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The Clean Power Plan

THE ISSUE IN BRIEF

- The EPA is overstepping its authority in creating the Clean Power Plan, which the Administration says will transform the domestic energy industry.
- The EPA claims it has authority under Section 111(d) of the Clean Air Act to require the fifty states to "shift[] generation from dirtier to cleaner sources" in order to reduce carbon dioxide emissions, which it is categorizing as a pollutant.
- There are two strong textual arguments that the EPA has gone beyond its statutory authority in issuing the CPP. First, the text of Section 111(d) seems to contemplate technology improvements, not shifting generation between sources. Second, Section 112 of the Clean Air Act provides that, if a source is regulated under Section 112—as are the fossil fuel fired utilities regulated under the CPP—it may not be regulated under Section 111(d).
- A process concern also exists. The draconian deadlines found in the CPP all but guarantee that the states and regulated utilities must take expensive steps to comply with the Plan before the federal courts have had an opportunity to address its lawfulness.
- The Supreme Court decided to stay implementation of the CPP until it can review the case. This indicates that five justices had significant concerns over the legality of the CPP and also found that the states would suffer irreparable harm without a stay of the status quo. Justice Scalia's death does not affect the efficacy or duration of the stay. The EPA will not be able to implement the CPP until the plan has been ruled upon by the D.C. Circuit and until the Supreme Court has had a chance to consider a petition for certiorari.

EXECUTIVE SUMMARY

The United States Constitution makes no mention of a vast administrative state like the one that exists today. Yet agencies promulgate regulations that carry the force of law, engage in court-type proceedings to determine the rights of individuals and businesses, and enforce their own determinations as to regulatory compliance. Two constitutional principles place a check on the authority of administrative agencies. First, under Article I of the United States Constitution, Congress must "make the law." As a result, in order for an agency to promulgate regulations, Congress must have delegated such authority. Second, under Article III, it is the province of the judiciary to say what the law is. Thus, parties affected by agency regulations must generally be allowed to challenge those regulations in federal court.

The Environmental Protection Agency ("EPA") has been known to push the envelope on both fronts, and never more than under the current Administration.

On October 23, 2015, the EPA released its Clean Power Plan ("CPP"). This plan, pushed out by unelected administrators in the waning hours of an administration, is ambitious. The Administration's stated goal is to "transfor[m] … the domestic energy industry."

Meanwhile, President Obama unabashedly touts the program as "the single most important step America has ever taken in the fight against global climate change." And yet, one searches the United States Code in vain for any statutory authorization from Congress for the EPA to "transform" the domestic energy industry in all fifty states. Further, the draconian deadlines provided by the Act all but ensure that states must take expensive steps to comply with the Clean Power Plan *before* the legality of such plan has been decided by federal courts.

As a result, nearly thirty states and numerous industry groups filed suit challenging the CPP in federal court. They also asked the United States Supreme Court to stay implementation of the CPP, and thus preserve the status quo, until the federal courts have determined whether the regulations are a lawful exercise of agency authority.

On February 9, 2016, the Supreme Court took the highly unusual step of issuing a stay order, halting implementation of the CPP until the legality of the EPA regulations can be resolved. Under the standards governing stay requests, five justices found it likely that the states would succeed on the merits of their challenge to the CPP and also that the states would suffer irreparable harm if implementation if the CPP was not immediately stopped. The Supreme Court's stay order thus signals that the Court has significant concerns over the legality of the CPP, and it guarantees that the CPP will be put on ice until the Court has had a chance to review it.

First, the parties will brief and argue the case before the D.C. Circuit with an opinion expected sometime this summer. It is likely that the losing side with seek review in the Supreme Court. Since only four votes are required to grant certiorari—one less than the five required to grant a stay—there is a good chance that the Supreme Court will decide to review the case on the merits regardless of the outcome in the D.C. Circuit. The death of Justice Scalia, however, adds an additional wrinkle. Justice Scalia was one of the five

justices who voted to grant the stay application and thus found merit to the challengers' position. That leaves four justices who were sufficiently troubled by the Clean Power Plan to grant a stay. If the Court hears the case before a new justice is confirmed, and if the justice's merits votes mirror their stay votes, the Court may split 4-4. In that case, the D.C. Circuit's ruling on the legality of the CPP will stand. Thus, the briefing and argument to take place in that court this spring has become all the more important.

This legal brief sets out the details of the CPP, its statutory background, and the main legal issues regarding the EPA's authority to issue the plan.

MORE INFORMATION

Issue Background: The Clean Power Plan

The Clean Power Plan is the Administration's effort to fight global climate change by reducing carbon dioxide emissions. The CPP requires states to reduce emissions 32% below a 2005 baseline by the year 2030. Specifically, the CPP establishes carbon dioxide emissions levels for each state based upon three so-called "building blocks." First, states must alter coal-fired power plants to increase efficiency. Second, states must substitute natural gas generation for coal generation. And, third, states must substitute low or zero-carbon energy generation, like wind and solar, for fossil fuel generation. Acknowledging that the plan disfavors certain kinds of energy production, the agency claims the authority to "shift[] generation from dirtier to cleaner sources."

