TEXAS PUBLIC POLICY FOUNDATION
PolicyPerspective

May 2015
Armstrong Center for Energy and the Environment

The EPA's Clean Power Plan: State Legislative Options

by Mario Loyola
Senior Fellow

Key Points

- The adoption of the EPA's Clean Power Plan by the states threatens Texas with shutting down a significant portion of its electrical capacity.
- The Clean Power Plan is an attempt to coerce the states into dramatically expanding the EPA's power far outside the bounds of the Clean Air Act.
- The EPA hopes that states will make up the lost electrical capacity through ruinously expensive changes.
- The EPA expects the Clean Power Plan to be adopted as a final rule in the summer of 2015. It will require that states submit "state plans" within 12 months.

The U.S. Environmental Protection Agency's (EPA) Clean Power Plan, due to be finalized in the summer of 2015, is one of the most ambitious and dangerous regulations in the history of the executive branch.

The adoption of the Clean Power Plan threatens the states with shutting down a significant portion of their electrical capacity if states do not reorganize their energy sectors and electricity use in the ways envisaged by the EPA, in matters that the EPA itself admits that it cannot regulate directly under the Clean Air Act. The proportion varies from state to state, but Texas could lose as much as 15 percent of electrical generating capacity if the EPA carries through on the coercive threat behind the Clean Power Plan. To avoid this, states must not only reorganize their power sectors in ways the EPA has not authority to require, but would also delegate perpetual enforcement authority over the new state rules to the EPA.

The Clean Power Plan is thus an attempt to coerce the states into dramatically expanding the EPA's power far outside the bounds of the Clean Air Act. Its hammer is the threat to force retirement of a large portion of existing coal-fired power plants, and saddle the rest with exorbitantly expensive and unnecessary upgrades.

The EPA hopes that states will make up the lost electrical capacity through ruinously expensive improvements in coal-fired carbon emissions (Block 1); the replacement of coal-fired electrical generation with natural gas(Block 2); renewable sources (Block 3); and significant limits on electricity use by businesses and everyday Americans (Block 4). Leaving aside the fact that regulation of CO_2 emissions under Section 111(d) is preempted by existing regulations under Section 112, only Block 1 is something the EPA could regulate under Section 111(d). And Block 1 is infeasible for coal plants, because the contemplated technology is not at all close to commercial viability at any cost.

The EPA expects the proposal to be adopted as a final rule in the summer of 2015. It will require that states submit "state plans" within 12 months. The state plan must include all of what EPA requires for each of the four blocks. The proposed rule provides that approved state plans become enforceable by the EPA as federal law. EPA lacks statutory authority over the state's electric utilities, which are the jurisdiction of the Texas Public Utility Commission.

If states fail to file an approvable plan by the deadline, the EPA must file a "federal plan," about which few details have been provided. The federal plan could be imposed toward the end of 2016, but would more likely have to await the next presidential administration. The EPA announced that it will provide guidance on a federal plan in August 2015, offered as a way to help states understand the consequences of not filing approvable state plans.

It is crucial for the Legislature to understand what is at stake in the choice between a state plan and a federal plan. The EPA admits that it has no power to enact the measures

continued

foreseen in Blocks 2, 3, and 4 under its own statutory authorities. Rather, it expects the states to enact those measures for it, in order to avert the catastrophic disruptions that would result under a federal plan. So, whether they choose a state plan or a federal plan, most states will have to substantially reorganize their energy sectors and electricity use (in areas entirely outside of the EPA's Section 111(d) purview), or else the EPA could simply shut down a significant amount of the states' electricity capacity in order to meet the plan's statewide emissions targets.

The government of Texas thus faces a major challenge. No combination of Texas state agencies has the authority to implement the measures that the EPA would require in order to approve a state plan. A major legislative overhaul would be needed in order to reorganize the state's power sector and impose the necessary conservation measures on consumers of electricity. Hence, it seems almost certain that in the absence of such legislation, the state will not be able to file a plan that the EPA can approve.

