



Harvard Kennedy School Energy Policy Seminar Series, Fall 2014

Legal and policy perspectives on EPA's proposed clean power plan

Monday, October 6, 2014

By Louisa Lund, Program Director, Consortium for Energy Policy Research

Is EPA's proposal for regulating carbon emissions from existing sources a reasonable interpretation of the Clean Air Act, likely to lead to significant environmental benefits at reasonable economic cost, or is it an overly complex overreach, likely to be overturned by the courts or abandoned by a future president? In a discussion moderated by Albert Pratt Professor of Business and Government Robert Stavins, David Doniger of the Natural Resources Defense Council and Jeffrey Holmstead of Bracewell & Giuliani discussed their differing views of EPA's proposed rule.

Noting that section 111(d) of the Clean Air Act calls for standards that reflect the "best system of emission reduction," Doniger argued that the EPA's proposal is a reasonable interpretation under the Supreme Court's decisions in *Chevron v. NRDC* and, more recently, *EPA v. EME Homer City*. The proposed standards set carbon emission reduction targets for power generators in each state based on a formula that considers each state's current energy infrastructure and assesses its potential for reductions through measures including on-site heat-rate improvements, shifting generation to cleaner resources, and increasing demand-side energy efficiency. Doniger noted that successful implementation of the clean power plan is the key to reaching the United States' domestic and international carbon reduction targets. The clean power plan and other actions under the president's climate action plan are contributing to a "virtuous cycle" of international cooperation, especially between the U.S. and China. The plan allows for states to minimize costs by giving them a great deal of flexibility in determining how to comply with their emission rate targets. The plan allows states to shift from rate-based to mass-based programs (e.g., cap and trade) and allows for interstate cooperation, including emission trading. But "with great flexibility comes greater stringency," Doniger said, noting that the EPA's standards can reasonably achieve greater emission reductions with this flexibility.

Presenting a very different perspective, Holmstead said that, although the Supreme Court has held that EPA has authority to regulate carbon emissions under the Clean Air Act, the Court has not given EPA "a roving mandate to do good." Rather, the Court has held that carbon regulations must be consistent with the statutory provisions of the Act. Under Section 111(d), he argued, EPA may only require states to set a "standard of performance" – set in terms of an allowable emission rate – for individual power plants based on the "best system of emission reduction" that will achieve a "continuous emission reduction" at an individual plant. In his view, EPA has gone far beyond its statutory authority by proposing to require states to reduce statewide electricity demand and restructure their entire electricity systems. Holmstead believes that this interpretation is required by the language and structure of Section 111 and more than 40 years of regulatory history.

Holmstead argued that as a result of this more narrow interpretation, EPA's targets will need to be revised downward significantly. However, in response to a question from Professor Stavins, Holmstead explained that in his view states would still be free to propose cost-saving compliance approaches as substitutes for plant-by-plant compliance—an interpretation of the law that Doniger criticized as being "asymmetrical."

Another area that received attention is the probable shape that enforcement will take for states that miss deadlines or refuse to comply. EPA is encouraging all states to submit their own implementation plans, but, for states that fail to comply, it can impose federal implementation plan. EPA has not provided information thus far on what form a federal implementation plan would likely take. Holmstead argued that, given the complex and state-specific nature of EPA's formula for setting emission standards, EPA is likely to find the task of setting state-specific federal implementation plans overwhelmingly difficult. He argued that EPA does not have authority to do many of the things that it wants states to do – such as changing the dispatch order to favor gas-fired plants and requiring the construction and operation of

wind and solar facilities. Doniger disagreed, noting that a number of simple approaches are being considered, and expressing a hope that EPA will soon clarify what it has in mind.

Doniger and Holmstead agreed that legal battles are likely, though any serious legal challenge will have to wait until a (possibly revised) final rule is adopted by EPA, an action that is expected in June 2015.

The panel was part of the Kennedy School's Energy Policy Seminar Series, which is jointly sponsored by the Energy Technology Innovation Policy research group of the Belfer Center for Science and International Affairs and by the Consortium for Energy Policy Research of the Mossavar-Rahmani Center on Business and Government.