The costs of such emissions reductions are staggering. The EPA itself estimates that compliance costs for the CPP will be roughly equal to the total cost of compliance with *every* Clean Air Act regulation enacted through 2010. According to the National Economic Research Associates, the cost of compliance will be upwards of $450 billion by the year 2030.

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And there are big questions as to whether the CPP will prove effective, even if implemented. The reduction is a small step towards the 80% reduction in emissions that policymakers claim necessary for the stabilization of greenhouse gases (GHGs) in the atmosphere. Even more troubling, it is difficult to see how the CPP will spur the innovation needed for poorer countries to develop less carbon-intensive energy sectors. The EPA's central planning effort critically fails to create incentives for innovation and technology improvements.

Particularly troubling, the EPA set a timeline for implementation of the CPP that effectively prevents the normal course of judicial review. States are required to submit plans, called State Implementation Plans, or SIPs in regulatory parlance, to meet the EPA's demanding energy standards on or before September 6, 2016—less than one year after publication of the final rule. States may request a two-year extension, but to be eligible, they must demonstrate reasonable progress towards the development of a SIP. For their part, utilities must begin making emissions reductions by 2022—though the date seems generous, given the nature of utility investment, it is generally recognized that utilities must begin making substantial investments in improvements within the next year or so. These compressed timelines all but require states and utilities to begin taking immediate steps—even if the CPP is later found unlawful.

These compliance-forcing timelines are particularly troubling given the EPA's regulatory history. Just last year, in *Michigan v. EPA*, the Supreme Court declared certain toxic air regulations unlawful, but because the EPA had already forced compliance, the Court's declaration meant little. As the states put it in their Supreme Court stay application:

> This Court's decision last Term in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), starkly illustrates the need for a stay in this case. The day after this Court ruled in Michigan that EPA had violated the Clean Air Act ("CAA") in enacting its rule regulating fossil fuel-fired power plants under Section 112 of the CAA … EPA boasted in an official blog post that the Court's decision was effectively a nullity. Because the rule had not been stayed during the years of litigation, EPA assured its supporters that "the majority of power plants are already in compliance or well on their way to compliance." Then, in reliance on EPA's representation that most power plants had already fully complied, the D.C. Circuit responded to this Court's remand by declining to vacate the rule that this Court had declared unlawful. […] In short, EPA extracted "nearly $10 billion a year" in compliance from power plants before this Court could even review the rule […] and then successfully used that unlawfully-mandated compliance to keep the rule in place even after this Court declared that the agency had violated the law.

The Statutory Background

The Clean Air Act is a cooperative federalism statute designed to control interstate air pollution. The CAA regulates emissions from stationary sources, like factories and power plants, and moving sources, like cars and airplanes. In 2005, the Supreme Court decided that carbon dioxide and other greenhouse gases were "pollutants" subject to regulation. Utilizing this new-found authority, the Obama Administration moved quickly to regulate GHG emissions from motor vehicles and large stationary sources. The EPA then sought a way to regulate other sources, too. Enter the Clean Power Plan.

The CPP is an aggressive set of regulations designed to lower GHG emissions by decreasing fossil fuel energy generation and replacing it with "cleaner" sources. To this end, the CPP imposes emission reduction obligations on existing power plants under Section 111(d) of the Clean Air Act. Section 111(d) is a little-used provision that has been lawfully invoked just once in the last 25 years. EPA's assertion of regulatory authority here, as evidenced by the Supreme Court's grant of a stay of implementation, is novel and unprecedented.

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Under Section 111(d), the EPA identifies the "Best System of Emission Reduction" that has been adequately demonstrated for a source category. Then, every other source category must meet this standard. States must develop SIPs to ensure that sources within the state meet the emissions targets. If states do not implement a SIP, the EPA has the authority to impose a Federal Implementation Plan.

The Litigation

Twenty-seven states, led by West Virginia, filed suit in federal court challenging the EPA's authority to transform their domestic energy industries (two more states have since joined the suit). The states argue that, because the statutory text enacted by Congress does not contemplate such regulation, the EPA has gone well beyond any congressional authorization and violated the separation of powers' principle that Congress shall make the law. Further, the states contend that the EPA's aggressive regulation of the domestic energy industry within each state violates principles of federalism that our Constitution was designed to protect.

The Section 111(d) Argument

First, the states argue that the EPA cannot use Section 111(d) to transform the nation's energy grid because the text of that provision does not "clearly" authorize the EPA to make decisions regarding the nation's energy sector—decisions of vast economic and political significance. Rather, the states argue that the plain terms of Section 111(d) authorize reduction of emissions *only* through the adoption of technology-based emissions standards. In other words, Section 111(d) authorizes emissions reduction requirements only through pollution control technology or operational or design advances "appli[ed]" to a stationary source. But the CPP's building blocks 2 and 3 are not technology measures that apply to a source. The Plan requires states to *substitute* one energy source for another. Instead of improving the efficiency of a source through technological improvements, the CPP attempts to govern the states' energy generation mix.