Any resulting federal plan would merely force retirement of the electrical capacity that could be retired by a fully compliant state plan. So even then, the state would be coerced into enacting wide-ranging legislation over matters entirely outside the purview of the Clean Air Act. The main difference with a federal plan is that the state would not be voluntarily delegating authority over its economic regulation to the EPA as required under a state plan.

Texas should refuse to serve as the EPA's deputy in the expansion of the EPA's power outside its statutory authorities. Submitting a state plan that the EPA can approve certainly seems out of the question. The EPA must be restrained within its statutory authority under the Clean Air Act.

Therefore, the Legislature can choose from among several possible approaches: It could enact legislation specifically prohibiting the submission of any state plan; it could enact legislation prohibiting that any state plan address matters and entities not directly subject to regulation under Section 111(d); it could simply declare that it is the policy of the state of Texas to oppose the Clean Power Plan; or the Legislature could simply do nothing, with the expectation that no state agency, or combination of agencies, will be able to file an approvable state plan.

This paper provides a brief overview of the regulatory framework and a litigation strategy, and examines the Legislature's options.

Regulatory Framework

The Clean Power Plan will require ruinously expensive and almost certainly infeasible improvements in coal-fired carbon emissions (Block 1); the replacement of coal-fired electrical generation with natural gas (Block 2) and renewable sources (Block 3); and significant limits on electricity use by businesses and consumers (Block 4). As is clear from the "second alternative BSER" allows states (or EPA, under a federal plan) to regulate carbon emissions from all relevant power plants "as a group," a scheme that is clearly designed to accommodate the cap-and-trade scheme rejected by Congress when the Senate refused to pass the Waxman-Markey bill.

Federal law specifically reserves the regulation of electrical dispatch (Blocks 2 and 3) to the states, with some aspects subject to the Federal Electrical Regulatory Commission (FERC). Block 4, meanwhile, is purely a matter of state regulatory authority except where Congress exercises its interstate commerce power, which it has not done in this case.

Perhaps 90 percent of the state's electrical demand is served by the wholly intrastate Electrical Reliability Council of Texas (ERCOT). Because of this market structure, federal statutes (which the EPA cannot override) gives the state of Texas exclusive jurisdiction over nearly all transmission of electricity in the state. During the nationwide movement to restructure electricity markets in the 1990s, it was this almost completely self-contained energy sector that allowed Texas to succeed where almost all other states came up short. Texas now has perhaps the most efficient electrical sector of any economy in the world, which has allowed the state to become the industrial engine of the American economy. Virtually half the electricity consumed in Texas is consumed by industry, a greater proportion than any other state.

The state's resulting market structure maintains a clear separation of authority between environmental regulators (Texas Commission of Environmental Quality), utility regulators (the PUCT and ERCOT), and the private sector. The TCEQ regulates source emissions, the PUCT regulates transmission and limited portions of the wholesale

and retail markets, and ERCOT manages the dispatch of electricity into the market—but the vast majority of the activity in the market is handled in the private sector and by municipalities and river authorities.

Given this regulatory framework, no state regulatory agency, alone or in concert, would be able to implement the measures contemplated in Blocks 2 and 3. And no Texas state agency has the power to regulate end-user energy-conservation, such as what temperature you're allowed to set your thermostat to, so the measures contemplated in Block 4 would also require state legislation.

Federal Litigation Options

Before going further, it is necessary to shed some light on the litigation aspect. Once the Clean Power Plan is formally adopted by the summer 2015, the state can file a petition for reconsideration before the agency. Once that remedy is exhausted, the state can file a petition for review before a federal circuit court of appeals, which would almost certainly be the D.C. Circuit Court of Appeals, a heavily progressive court. If that doesn't work, the state can appeal to the Supreme Court, where the EPA has already been warned that it is "patently unreasonable—not to say outrageous—for the EPA to insist on seizing expansive power that it admits the [Clean Air Act] is not designed to grant" *Utility Air Regulatory Group v. EPA*.

