



Organizing Resistance to the EPA: States Must Work Together

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Key Points

- The EPA admits the Clean Power Plan will have no measurable impact on global temperatures.
- The EPA is asking states to do things it does not have the authority to impose through the Clean Air Act.
- One of the best ways for states to coordinate their responses to the Clean Power Plan is through an interstate compact.

Introduction

The U.S. Environmental Protection Agency (EPA) has announced that it will finalize a sweeping new regulation, the Clean Power Plan (CPP), to fight climate change. The CPP is designed to reduce carbon emissions from existing electrical power plants, chiefly coal plants.

Yet, the EPA admits the CPP will have no measurable impact on global temperatures. Across whole regions of the country the main effect will be either steeply rising electricity rates or potentially catastrophic shortages of electricity.

The problem for the EPA is that most of what it is asking states to do for an approvable state plan is not something the EPA has any authority to impose directly under the Clean Air Act (CAA). Specifically, the federal plan cannot touch entities that are not subject to Section 111 of the Clean Air Act. That makes it very different than other cooperative federal-state regulatory programs that require states to implement the requirements of an EPA rule.

Differing from most other cooperative federal-state regulatory programs, the CPP attempts to direct state regulatory actions in areas that the federal government doesn't have the authority to regulate itself. For instance, an approved plan under the CPP would require states to follow federal dictates regarding the fuel mix used in generation and the amount of energy used by consumers. This is the case even though the EPA lacks statutory authority to

regulate these areas. Additionally, the EPA has neither the authority to force states to submit approvable state plans or to impose the majority of the CPP on states that fail to submit a plan.

To get around this problem, the EPA designed the CPP in a way that attempts to force the states to choose between significantly higher prices or potentially severe shortages. This has put states like Texas into a bind. State agencies may be examining how their states can comply with the Clean Power Plan. However, even if they want to comply there is almost nothing most states—including Texas—can do to comply with the CPP's requirements for a federally approvable state plan without major legislative changes.

In many states the CPP has created such a dilemma for state governments that legislatures are deadlocked in their attempts to understand the impact on electrical utilities and coal-fired power plants, and for the towns that employ them.

While state legislatures have been busy analyzing the general situation, state agencies have been digging through the details of the CPP. Agencies have their own considerations, and their own regulatory environments. In many states, the regulatory agencies that interact with the EPA are developing plans that would partially comply with the CPP under its Block 1, which requires states to make coal-fired generation more efficient, resulting in less CO₂ emitted per unit of electricity generated.

Block 1 (see more below on the CPP's four building blocks) is the only part of the CPP under which the EPA has at least some semblance of authority to regulate generation.

There is a lot to be said for the partial Block 1 compliance approach, but there are also considerable risks. States should not act as if they were in a Prisoner's Dilemma in which cooperation with the EPA—rather than coordination with each other—is the only rational response. They are not. They should coordinate their response to EPA, and forge a united front. The stronger the agreement among the states, the stronger their chances of staring down the EPA.

How the Clean Power Plan Works

Under Section 111(d) of the CAA, the EPA is empowered to designate a “best system of emissions reduction” (or “BSER”) for facilities that emit certain pollutants. Normally, the “BSER” is a “scrubber” or some other technology that physically reduces emissions at the source facility. But the EPA's creative lawyers have discovered almost infinite elasticity in the concept of a BSER. With the CPP the BSER would require reworking each state's mix of electric generation and consumption, matters that the Federal Power Act leaves to the states and, in a few cases, to the Federal Energy Regulatory Commission.

The core of the CPP is its BSER, which consists of four baskets, or “blocks,” of measures that states must undertake in order to reduce coal-fired electrical generation. These measures include costly and in some cases infeasible improvements in heat rates of emissions rates of coal-fired power generation (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 consumers (Block 4) through so-called energy efficiency measures. Of these, as the EPA admits, only Block 1 is something that EPA could ordinarily impose directly under the Clean Air Act.

The trouble for many state agencies is that, without new sweeping legislation, the most that they (i.e., the states) can do under their statutory authorities is something under Block 1. But even there, many agencies are studying only partial compliance, because fully meeting the EPA's goal of 6 percent improvement in heat rate for Block 1 is virtually impracticable, and certainly not “adequately demonstrated” as the Clean Air Act requires for plans under Section 111(d).

State legislatures are hesitant to defy the EPA since any legislature that does so could be singled out for harsh treatment by EPA. This fear is not baseless, as evidenced by the case of the Prevention of Significant Deterioration (PSD) and Title V permitting requirements for greenhouse gases in Texas in 2011. State utilities are under similar pressure. They have to operate within their regulatory environment, and that means operating on the assumption that a proposed federal rule will be largely implemented, no matter the increased cost to consumers.

Risks of a Block 1 State Plan

While it appears some states are considering letting their state agency file a partially compliant state plan, these states run a considerable risk in doing so. The EPA could approve the plan in partial fulfillment of the requirements for a fully approvable state plan under the Clean Power Plan. In that case, the enforcement provisions of the Clean Power Plan, which provide for federal enforcement of approved state plans, could kick in. In this scenario, a state might be deemed by the courts to have acquiesced to the authority of the EPA to implement the entire CPP, even though it doesn't have the authority under federal law to do so. In other words, a partial response might force a state to fully comply with the CPP.

