



Power Play by the EPA

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Key Points

- A reduction in global temperature of 0.02°C is not worth Texas' state sovereignty, economic stability, or sacrifice of the most successful electric grid in the country.
- Texas generates 11 percent of the nation's electricity, yet is tasked with 17 percent of the CO₂ emission reduction.
- The CPP would allow the EPA to not only dictate the end goal for a state's energy policy, but also the best way to achieve it.
- The total amount of CO₂ emissions the EPA hopes to reduce across the country by 2030 would be emitted by China in less than two weeks.
- CO₂ is produced by every human action.

Introduction

Rather than debate the existence of climate change, consider that a reduction in global temperature of 0.02°C is not worth Texas' state sovereignty, economic stability, or sacrifice of the most successful electric grid in the country. These are the terms of acceptance of the U.S. Environmental Protection Agency's (EPA) Clean Power Plan (CPP)—or any other plan that seeks to reduce CO₂ through shuttering coal-fired power plants.

The EPA released the Clean Power Plan in June 2014. This proposed rule mandates a 30 percent reduction in CO₂ emissions from existing electric generation by 2030 from 2005 levels. The CPP would require a re-engineering of the nation's electric generation and arrogate long-held state authority over electric utilities to impose federally centralized low-carbon operation of the electric power system.

Packaged under the auspices of choice, the EPA's proposed rule mandates that states submit an implementation plan one year after release of the final rule. If a state fails to submit a plan, or if the EPA rejects the plan, the EPA would seize control of the offending state's electric grid and implement a plan of its own construction. To date, neither the final rule nor a model of the federal implementation plan has been promulgated, though the EPA has stated its intent to do so late this summer.

Four Building Blocks of the Clean Power Plan¹

1. *Building Block 1* mandates a 6 percent heat-rate (fuel efficiency) improvement for each coal-fired power plant.
2. *Building Block 2* envisions an increase in utilization of combined cycle natural gas plants by 70 percent of the total electric generation capacity and an according reduction in coal-fired generation.
3. *Building Block 3* requires a massive deployment of renewable energy to average 13 percent of state capacity across the country. However, modeled targets vary widely between the states. Texas is assigned the highest target, a 150 percent increase of its already installed renewable capacity.
4. *Building Block 4* focuses on demand for electricity rather than supply. It would require states achieve annual incremental savings in demand of 1.5 percent, measured as a percent of retail sales avoided through demand side management measures. Incremental savings are understood as a reduction in electricity use connected with new energy efficiency programs in a given year.

Under the Clean Air Act, the EPA is authorized to regulate pollutants at the physical source of the emissions from individual industrial facilities—commonly described as “inside the fence” of the power plant. Yet, the core measures in EPA’s proposed CPP require wide-ranging actions “outside the fence” extending—state by state—to the entire national system of electric generation. Once EPA asserts authority beyond the source “inside the fence,” EPA’s power to compel lacks a limiting principle under the law.

While the first building block is the only one of the four that operates “inside the fence,” the heat rate mandate is likely unachievable for most coal-fired plants in the country. Due to the relative youth of Texas’ coal fleet, many coal-fired plants have already optimized their heat rate efficiencies. Industry sources indicate that a one-to-three percent reduction is all that would be achievable.

Forced fuel switching mandated by *Building Block 2* would necessitate the closure of hundreds of coal-fired plants across the country; in Texas it means as many as 19 to 25 closures. Making matters worse, many of those coal-fired plants may prematurely retire within the next three years as a result of costs to comply with the CPP and the EPA’s earlier promulgated Mercury Rule. These coal-fired plants represent 16,500 out of 110,000 megawatts of generating capacity.

Early closure of coal-fired power plants is enough to raise significant questions about grid stability. Couple that with an increase in reliance on renewables, like intermittent wind generation, and the likelihood of statewide brownouts during peak usage times becomes all but certain.

Regarding renewables, no “battery” exists that can store renewable electricity for use during off-peak production times. The sun doesn’t shine at night. The wind doesn’t blow at all hours. In fact, when it becomes too windy turbines must be shut off entirely to prevent an expensive malfunction. This means that coal and gas-fired plants must be kept in spinning reserves (idle) in order to ramp up quickly and meet demand. This is costly, wasteful, and unnecessary.

Through the CPP, the EPA attempts to assert its authority to regulate everything, and anyone, who has an effect on CO₂ emissions. This includes retail consumers who use electricity from a plant to charge their phone, watch TV, use the air conditioner—or worse yet, charge their electric car.

