EPA's approaches to setting performance standards based on the best system of emission reduction (BSER) adequately demonstrated in the two proposals are entirely independent, distinct, and ignorant of each other, if not flatly inconsistent. For example, in the §111(b) proposal, EPA's BSER analysis focuses specifically on emission reduction opportunities for individual facilities within the fenceline of those facilities, and sets separate standards for coal- and natural gas-fired EGUs. By contrast, in the §111(d) proposal, EPA adopts an entirely distinct approach to BSER that looks far beyond

7. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1107, 43 ELR 20216 (9th Cir. 2013).
8. Mercury and Air Toxics Standards (MATS), 77 Fed. Reg. 9304 (Feb, 16, 2012) (codified at 40 C.F.R. pts. 60, 63).
9. *See* Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List, 70 Fed. Reg. 15994, 16032 (Mar. 29, 2005).
10. AEP v. Connecticut, 131 S. Ct. 2527, 2537 n.7, 41 ELR 20210 (2011).
11. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 14 ELR 20507 (1984).
12. *See* 70 Fed. Reg. at 16031.
13. United States v. Borden Co., 308 U.S. 188, 189 (1939).
14. Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995).

the fenceline of any given facility, and merges not only coal and gas together, but also GHG reductions associated with renewable energy, nuclear energy, and demand-side energy efficiency—energy sectors that are not subject to the §111(b) proposal in the first place, and arguably not even subject to the CAA.

As a result of these disparate approaches, the §111(d) proposal turns §111 on its head by setting standards for existing facilities that are *more stringent* than those for new facilities in 30 states. If the ESPS survives the first argument above, and a court concludes that there is no generic preemption of §111(d) for §112 sources, this inconsistency between the §111(b) and (d) approaches may be grounds for the court to remand EPA's specific approach back to the drawing board for a rule that draws a stronger nexus between new and existing source regulation.

C. Regulating "Beyond the Fenceline"

In what has become the prominent environmental catchphrase of the last six months, the most contentious legal battleground—and most precedent-setting under the CAA—is the proposal's approach to setting performance standards for EGUs based on emission reduction goals that can only be realized beyond the fenceline of those facilities. In so doing, EPA has assumed regulatory authority over energy generation, dispatch, and retail demand that has always been predominantly (if not exclusively) subject to state regulation.

EPA's policy rationale for adopting this approach is apparent. The Agency concludes that, under the best of circumstances, existing coal-fired EGUs can realize at most 6% reductions in their GHG emissions by 2030 (a number that most coal-fired EGUs would contest as unrealistic and too aggressive). Thus, to realize the goal of 30% reductions by 2030, EPA had to look elsewhere to make up the difference. The core premise of the ESPS, therefore, is that fossil fuel-fired EGUs can be held accountable for the actions of third parties in other sectors that can reduce overall GHG emissions by displacing coal. And the other side of the coin is EPA's authorization to states to also hold non-EGUs liable under the CAA as a means of enforcing those reductions.

Putting aside the policy, the legality of this approach is untested and beyond the bounds of EPA's past experience under the CAA. EPA hinges almost the entirety of its position on the fact that the §111 standard here—the best s*ystem* of emission reduction—enables EPA to regulate a "system" of reductions. But that is a very heavy lift for a single word read out of context. The arguments surrounding the legislative history, case law, and past practice will be thoroughly fleshed out in the public comments and the legal briefs, with challengers pointing to the approach's inconsistencies with everything that has come before it during the generations of CAA implementation to date.

But beyond the pure legality of the issue, the fundamental question for judges weighing it likely will focus on the precedent-setting nature of the decision. Ultimately, putting the specific arguments aside, supporting EPA's interpretation would require a court to endorse an approach that can hold individual facilities responsible and liable for the actions of third parties in entirely distinct sectors that are not regulated by the same rule or perhaps by the CAA at all. EPA's "portfolio" approach of compliance also, in turn, would hold unrelated third parties liable for a rule under a provision of the CAA that was never intended to apply to them. Even a court sympathetic to EPA's policy goals will pause on the precedential nature of such a decision, not only for this and future GHG rulemakings, but also for the potentially dramatic expansion of the CAA in other contexts into the future.

The legal questions here also extend beyond the CAA. When viewing the ESPS's beyond-the-fenceline approach through the lens of being fundamentally a regulation of energy in the states, states are likely to advance arguments about how the ESPS upsets the delicate balance between state and federal regulation of the energy sector expressed in the Federal Power Act, state regulations, and regional energy agreements. To implement EPA's ESPS, many states would have to enact new laws and regulations to enforce the new policies set by EPA, even though EPA itself would lack the authority to implement them directly under the CAA. All of this raises questions about the ESPS unraveling cooperative federalism, in potential violation of the Tenth Amendment and other laws.

D. EPA's Technical Assumptions

In the ordinary course, EPA should feel most confident and challengers most insecure when the legal debate before a court turns to challenging EPA's technical assumptions. As the D.C. Circuit recently reminded litigators who challenge EPA rules, "we do not determine the convincing force of evidence, nor the conclusion it should support, but only whether the conclusion reached by EPA is supported by substantial evidence when considered on the record as a whole."[15] Thus, precious real estate in briefs typically is used sparingly in challenging technical issues and factual conclusions.