The most important state strategy is to challenge the rule in federal court, starting with a petition for emergency stay suspending all the deadlines in the Clean Power Plan as soon as possible. The state should also expect to file a petition for reconsideration before the EPA, and then a petition for review by the D.C. Circuit Court of Appeals. This legal challenge will take place along a fairly rapid timetable, but unfortunately not a timetable as rapid as that of the Clean Power Plan. This is one of the most oppressive aspects of the plan.

States seeking to challenge the plan would face punitive consequences for non-compliance even before administrative and court remedies were exhausted, because most states must legislate in order to avoid the punishment of federal action under either a state plan or a federal plan. That simply takes too much time for timely compliance with the Clean Power Plan.

In order to avert the potentially catastrophic consequences of the EPA action under either a state plan or a federal plan, the Texas Legislature would have to enact enabling legislation in the current session, even before the plan is enacted as a final rule. This is surely a strong basis for an indefinite, emergency stay of the rule, a petition for which should be filed the moment the rule is promulgated.

State Legislative Options

As the preceding sections imply, there is a strong case that the Legislature should simply do nothing. That option, however, entails several risks that the Legislature should consider. Even if the Legislature decides to do nothing, it will still be making a portentous choice. The Legislature is well-advised to consider the pros and cons of various approaches.

Blanket prohibition on filing state plan

The Legislature could enact legislation specifically prohibiting the submission of any state plan. House Bill 3590 (Krause) is a fine example of this approach.

The most valuable benefit of this approach would be to ensure that the state does not in any way empower the EPA in the implementation of the Clean Power Plan, and does not delegate enforcement authority to the EPA. This makes it virtually unique among the approaches discussed in this section, in that it would put a clear redline of refusal before the EPA, forcing it to contend with the opposition to its proposed rule on a national stage. This strong position would give Texas an undisputed leadership role among the states in organizing opposition to the EPA, and would help raise public awareness and support for a courageous stance.

The main risk of this approach is that the EPA might accelerate the timetable contemplated in the Clean Power Plan and impose a federal plan much sooner than the end of 2016 (the earliest possible time it could impose a federal plan if a submitted state plan is disapproved). If legislation is enacted in the current session, the EPA might impose a federal plan within months of final enactment of the Clean Power Plan, perhaps in fall of 2015.

Prohibition on state plan affecting activities and entities outside Section 111(d)

The Legislature could enact legislation prohibiting that any state plan address matters and entities not directly subject to regulation under Section 111(d). Again, a fine example of this approach is HB 3590 (Krause), which

would prohibit the PUCT from adopting a state plan that gives the EPA "authority to regulate a person, entity, or activity that it did not regulate on January 1, 2015." Another fine example of this approach is SB 1761 (Creighton), which would constrain any state plan in a number of significant respects.

This approach has several potential benefits. First, it would raise a major barrier to the EPA's ability to expand its authorities outside the scope of the Clean Air Act by coercing the state into enacting the measures in Blocks 2, 3, and 4 and thereby delegating to the EPA enforcement authority over those matters. The EPA would almost certainly disapprove such a plan, which would force the EPA to impose a federal plan. If the EPA concludes that the legislation itself bars an approvable plan and consequently accelerates the timetable in order to impose a federal plan early, it would force the EPA to single Texas out for punitive treatment simply for refusing to allow the EPA to dictate matters that fall outside the statutory authority of the rule. Most Texans would see that as patently unfair and a clear admission of the EPA's intent to aggrandize its power by coercing the states. Another benefit of this approach would be to raise public awareness and give Texas a leadership role among the states in organizing opposition to the rule.