Generation

At its heart, the CPP is no more than a base attempt to eliminate coal-fired power plants. Texas generates 11 percent of the country’s electricity, as much as Florida and California combined.² However, under the CPP, Texas is tasked with 17 percent of the nationwide CO₂ reduction—a burden far heavier than any other state. In fact, Florida and Louisiana, the states with the next highest reduction burdens, have reduction targets that, are half that of Texas.³

In order to achieve this lofty reduction of CO₂, the EPA envisions an increase in utilization of combined cycle natural gas plants by 70 percent of the total electric generation capacity. However, if Texas relied on natural gas plants to meet 100 percent of demand, CO₂ emissions would still exceed the standards set out in the Clean Power Plan.

Currently Texas leads the nation in renewable electric generation with 12,000 megawatts of installed wind generation. If Texas were considered a nation, it would rank fifth in largest renewable capacity. Yet, the CPP requires Texas increase renewable generation by more than 150 percent—higher than any other state.

Texas is in a unique position; 85 percent of the electric load is operated entirely intrastate by the Electric Reliability Council of Texas (ERCOT). States seeking to comply with the plan are given one year to submit a state plan if they intend to proceed alone, while states that are proceeding as part of a group are given an additional year to present a plan. The EPA touts the interconnectedness of the national grid and the opportunity to develop regionally based state implementation plans, but Texas stands almost entirely apart.

The Clean Air Act and EPA's Manipulation

Plainly, the EPA's plan attempts to rewrite the Clean Air Act (CAA) and expand the scope of its authority in breathtaking, baseless, and unconstitutional ways by claiming authority under §111(d) to regulate source emissions from power plants already regulated by §112 of the Act.⁴

The EPA's assertion of authority, that it is authorized to regulate CO₂ emanating from existing sources under §111(d), fails on its face.

Section 111(d) provides: Standards of performance for existing sources; remaining useful life of source

- (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which
 - (A) establishes standards of performance for any *existing source* for any air pollutant
 - (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408
 - (a) of this title *or emitted from a source category which is regulated under section 7412 of this title...*⁵

Section 112 or, "Section 7412," refers to the section of the CAA that establishes programs for protecting public health and the environment from exposure to 188 listed air pollutants⁶—notably, CO₂ is absent from this list. Anticipating that the EPA would regulate electric power plants under §112, as part of the 1990 amendments, Congress enacted §112(n)(1) to evaluate regulation of those plants under §112 within three years. In 2000, the EPA included coal-fired electric generating plants as part of its "source category" under §112 and since then it has never ceased.⁷

Simply, if an existing source is regulated by the EPA under §112, it may not be regulated under §111(d) as well.

As if the plain language of the Act was not enough to settle the issue, the EPA has attempted to argue that the House and Senate versions of §111(d) were both enacted in the 1990 CAA Amendments, and that both amendments amount to two separate versions. The fact that the U.S. Code only reflects one of the amendments, EPA officials assert, causes an ambiguity that opens §111(d) up to their reasonable interpretation.⁸

At the outset, this argument denies the fundamental rule of statutory interpretation—that agencies *must* attempt to reconcile or harmonize statutory provisions—rather than claiming the power to pick which provision best suits them for enforcement.⁹

The House amendment provided a substantive change to §111(d), which is now present in the U.S. Code, and provides that the EPA may not regulate emissions of any pollutant from a source category already regulated under §112. Before the 1990 Amendment, the concept of "source categories" did not even exist; §111(d) focused on whether the pollutant was listed in §112, and therefore agreeable to regulation. As Constitutional scholar and liberal icon Laurence Tribe states in his written testimony before Congress, "The amendment changed the restriction in §111(d) from one triggered by hazardous air pollutants amenable to regulation to one triggered by source categories actually being regulated under §112."¹⁰

The Senate amendment amounts to nothing more than a clerical change. It operated by striking "§112(b)(1)(A)" and inserting "§112(b)."¹¹ It appears later in the statute at large as a conforming amendment that was needed to bring §111(d)'s cross-reference section up to date with §112.¹²

The Legislative history is clear: the Statement of Senate Managers states unequivocally that the "Senate recedes to the House" with regard to the substantive provisions in §111(d).¹³ Once the House amendment was adopted, the Senate's conforming amendment was rendered non-executable *because the replaced reference no longer existed*. This clerical error is one the EPA itself expressly recognized as a drafting error that should not have been considered in 2005.¹⁴

Importantly, if effect is given to both amendments, the EPA still lacks statutory authority. The two amendments can be applied jointly to prohibit regulation “under §111(d) of any hazardous air pollutants already regulated under §112, as well as any emissions of any pollutants from a source in ‘a source category which is regulated under §112.’”¹⁵ This leaves no room for agency discretion.

Agencies are creatures of statutory creation, and as such, they possess only the authority Congress imbues them with. Absent Congressional direction, agencies are not permitted to expand their authority. If Congress had intended for the EPA to regulate CO₂ as a hazardous or dangerous emission under §112 or §111(d), then Congress would have affirmatively done so.