Admitting as much, the EPA argues that Section 111(d) empowers the agency to set emissions targets based on shifting generation from dirtier to cleaner sources within the "complex machine" of a state's energy grid. But Section 111(d) was designed to set technology-based emissions standards for certain "particular sources" defined as "designated facilities" according to EPA's own near-in-time regulations. Reversing decades' worth of internal policy, the EPA now treats the *entire* energy power sector of a State as a "particular source." Such a definition, the states contend, defies the plain wording of the statute.

The Section 112 Exclusion

The states argue that EPA has no authority to issue the CPP regulations for a second reason: Section 112 of the Clean Air Act. That section, they claim, prohibits the EPA from regulating fossil-fuel powered sources—twice. That is, Section 112 provides that EPA may not regulate source categories under Section 111(d) if they are already regulated under Section 112. Because fossil fueled energy generation is regulated under Section 112, the states suggest that it cannot be regulated under Section 111(d).

EPA argues that Section 112 only displaces Section 111(d) regulation when the *particular* air pollutant at issue is actually regulated under Section 112. But the statute talks about sources, not pollutants. And the states have a strong argument that the EPA has no authority to "rewrite clear statutory terms to suit its own sense of how the statute should operate."

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Just as importantly, it is hardly clear that Congress intended a little-used provision like 111(d) to transform the EPA into the nation's most powerful central planner, taking decisions of vast economic and political significance from the states. Under Supreme Court precedent, Congress is required to speak clearly if it wishes to delegate to an agency decisions of vast "economic and political significance." The Court thus greets with skepticism an agency's claim of authority to regulate "a significant portion of the American economy," especially when that authority is discovered in a long-extant statute.

Just two years ago, in *UARG v. EPA*, the Supreme Court rejected the EPA's attempt to require permits for stationary sources based on their potential to emit greenhouse gases. EPA's interpretation of the Clean Air Act was unreasonable, the Supreme Court found, because "it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."

So too here. The states argue that there is no clear statement from Congress authorizing the EPA to regulate the energy sectors of the fifty states. The text of Section 111(d) comprehends technology based regulations, the substitution of one type of energy generation for another. Section 112, for its part, suggests that the EPA may not regulate fossil-fuel sources under Section 111(d) at all, given their regulation under Section 112.

Indeed, in the failed Clean Energy Jobs and American Power Act, Congress *rejected* the present Administration's effort to pass cap and trade authority over carbon dioxide emission from fossil fuel-powered plants. It is a troubling world we live in if an unelected agency might nevertheless be found to have the authority to require just that from the states and regulated industries.

The Chevron *Issue*

Agency interpretations of statutes, like the EPA's interpretations of the CAA, are sometimes reviewed under the deferential standard set forth in a 1984 Supreme Court case: *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*. Under the rules set forth in that case, the Court defers to an agency's interpretation of an ambiguous statute so long as that interpretation is reasonable. The idea is that Congress delegated to the agency (and not the courts) the authority to implement the statute.

There are several important qualifications to *Chevron* deference. First, the statute must be one that Congress intended to be agency-administered. Second, the statute must be ambiguous, leading to the assumption that Congress has empowered the agency to resolve the ambiguity. Third, an agency interpretation of an ambiguous statute must be reasonable and "within the bounds of its statutory authority."

Here, the states argue that *Chevron* does not apply because the statute is not ambiguous under the Major Questions doctrine. Under that doctrine, the courts expect Congress to speak clearly when delegating questions of significant economic and political significance. The states argue, moreover, that the EPA should not receive any deference for its interpretation of the Clean Air Act because the EPA is seeking to invade an area of traditional state concern. According to the Supreme Court, the states' power over interstate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the State." Finally, the states argue that the EPA should receive no deference for its interpretation of the Clean Air Act because the EPA has no expertise in regulating the power grid. Given the State's primary responsibility for energy production and consumption, and a different agency's authority over interstate energy (the Federal Energy Regulatory Commission), it is hardly surprising that EPA has admitted that it does not have specific expertise over energy distribution. All of these federalism concerns reinforce the argument that Congress did not delegate to the EPA the authority to regulate carbon dioxide emissions under section 111(d) of the Clean Air Act.

CONCLUSION

Time and again, the Supreme Court has reined in an overzealous EPA. Just two years ago, in *UARG v. EPA*, the Supreme Court used separation of powers principles to put the EPA back in its constitutional place. In that case, the Court noted that, under our system of government, Congress makes the laws, and the President faithfully executes them. While the President can at times act through agencies like the EPA, the power to execute the laws does not include a power to revise clear statutory terms. The question for the courts, then, is whether Congress vested the EPA with the power to regulate GHGs through Section 111(d). There are good statutory reasons to think not.