The major risks of this approach are, first, that the EPA might accelerate the timetable and impose a federal plan early (though this risk would be significantly less than under the first approach above), and, second, that the state might still file a plan that the EPA could approve as a partial plan, to be complemented by a federal plan. That would result in delegation to the EPA of enforcement authority over the activities and entities addressed in the state plan. The latter risk could be lessened with the addition of a proviso to the effect that, if the state plan results in the delegation of enforcement authority to the EPA, the plan is withdrawn.

Declaration of policy

The Legislature could simply declare, in a resolution, that it is the policy of the state of Texas to oppose the Clean Power Plan. A good example of this approach in the current Legislature is SCR 27 (Hancock).

SCR 27 would proclaim the Legislature's refusal to help the EPA enlarge its authority; urge Congress to quash the rule; direct state agencies to "resist the implementation" of the Clean Power Plan; and direct state agencies not to file a state plan until exhaustion of administrative and court remedies.

The chief benefit of this approach would be to define opposition to the Clean Power Plan as a policy goal for the executive branch. This would serve to raise public awareness and engagement, and focus the attention and commitment of executive branch agencies. It would also give Texas a leadership role among the states in organizing opposition to the rule.

Compared with the other approaches discussed above, there is considerably less risk in this approach, as the EPA would have no basis to accelerate the timetable and impose a federal plan early. The main risk of this approach is that it is a non-binding resolution, and the Legislature would have essentially no control over the filing of any state plan, or over the shape of any such plan.

A variant of this approach could define a policy of non-cooperation with the EPA under the Clean Power Plan until administrative and court challenges have been exhausted.

Simply do nothing

The Legislature could simply do nothing, in the expectation that no state agency, or combination of agencies, will be able to file an approvable state plan. The chief benefit of this approach is that, while the state would not be able to file a fully approvable state plan, the EPA would have no basis for accelerating the timeline and imposing a state plan early.

The main risk of this approach is that the Legislature will have essentially no control over the filing of any state plan, or over the shape of any such plan. State agencies could, under duress, attempt to file an approvable state plan, and the EPA might approve the state plan as partial satisfaction of rule requirements, to be complemented with a federal plan. The net result would be out of the hands of the legislature and entirely within the prerogative of state executive branch agencies.

Conclusion

Both the state plan and federal plan would require Texas to completely reorganize its retail electric-power market and wholesale intrastate power market in accordance with the EPA dictates. This would essentially eliminate the Texas competitive electric market. It would be a commandeering, not simply of state agencies, but also of the state legislature, as well as a violation of the statutory limits on EPA power. The EPA must be forced to operate within its existing statutory authority, and be accountable to the people for the catastrophic results that would ensue if the Clean Power Plan is not defeated. ★

About the Author

Mario Loyola is senior fellow at the Texas Public Policy Foundation, focused on constitutional law and federalism, including constitutional litigation. Loyola joined the Foundation in July 2010 as founding director of the Center for 10th Amendment Action, focusing on energy and environment, health care, and other federalism issues. Loyola began his career in corporate law. Since 2003, he has focused on public policy, dividing his time between government service and research and writing at prominent policy institutes. He served in the Pentagon as a special assistant to the Under Secretary of Defense for Policy, and on Capitol Hill as counsel for foreign and defense affairs to the U.S. Senate Republican Policy Committee.

Loyola is a regular contributor to *National Review* and National Public Radio, and has written extensively for national and international publications, including op-eds in *The Wall Street Journal*. He has appeared on Fox News, CNN, BBC Television, and more. Together with Prof. Richard A. Epstein, Loyola wrote three *amicus* briefs for the U.S. Supreme Court in the Obamacare case, *NFIB v. Sebelius*.

Loyola received a B.A. in European history from the University of Wisconsin-Madison and a J.D. from Washington University School of Law. He is admitted to practice law in New York State, the Commonwealth of Puerto Rico, the U.S. Supreme Court, and the Fifth Circuit Court of Appeals.

About the Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

Texas Public Policy FOUNDATION

901 Congress Avenue | Austin, Texas 78701 | 512.472.2700 PH | 512.472.2728 FAX | www.TexasPolicy.com