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## Is EPA Playing Chicken With Clean Air Act Greenhouse Gas Standards?

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According to sources within the Obama administration, the Environmental Protection Agency will delay issuing a final rule that would limit carbon emissions from new power plants. The EPA proposed the carbon pollution standard for new power plants a year ago. The EPA received more than approximately 2.5 million comments during the public comment period, which closed in June 2012. The deadline for a final rule was set for the end of March.

The regulation's origins stem from the Supreme Court's landmark decision in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), which found that the EPA had the power to regulate greenhouse gases as a "pollutant" under the Clean Air Act. Consistent with the Supreme Court's ruling, in 2009, the EPA determined that greenhouse gas pollution threatens Americans' health and welfare by leading to long-lasting changes in our climate that can have a range of negative effects on human health and the environment.

That endangerment finding effectively requires the EPA to adopt standards for both mobile and stationary sources of greenhouse gases. The U.S. Court of Appeals for the D.C. Circuit upheld the endangerment finding in 2012 in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012).

It is not clear what is motivating the delay. As of this writing, the EPA has issued no official statement. EPA administrator nominee Gina McCarthy had previously alluded to the burden of receiving and addressing 2.5 million comments — apparently, the most ever received by the EPA — on the proposed rule. The agency may simply need more time to respond to the comments.

The motivation may be something else entirely.

The coal industry has cried foul since the regulatory process began. The proposed rule limits emissions of new fossil-fuel-burning power plants to 1,000 pounds of carbon per megawatt hour, based on yearly emission measurements. "New" power plants are power plants for which construction commences after March 27. As a practical matter, the rule would make the construction of new coal-fired power plants impossible unless they were to develop technology to cost-effectively reduce carbon emissions to that level.

The proposed rule does, however, allow power plants that utilize carbon capture and storage technology — as coal-fired plants would have to do — to use a 30-year average of carbon dioxide emissions to comply, rather than yearly emissions. Nevertheless, the coal industry has painted the proposed rule as manifestly unfair. Carbon capture and storage technology is too expensive, if one can even say that it is available. While it will likely get cheaper, building a new coal-fired power plant — potentially a multibillion-dollar investment — on faith is not a risk that most, if any, companies will take.

The delay could allow the EPA to create a separate yearly standard for coal plants, one with which new coal-fired power plants could reasonably comply.

The Obama administration and Congress may also be engaged in a game of political chicken. President Obama has previously sought a market-driven solution to greenhouse gas emission reduction — a cap-and-trade regime, or some similar system — as part of a broad overhaul of environmental statutes. The political climate is such that a broader overhaul is unlikely, if not impossible. Senator Lisa Murkowski, R-Alaska, even sponsored a bill, known as the "Murkowski Amendment," that would strip the EPA of its authority to regulate greenhouse gases.

The courts have blocked several attempts by the EPA to impose cap-and-trade regimes through agency rulemaking. Compare *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. Dec. 23, 2008) (striking down the Clean Air Interstate Rule, which utilized a regional cap-and-trade approach, for exceeding the EPA's authority granted by the Clean Air Act), with *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (invalidating George W. Bush-era Clean Air Mercury Rule, which utilized a cap-and-trade approach, for being too weak).

The Obama administration may be using the EPA's authority to regulate greenhouse gases as a way to motivate Congress to pass a standalone cap-and-trade law. Indeed, Obama alluded to a "market-based solution to climate change" in his 2013 State of the Union address.

"But if Congress won't act soon to protect future generations, I will," the president said. The proposed rule makes good on Obama's promise (or threat) to act where Congress will not. Opponents of greenhouse gas regulation may find a standalone statute to be a lesser evil than the EPA regulation. The proposed rule sets a hard ceiling on emissions for each source. A cap-and-trade law would provide companies flexibility and some ability to self-determine compliance.

One criticism of the proposed rule is that it focuses only on the supply-side equation of carbon emissions. Simply forcing energy suppliers to cut emissions does not address, at least not directly, the consumption of energy by the U.S. economy. The United States, which contains less than 5 percent of the world's population, consumes approximately 25 percent of the world's energy. While its citizens do not consume the most per capita, the United States consumes the most total energy of any country.

Reducing energy usage would directly reduce carbon emissions. The proposed rule does nothing to reduce demand. Arguably, the importance of using less energy, or using energy more efficiently, could outweigh the supply-side caps on carbon emissions. Advancements in energy efficiency will continue to reduce emissions. But changing the culture of energy consumption is a more difficult path to implement and enforce. Certainly, it is more difficult than supply-side regulation without significant price increases.

Perhaps as a recognition of this, it was recently reported that the Obama administration will soon require all federal agencies to consider climate change and, by implication, carbon emissions prior to approval of major projects.

National Environmental Policy Act assessments and state "baby NEPA" assessments, which seek to determine the significance a given activity will have on the environment, must address the impact on climate change. This would theoretically include large infrastructure projects that depend on federal money and federal agency approval. The policy would be an aggressive expansion of the government's goal of reducing greenhouse gas emissions. Its reach would be large, although how large is not clear. The federal government has already sought to curb its own energy usage, as it did with the Energy Independence and Security Act of 2007, the Energy Policy Act of 2005, and Executive Orders No. 13,423 (January 24, 2007)

and 13,514 (October 5, 2009). The government is the single largest consumer of energy in the United States, and accounts for 1.5 to 2 percent of overall consumption. That percentage, however, excludes projects requiring agency approval or funded with federal money. The inclusion of all federally funded or approved projects would significantly increase that number. It could also significantly impact the economy. Energy and construction industry representatives warn that delays caused by the policy would be catastrophic for companies undertaking such projects and for the economy as a whole.

It remains to be seen what exactly the EPA will do. The energy sector is watching closely. So are the 2.5 million people who submitted comments to the EPA. •

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