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## Environmental LAW

### EPA's Clean Power Plan subject to litigation, congressional challenges

As we reported in the August column (*The Daily Record*, Aug. 3, 2015), the U.S. Environmental Protection Agency issued a rule that sets the first limits on carbon emissions from power plants in the country. Although issued with celebration by the Obama Administration and certain environmental groups, the Clean Power Plan rule issued pursuant to the Clean Air Act has caused significant opposition from the states, power industry and business. However, with the Paris Climate Summit just completed, EPA and the Administration are intent on moving forward with regulations and executive action.

As an overview, the rule seeks to achieve a 32 percent reduction in emissions from 2005 levels by 2030. The goal is to reduce carbon dioxide in the power industry which would be accomplished by reducing coal's share of the electric production pie. Currently it provides 39 percent of the country's power. However, EPA predicts that it will supply 27 percent based on the rule and market forces, including competition from natural gas.

The rule sets up state-specific emission limits based on the greenhouse-gas emission levels in the state's electricity portfolio. The rule provides that each state will have interim targets that must be met beginning in 2020. States will have one year to develop and submit their individual compliance plans, a regional plan in conjunction with other states, or to seek extensions. Following the submissions, EPA will have one year to approve or reject the plan. EPA is also developing a federal model that states may use or which EPA may impose if a state fails to comply. EPA has referenced cap and trade schemes as a way for states to comply.

EPA has set the renewable share at 28



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percent of the electric generation. EPA has reduced the share of coal production to 27 percent by 2030. Nuclear power plants do not produce greenhouse gases and account for about 20 percent of the current power portfolio. However, nuclear energy will not count towards the state's goals unless the plants expand.

Several nuclear reactors are set to close, which will require the affected states to keep these sources in place or overcome the loss of clean energy with other sources.

The rule is already subject to serious legal challenge from parties across the spectrum — the coal industry, power providers, business groups and states. There are significant questions whether EPA has the constitutional authority and statutory basis under the Clean Air Act to issue the rule. Initially, EPA has gone from regulating single emission sources (i.e., plants and smokestacks) to a sweeping re-design of the US energy system. The plan also appears to trample on principles of federalism under existing Clean Air Act programs because generally EPA sets emission limits and allows states to meet them, but the rule instead commands states to meet a national model. Another concern is whether EPA has double-regulated existing power plants, which is prohibited under the Clean Air Act.

West Virginia and 25 states filed suit challenging the Clean Power Plan. In other cases the US Chamber of Commerce and more than a dozen industry groups are the

plaintiffs. Several of the states and industry groups have requested the D.C. Circuit to stay the implementation of the rule pending the litigation being resolved due to the significant and immediate costs that are imposed on states and utility companies. In sharp contrast, 18 states, including New York and California, have sought to intervene in the cases in support of the EPA's rule.

In other climate related litigation under the Clean Air Act, 24 states have brought suit against the EPA's new source performance standards for carbon dioxide emission from new power plants. Conversely, 16 states have filed to intervene in this set of cases on behalf of EPA. While the EPA's new regulations have pitted the states against each other, it has also sparked different approaches within individual states, with some governors and attorneys general being at odds over legal positions.

At the Congressional level, the House and Senate have taken steps to challenge the Clean Power Plan. On December 1, the House adopted a Senate resolution against the Clean Power Plan by a 242-188 vote. Similarly, on the same date the House passed a resolution against the EPA's power plant rule. Clearly Congress is upset with the Obama Administration's attempt to circumvent the legislative process and act unilaterally on climate change issues after failing to succeed on a cap and trade bill in the early years of the Administration. Congress is also planning to hold hearings on climate change matters in 2016.

Despite significant opposition from Congress, the Obama Administration participated in and trumpeted the Paris Climate Conference. The Administra-

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tion is touting a non-binding agreement from the countries in attendance to hold the global temperature rise well below 2 degrees Celsius (3.6 degrees Fahrenheit) and aim for 1.5 degree Celsius. Despite the lack of binding provisions or penalties for non-compliance, the agreement is said to be productive because it will provide pressure on countries to comply. Although the agreement specifically avoided bind-

ing provisions and will not be submitted to Congress for approval as a treaty, nor would it have obtained two-thirds Senate approval, the Obama Administration is intent on pressing forward with executive action and regulations.

The Clean Power Plan and the Obama Administration's climate agenda will dramatically affect energy, industry and the public in a variety of ways if fully implemented. Adoption of sweeping regulation by EPA rather than by elected members of

Congress, accountable at election-time to the votes, is cause for concern. The outcome of legal challenges and budgetary limits will be critical in addressing executive and regulatory actions in this area.

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