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The EPA's Dangerous New Power Grab

by Mario Loyola
Senior Fellow

Key Points

- The Clean Power Plan is a dangerous gambit to expand EPA authority far beyond the Clean Air Act, through the coercive threat of ruining the states' economies, and endangering health and safety.
- The Clean Power Plan is *unconstitutionally coercive* of the states in a way the Supreme Court has never upheld.
- The Clean Power Plan leverages a rarely-used section of the Clean Air Act, Section 111(d), to require each state to regulate its production, transmission, and consumption of electricity.

Last summer, the EPA proposed the Clean Power Plan, ostensibly a regulation of carbon emissions under Section 111(d) of the Clean Air Act. In fact, the plan is a dangerous gambit to expand EPA authority far beyond the Clean Air Act, through the coercive threat of ruining the states' economies, and endangering health and safety, if state governments do not pledge to reorganize their power sectors according to EPA dictates.

As explained below, the Clean Power Plan is *unconstitutionally coercive* of the states in a way the Supreme Court has never upheld. Moreover, the plan faces *serious statutory hurdles*. And the EPA has failed to demonstrate that the plan would have *any health or environmental benefits* at all. States should refuse to comply with the EPA's dictates.

The Clean Power Plan

The Clean Power Plan leverages a rarely-used section of the Clean Air Act, Section 111(d), to require each state to regulate its production, transmission, and consumption of electricity so as to meet certain numerical carbon-dioxide emissions standards that vary from state to state. Section 111(d) is an obscure provision that has been used to regulate only a handful of specific sources, such as solid-waste incinerators. From this modest provision, the EPA has plucked one of the most ambitious regulations in the history of the administrative state.

Under Section 111(d), states are required to develop standards of performance for emissions sources in accordance with the "best system of emission reduction" ("BSER") that the EPA has determined to be "adequately demonstrated" for that source category, taking costs and other factors into account. The BSER typically involves technological devices at the facilities, but in the Clean Power Plan, EPA has stretched the meaning of BSER to cover an expansive range of facilities and activities well beyond those actually subject to Section 111(d).

The BSER that EPA has "determined" for the Clean Power Plan consists of four categories (or "blocks") of measures states are to take in order to reduce carbon emissions. These mandated measures include costly and almost certainly impossible 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 everyday Americans (Block 4). Of these, as the EPA admits, only Block 1 is something that the EPA could regulate under Section 111(d) assuming it has the authority to regulate CO2 under that section at all, which it does not, as explained further below.

The EPA expects the proposal to be adopted as a final rule in the summer of 2015. It will then require that states submit "state plans" within 12 months. The state plan must include all of the BSER the EPA requires for each of the four blocks. If approved, those plans will become enforceable by the EPA as federal law. If states fail to file an approvable plan by the deadline, EPA has to file a "federal plan," about which little is known, but as to which EPA has promised more details in guidance to be published

continued

this summer. But whether they choose a state or 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 shut down a significant number of the state's power stations in order to meet the plan's statewide emissions targets.

The key to understanding the Clean Power Plan is the EPA's discovery of infinite elasticity in the concept of BSER. This term has always been understood to apply to some specific technological device commercially demonstrated for use at the individual facilities. But now the EPA is stretching it to encompass virtually the whole economy of each state. The EPA reasons that if a state adopts the measures called for in the four Blocks, most of which involve entities and activities well beyond the facilities actually subject to Section 111(d), the state's power plants will achieve the EPA's ambitious carbon-emission goals. These "beyond the fenceline" measures include the regulation of dispatch to the electrical grid and energy consumption, matters that EPA has no power to regulate under Section 111(d).

Unconstitutional Coercion

State participation in the Clean Power Plan is nominally voluntary. However, "encouragement" is provided in the form of an unprecedented punitive threat, namely that of imposing onerous costs on the states' electrical generation, and shutting down a significant portion of it all together. The choice states face is between massive cost increases and a potentially catastrophic disruption of electrical generation.

In a typical state like Texas, no single state agency has authority over the matters the EPA seeks to regulate through the Clean Power Plan. Thus, most states will have to enact legislation to reorganize and expand the authorities of their state agencies whether they adopt a state plan or a federal plan. This constitutes a kind of federal coercion of the states the Supreme Court has never upheld.

In *New York v. United States* (1992), the Court said:

> A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

Yet that's exactly what the Clean Power Plan does: both the state plan and the federal plan are unconstitutionally coercive regulatory techniques, and the states are forced to choose between them.

Furthermore, this isn't even a case of overlapping federal and state jurisdiction, which is usually presupposed in the cooperative federalism programs the Supreme Court has approved. The EPA is leveraging its power to affect one sector of industry in order to influence state regulation of other sectors, and then on top of it all it is requiring states to delegate enforcement authority over the resulting state regulations to the EPA. The prospect of delegating state authority to the EPA is reason enough for states to refuse to propose even partial state plans, such as the Block 1 plans that some state agencies are reportedly developing.

Illegal Under the Clean Air Act

In addition to being unconstitutional, the Clean Power Plan faces a number of serious statutory hurdles.

With respect to electrical regulation, federal statutes (which the EPA cannot override) specifically leave most things to state jurisdiction, with a limited role for the Federal Electrical Regulatory Commission, and virtually none at all for the EPA. The Federal Power Act specifically reserves the regulation of wholesale electricity markets to FERC and further limits FERC's authority to "only those matters which are not subject to regulation by the states." In Texas, the retail electricity market is almost wholly regulated by the state.

Yet another problem is that the regulation of carbon emissions under Section 112 of the act pre-empts regulation under Section 111(d). The EPA relies on what it deems an "ambiguity" created by differing amendments to Section 111(d) by the House and Senate in the 1990 Clean Air Act Amendments Act. Yet the supposedly contradictory amendments can be fully incorporated into the Clean Air Act without any conflict or ambiguity at all.

No Environmental Benefits

Section 111(d) of the Clean Air Act requires the EPA to show that sources to be regulated are contributing to an identified danger. EPA simply has not made the requisite findings. Therefore the Clean Power Plan could be held to

impose costs out of all proportion to benefits, without the rational basis that the EPA must prove in order to sustain a rule under the Administrative Procedure Act. Indeed, the EPA itself admits that the plan's CO2 reductions would only reduce projected warming by at most 0.02 degrees Celsius, which would not even be measurable.

Conclusion

States that attempt to comply with the EPA dictates through state plans will enable an unprecedented expansion of the federal government over powers long reserved to the states. States should not be complicit in the EPA's unconstitutional and illegal power grab. ☆

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.

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