The ESPS, however, may present an exception to this general practice rule for challengers. Throughout the rule, EPA relies on several overarching uniform assumptions regarding heat rate improvements at coal-fired EGUs, the ability to seamlessly switch dispatch from coal to natural gas combined cycle facilities, states' abilities to enact renewable portfolio standards and preserve at-risk nuclear energy, and efforts to improve demand-side energy efficiency on an annual basis. It would not be surprising to see the public comments take issue with both the lack of a record basis for EPA's assumptions and a litany of examples where the real world in individual states is at sharp and distinct odds with EPA's across-the-board assumptions.

15. Coalition for Responsible Reg. v. EPA, 684 F.3d 102, 122, 42 ELR 20141 (D.C. Cir. 2012).

Although EPA surely will cite a mountain of case law in support of its position that neither other parties nor the courts should second-guess its judgment on its factual conclusions, the assumptions that will be challenged are not highly technical environmental and scientific issues where deference is most warranted for EPA, but rather involve assumptions about energy issues outside EPA's expertise. Further, given the black-and-white nature of likely rebuttal facts that certainly will be presented, courts are likely to be more willing to truly assess whether EPA's conclusions are arbitrary and capricious.

E. In the Shadow of the Supreme Court

In what may have been the most unfortunate timing coincidence for EPA during the Obama Administration, just five days after the proposed rule was published in the *Federal Register*, the Supreme Court issued a stern decision that may prove to be the strongest influence on judicial review of the rule. In a passage quickly inserted into the front page of the playbook for challenging EPA regulations, the Supreme Court in *UARG* chided the Agency, stating that:

> 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, 120 S. Ct. 1291, 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."[16]

Beyond that broader direction, however, also came the Court's comment that EPA cannot "regulate millions of small sources" including commercial, residential, and public buildings,[17] a holding that appears to speak directly to EPA's proposal to regulate demand-side energy efficiency.

Although it is too early to know how lower courts, not to mention EPA, will implement this direction across a wide range of rulemaking challenges, the precedent of the Supreme Court's opinion seems as relevant to the ESPS as it was to the Tailoring Rule that the Court partially struck down in *UARG*. In the ordinary course, there is probably little doubt that an agency in the wake of such a relevant Supreme Court decision would take the time to revisit its regulatory approach to reconcile it with the Court's direction. But very little about the ESPS is ordinary, and the Administration has committed to an approach and time line that does not offer the flexibility required to fix the fundamental issues identified by the Court.

Thus, of the various rounds of legal battles on the horizon, the most interesting one will be how EPA and the D.C. Circuit grapple with the shadow of the Supreme Court's *UARG* decision. While EPA certainly will work to distinguish it in the record, the D.C. Circuit is unlikely to give the Supreme Court's holding short shrift. As for the Supreme Court itself, it is admittedly difficult to fathom how five Justices who were sufficiently concerned about the Tailoring Rule to reverse it in part based on the language above would not share as significant a concern with a rule that is exponentially broader in reach.

IV. Conclusion

Since the release of the proposed ESPS, I have participated in more than 50 discussions with professional organizations, states, industry groups, think tanks, and environmental nongovernmental organizations regarding the legal defensibility of the ESPS. Reflecting on the unique opportunities to hear a wide and diverse range of informed views and positions, what strikes me the most is the extent to which any discussion of environmental issues has been thematically absent in all of the presentations. Virtually every presenter and every question has focused not on how this rule will impact the environment—EPA's core mission—but on how and whether this rule can be reconciled with, implemented alongside, or be disruptive to state energy generation, markets, and transmission. The presenters who have joined me at the podium have not been state environmental permitting officials or environmental regulators. Instead, they have been the voices of the energy sector.

To me, this observation underscores what simultaneously may be the ESPS's strongest defense and its greatest vulnerability. The Obama Administration clearly has decided that in the absence of congressional action and international consensus, it cannot wait longer to take firm action to address the challenge of climate change before its window closes in 2016. The Administration is thus sending a strong signal that it has no choice but to use the existing tools at its disposal in new ways to tackle the most significant environmental challenge for the planet. A reviewing court will not consider a rule of this magnitude in a legal vacuum and may be inclined to give strong deference to such an important policy goal.

At the same time, a court cannot neglect the weighty issue of the precedent to be endorsed along the way. EPA's interpretation here would reach far beyond fossil fuel-fired EGUs and GHG emissions and open a new era for the Agency to regulate for the first time in its history not just EGUs, but entire sectors of the economy that have never been within the reach of a specific rule or even the CAA as a whole. In essence, endorsing the ESPS would endorse a new self-appointed role for EPA fundamentally to become the leading and most powerful regulator of energy itself in the nation—a role that Congress has not assigned to the Agency or any other federal agency and about which the Supreme Court has expressed significant skepticism. Regardless of how noble the goal, ultimately, courts are likely to be more concerned about a specific approach that sanctions an entirely new regulatory role

16. UARG v. EPA, 134 S. Ct. 2427, 2444, 44 ELR 20048 (2014).
17. *Id.* at 2446.

for the Agency moving forward. President Obama's environmental, energy, and climate change legacy may very well be that he was the first president to enact national regulations to reduce GHG emissions, but for these reasons, the longevity of the §111(d) component is in significant legal doubt.