How a drafting error could doom Obama's carbon regulations

Looks like the government needs a copy editor...

By Josiah Neeley | July 30, 2014 23 47 7

Back to reality. (Jeff Swensen/Getty Images)

On June 2nd, the U.S. Environmental Protection Agency unveiled its "Clean Power Plan," a new proposed rule for power plants that could fundamentally alter America's energy landscape. The Plan, which would require a 30 percent reduction of carbon-dioxide emissions from electrical generation by 2030, has enormous implications for the course of the U.S. economy and electrical grid. If implemented, it could be one of the most important features of Obama's legacy as president.

To be implemented, though, the Clean Power Plan must first survive a court challenge. And that's a big problem for the administration, because the EPA's assertion of authority in the rule is likely illegal on many levels.

To understand why the Clean Power Plan may be at risk, we need to take a brief detour into the exciting world of federal environmental law. The EPA's authority to regulate air emissions is governed by the Clean Air Act, which breaks that regulatory authority into different categories. Section 111(d) of the act, for example, gives the EPA authority to set certain standards for existing power plants, while section 112 of the act authorizes EPA to regulate for certain hazardous pollutants. There is a significant amount of overlap between these two categories, and so to avoid duplicative regulation, the EPA was initially prohibited from issuing regulations under 111(d) for pollutants already regulated by 112.

Here's where it gets complicated. In 1990, Congress passed a major set of amendments to the Clean Air Act. The House version of the bill expanded the limitations on 111(d) by prohibiting the EPA from using it whenever an entire category of pollutant sources (e.g. power plants) had already been regulated by 112. Under the old rule, the EPA would be prevented from regulating, say, mercury emissions from power plants under 111(d) if it had already regulated those emissions under 112. Under the new version, once EPA had regulated mercury emissions from power plants under 112,

it would have to stick with 112 to regulate other types of power plant emissions. Section 111(d) would be off the table. The Senate version made some minor changes to the statutory language, but didn't make this change.

Ordinarily, when the House and Senate pass different versions of the same bill, any discrepancies are reconciled by a Conference Committee. In this case, however, the Committee was asleep at the switch, and included both the House and Senate amendments to the language in the final bill. Since the two versions of the language are inconsistent, this has created a bit of a statutory puzzle. The U.S. Code includes the House language. The EPA, by contrast, has long maintained that the Senate language is what governs.

This matters, because under the House language, the EPA's Clean Power Plan would be illegal, since the EPA has already issued regulations under 112 of the same "source category" as the existing power plants covered in the new rule.

States have already started to raise issues about the EPA's purported justification of the Clean Power Plan. On June 26th, the attorneys general of Alabama, Alaska, Kentucky, Ohio, Oklahoma, South Carolina, West Virginia, and Wyoming filed legal documents calling the EPA's actions "nothing short of extraordinary" and asking for the rule to be withdrawn.

This case of Schrödinger's legislation is hardly the only legal issue raised by the Clean Power Plan, or even the most substantially important. As currently proposed, the EPA's rule could fundamentally transform America's electric sector, centralizing authority over what has always been a state prerogative. The economic consequences of the rule could be severe, and risks to the reliability of the electrical grid are quite real. Even in strictly legal terms, the Clean Power Plan raises issues of legal interpretation and administrative law that are far meatier than the issue of the inconsistent amendments.

Given the nature of the stakes involved, it may seem odd that the the Clean Power Plan should stand or fall on such esoteric technicalities. But as the recent D.C. Circuit decision in Halbig shows, legal challenges need not raise profound issues of political philosophy in order to have a major effect on the law.

Depending on who you ask, Halbig either involves an attempt at federal incentivization that backfired or the mother of all drafting errors. Under the Affordable Care Act, popularly known as ObamaCare, states were given the opportunity to set up health insurance exchanges, in which some individuals would be eligible for subsidies to help pay for the health care they chose. The law provides that if a state chooses not to set up an exchange, the federal government can do so. The problem was, subsidies are only authorized on the state exchanges, not the federal ones. This might have been written into the law as an attempt to incentivize states to set up their own exchanges or it might have been an oversight. It depends on who you ask. But given that 36 states declined to set up their own exchange, the lack of subsidies for the federal exchange could have a huge impact. When the IRS went ahead and authorized subsidies for the exchanges anyway, lawsuits naturally followed.

Now, there's not widespread agreement in the courts about the wording of the Affordable Care Act. One appeals court ruled against the federal government, another didn't. But I suspect there will be very little doubt that there was an error in the drafting of Section 111(d). As in Halbig, the EPA finds itself in the position of ignoring the plain language of the U.S. Code while attempting to justify this action by claiming that it shouldn't be hampered by Congress' "drafting error."

The reality is that government action is thwarted by "technicalities" all the time. Liberals who refuse to take such arguments seriously do so at their own peril.

Josiah Neeley Follow @jneeley78

Josiah Neeley is a Policy Analyst for the Armstrong Center for Energy and the Environment at the Texas Public Policy Foundation.