If the risks of that scenario are attenuated by certain factors, as explained below, there is still an over-arching risk in letting state agencies operate on auto-pilot. Many stakeholders are swinging into action, and they are espousing divergent views of the best approach to the CPP. State environmental agencies—those generally on the hook for any federal regulation under Section 111—are not the only ones who must respond; electrical utilities, the owners of coal-fired generating plants, and both natural gas and the renewable source generators have their own interests affected as well. How these major stakeholders react is a major concern, particularly under a state policy of no reaction. This is why it is strongly recommended that states coordinate their response to EPA, preferably through a multi-state agreement or interstate compact.

In its preamble, the proposed rule states the following:

Under CAA Section 111(d), a state must submit its plan to the EPA for approval, and the EPA must approve the state plan if it is “satisfactory.” If the state does not submit a plan, or if the EPA does not approve a state's plan, then the EPA must establish a plan for

that state. Once a state receives the EPA's approval for its plan, the provision in the plan become federally enforceable against the entity responsible for noncompliance, in the same manner as the provisions of an approvable SIP under CAA Section 110.

[79 Fed. Reg. 34830, 34844 (June 18, 2014).]

Hence, a state agency that submits even a partially compliant Block 1 plan risks federal approval, and as a result also risks triggering federal enforcement authority, by state election. That consideration alone might counsel against submitting even a partially compliant state plan. Moreover, some states have non-delegation provisions in their constitutions that may prohibit the filing of a state plan under these circumstances. However, the direct consequences may not be as harmful as they first appear.

The federal-state confrontation over PSD/Title V permitting under the Obama administration's early CO₂ regulations was a clear violation of the Texas Constitution. The EPA requires state law to accommodate any new National Ambient Air Quality Standards for the six criteria pollutants. That was a delegation of legislative authority, and ran clearly afoul of the non-delegation principle of the Texas Constitution as explained by the Texas Supreme Court in *Trimmer v. Carlton*, 296 S.W. 1070 (1927). As the court explained in that case: "The general rule is that when a statute is adopted by a specific descriptive reference, the adoption takes the statute as it exists at that time, and the subsequent amendment thereof would not be within the terms of the adopting act."

That was a major problem in the case of the PSD/Title V permitting controversy. However, in the case of the CPP, the EPA is not asking for authority to change state law prospectively. And nothing in the CPP suggests that the federal enforcement triggered by EPA approval of a partially compliant Block 1 state plan would go beyond Block 1 to affect entities and activities outside Section 111 of the Clean Air Act—in other words, the measures determined as BSER for Blocks 2, 3, and 4.

So while the risks of direct consequences of letting a state agency file a partially compliant Block 1 plan may be less than originally thought, a more significant difficulty arises for states in their inability to control—without an act of the legislature—what other stakeholders might do.

Electric utilities, faced with imposition of a federal plan, might start proffering alternative supplies of electricity, as envisioned by building Blocks 2, 3, and 4. The federal plan could theoretically impose a cap-and-trade or similar scheme to incrementally shut down coal-fired electrical power plants. Part of the danger of the CPP is that if electric utilities see such a scheme on the horizon, they will start planning for it. The market would likely start discounting the value of coal-fired power plants, in an industry that has already seen declining values due to heavy regulation and competition from natural gas. This could result in a shift away from less expensive coal-fired generation to more expensive renewable generation or to major expenditures on new gas-fired generation—even without the CPP being implemented in a state. Thus a state that successfully obstructs implementation of the CPP might still experience significantly increased electricity costs. Texas, with its energy-only market that provides regulators little control over the fuel mix, is particularly susceptible to this scenario.

Escaping the Prisoner's Dilemma

In game theory, the Prisoner's Dilemma presupposes that the prisoners cannot coordinate their action. Game theory teaches that if they could coordinate their response, they would all be released. But because they can't communicate, they can't coordinate their response, and as a result, all the players accept the sub-optimal result of continued detention.

Given the potential effects of the CPP, state governments may believe they are locked in a Prisoner's Dilemma. Stakeholders might be loath to paint a target on their backs for the EPA. The state legislature may be loath to paint a target on the state's back. The overwhelming incentive might seem to be to do nothing but comply with the EPA. However, if states take that route, they do trap themselves in such a dilemma.

State officials face a similar situation. If they prefer to prohibit any form of compliance with the EPA's proposed rule and if a lot of other states do the same, then the correct move is for states to coordinate amongst themselves to agree on such a response. Just as mutual agreement is the way out of the Prisoner's Dilemma, mutual agreement among the states is the way out of the dilemma that states are now confronting with the EPA.

Recommended Elements of a Multi-State Compact

One of the best ways for states to coordinate their responses to the CPP is through an interstate compact. A compact that impacts federal law normally needs congressional approval. But a mere multi-state agreement, such as the “reciprocal legislation” exemplified by the Uniform Commercial Code, does not need congressional approval if it does not directly impact federal law. That is a proper place to begin the analysis of what states can do together.

A compact or reciprocal legislation to the effect that states will simultaneously refuse to adopt any measures in compliance with the Clean Power Plan would be a powerful device. If the agreement is made contingent on a certain number of states adopting, it, the agreement would have simultaneous legal effect, enhancing its effectiveness as a coordination device.

Beyond those elements, the compact could also include a provision that suspends the EPA’s ability to impose any measures under a federal plan if a state fails to file an approvable state plan. However, such a provision would directly impact federal law, and would need congressional approval. Such an approach should be coordinated with congressional allies from the start, and—if achieved—holds the greatest promise of pushing back the EPA’s overreach.

Conclusion

It is crucial that state agencies and stakeholders consider their options carefully. The consequences of not working together within states, and not working with other states, could be particularly damaging in the context of the Clean Power Plan’s design that attempts to place states between a rock and a hard place. ★

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