State Sovereignty

In his testimony in March before the U.S. House committee on Energy and Commerce, Prof. Tribe asserted that “[the CPP’s] submissive role for the States confounds the political accountability that the Tenth Amendment is meant to protect. The EPA’s plan will force States to adopt policies that will raise energy costs and prove deeply unpopular, while cloaking those policies in the Emperor’s garb of state choice[.]” “Such sleight of hand,” Tribe says, “offends democratic principles by avoiding political transparency and accountability.”¹⁶

The U.S. Supreme Court, in *New York v. United States*, condemns arrangements that impede accountability and conceal political choices because, “where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”¹⁷

In the recent oral arguments for *King v. Burwell*, a case with significantly similar federalism issues to those at issue here, Justice Kennedy noted that “serious constitutional problem[s]” can result if a federal statute was interpreted as threatening the citizens of a state with significant injury *unless* the state agreed to follow federal policies.¹⁸ Further, states could not have expected that when the Clean Air Act was adopted and they took on costly implementation plans to regulate conventional pollutants from sources like power plants, that the EPA would eventually seek to phase out those plants entirely by regulating CO₂, which is produced by *every* human action.

Under the CPP, the EPA would not only regulate emissions, but would also regulate electricity production, consumption, and distribution within each state. These are matters that have always been deemed to be entirely within a state’s powers according to the Federal Powers Act, which provides that states have exclusive jurisdiction over intrastate electricity matters. The CPP would allow the EPA to not only dictate the end goal for a state’s energy policy, but also the best way to achieve it—reducing states to nothing more than marionettes on federal strings.¹⁹

CO₂ is a Greenhouse Gas that’s Good for the Greenhouse

CO₂ has none of the attributes of a pollutant. Current ambient levels of CO₂ in the atmosphere have no direct impact on human health. Rather, the reverse is true—CO₂ is the building block of life and is produced from all human endeavors.

“CO₂ is the chemical compound used by plants to construct their tissues—the food source of animals and humans. The EPA may call CO₂ a dirty pollutant, but it remains the ‘gas of life’ for living plants and likewise for humans, who depend upon plant growth for food.”²⁰

An increase of slightly more than 100 parts per million of CO₂ has occurred in the atmosphere since the beginning of the Industrial Revolution. Far from being disastrous, numerous studies have shown the opposite, that the increase in CO₂ has enhanced plant productivity, growth, moisture retention and resistance to pests.²¹ Among other things, this means that food supply is increased using the same amount of land.²²

Conclusion

The CPP would destroy the Texas competitive electricity market and make carbon content—not price, reliability, or safety—the first priority of electric power to the grid. Worse yet, the total amount of CO₂ emissions the EPA hopes to reduce across the country by 2030 would be emitted by China in less than two weeks.

Texas should not rush headlong into futility at the expense of its sovereignty, economy, and electric grid. The stakes are not greenhouse gas emissions; the stakes are rooted in the very concept of federalism and state authority. ★

Notes

¹ Kathleen White, “EPA as Overlord of the U.S. Electric Power,” (Oct. 2014) (referenced throughout).

² White, “EPA as Overlord of the U.S. Electric Power,” at 9.

³ *Ibid.*, at 5.

⁴ 42 U.S. §7401 et. seq.

⁵ 42 U.S. §7411(d). (emphases added).

⁶ Laurence Tribe, Testimony of Laurence H. Tribe, *EPA’s Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues*, HOUSE COMMITTEE ON ENERGY AND COMMERCE: SUBCOMMITTEE ON ENERGY AND POWER, 34 (17 MAR. 2015).

⁷ Tribe, at 36.

⁸ Tribe, at 40.

⁹ *Id.*; *Branch v. Smith*, 538 U.S. 254, 273 (2003) (*emphasis added*).

¹⁰ Tribe at 40 – 41.

¹¹ Pub. L. No. 101-549, §302(a).

¹² Tribe, at 42.

¹³ *Ibid.*, at 42; 136 Cong. Rec. 36,065 (1990)(Chafee-Baucus Statement of Managers).

¹⁴ 70 Fed. Reg. 15994,16031 (Mar. 29, 2005); Tribe, at 43.

¹⁵ Tribe, at 45.

¹⁶ *Ibid.*, at 3, 22.

¹⁷ 505 U.S. 144, 169 (1992).

¹⁸ *Ibid.*, at 4.

¹⁹ *Ibid.*, at 17.

²⁰ Kathleen White, “Fossil Fuels: The Moral Case,” at 20 -21 (June 2014).

²¹ White, “Fossil Fuels: The Moral Case,” at 19. [Citing Craig D. Idso, “The Positive Externalities of Carbon Dioxide: Estimating the Monetary Benefits of Rising Atmospheric CO₂ Concentrations on Global Food Production,” Center for the Study of Carbon Dioxide and Global Change (Oct. 2013)].

²² White, “Fossil Fuels: The Moral Case,” at 20.

About the Author



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