Illegality of EPA's Clean Power Plan & Benefits of SB15-~~528~~ 258

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My name is Mike Nasi. I am a partner at the law firm Jackson Walker, located in the firm's Austin, Texas office where I head up the firm's air regulatory practice. I have been asked to testify here today because I have been a practicing air quality attorney working with EPA air quality regulations for over 22 years and represent power generation interests, including rural electric cooperatives, in pending DC Circuit and U.S. Supreme Court cases regarding a number of recently-promulgated EPA air regulations targeting the electric generation sector.

As proposed, EPA's Clean Power Plan is illegal. This is not just my opinion, but the position of thirty-two states' elected officials; huge swaths of the electric power, manufacturing, and chemical industries; various businesses and community organizations; and even those in the President's inner circle. As recently stated by Laurence Tribe – the renowned scholar and close advisor to the President:

> "EPA is attempting [in the Clean Power Plan] an unconstitutional trifecta: usurping the prerogatives of the States, Congress and the Federal Courts – all at once. **Burning the Constitution should not become part of our national energy policy."**

The Clean Power Plan (CPP) is an unprecedented and unconstitutional attempt at a power grab by the EPA. In direct conflict with the 10th Amendment of the U.S. Constitution, EPA intends to take over roles reserved to the states and remake them in their vision – including a takeover of electricity production, consumption and distribution. Under the guise of "state flexibility," EPA hopes to coax states, or, if necessary, coerce them to develop state plans that would create authority EPA does not otherwise have to enforce the "outside the fence" elements of the CPP.

The Clean Air Act places limits on EPA's authority; specifically, to "defining" the best system of emissions reduction – BSER – and promulgating a guideline document. It does not provide EPA the authority to set binding state-specific emissions rate targets or regulate electricity markets under the auspices of a federally enforceable state plan. By setting such stringent emissions limits under incredibly compressed timelines, and by preventing states from considering actions they've already taken before the 2012 baseline year – including retirements, significant build out of renewable generation and reductions in end-user demand – EPA has failed to provide the states with any of the state-led authority or flexibility required in the Clean Air Act. This authority and flexibility is central to the cooperative federalism required by the Clean Air Act.

At its core, EPA does not have the authority to require states to undertake the actions contemplated in its BSER model – the so-called four building blocks of the rule. Block 1 – increased coal power plant efficiency – is unreasonable and technologically impractical, if not impossible. The remaining three blocks, however, are where EPA truly contravenes the Clean Air Act by looking "beyond the fence" for emissions reductions. The plain language of Section 111(d) makes it clear that a standard of performance should only apply to an "existing source" "which emits or may emit an air pollutant." There is no discussion of "groups of sources" or "markets related to an existing source," but rather, requires that standards apply to individual "existing sources" in isolation – "within the fence." Blocks 2 through 4 completely contradict the within-the-fence requirements. Regarding Block 2, EPA has no authority to require re-dispatch of generation, which is left largely to the free market or the regional transmission organizations ("RTO") and independent system operators ("ISO") that oversee dispatch [and Public Utility Commissions]. EPA simply is not provided the authority under the CAA to set mandatory state emission budgets based on the emission reductions it calculates are possible from fuel switching, renewable generation increases, or end-user energy efficiency. This is also in direct contravention of the Federal Power Act, which leaves to the states exclusive jurisdiction over intrastate electricity matters.

The legal problems with EPA's rule start well before reaching the question of their "beyond the fence" state budgets, however, as EPA has three significant statutory hurdles it has not and cannot clear. The explicit language of the Clean Air Act prevents EPA from promulgating this rule. The Act states that EPA is prevented from applying Section 111(d) standards to source categories already regulated under Section 112 of the Act; fossil fuel power plants are regulated through Section 112 by the Mercury and Air Toxics Rule. EPA claims that the Act is ambiguous due to drafting errors, but the language as codified in the United States code is clear. Even accounting for drafting errors, the language still clearly prohibits EPA's actions. Furthermore, the Supreme Court has already spoken on this issue, in a note to its decision in *AEP v. Connecticut*, in which it stated: "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under the...the "hazardous air pollutants" program, [Section 112.]"

The Clean Air Act also requires a valid new-source 111(b) rule to be in place before EPA may proceed to an existing source rule under Section 111(d). These rules are still in the proposal stage, and even if finalized, are riddled with technical and legal flaws that in my opinion will result in the rules being vacated, which will remove this necessary legal prerequisite to any 111(d) rule. EPA has also failed to make a necessary Section 111-specific endangerment finding based

on CO2 emissions from the fossil fuel source category. EPA attempts to rely on its endangerment finding for GHG emissions from motor vehicles as the endangerment finding for this rule. But this motor vehicle endangerment finding is based on a completely different section, even title, of the Clean Air Act; it was an endangerment finding for six separate greenhouse gases, not just CO2 as the Clean Power Plan addresses; and the statutory language of the endangerment finding itself is different, with the Section 111 standard imposing a greater burden on EPA. EPA attempts to say that there is a "rational basis" for this rule, but this is simply not true; the rule, even if fully implemented, will have an almost imperceptible impact on global climate.

Colorado's ability to comply with the Clean Power Plan is in serious question, though due to no fault of your own. The sheer enormity of the emissions reductions and the incredibly short time constraints of the rule alone would be a daunting, if not impossible challenge, but the legal authority of state agencies to implement the rule is simply not there in many respects. As an initial matter, the Air Quality Control Commission's authority, as implemented by the Colorado Department of Public Health & Environment, is limited to drafting regulations directed at sources of air pollutants. There is no authority to go "beyond the fence," which, like the federal government, significantly constrains the ability to develop any plan addressing Blocks 2 through 4 of EPA's BSER model. The

Public Utilities Commission is also subject to limitations on breadth of authority, that precludes it from addressing the environmental components and entities necessary to meet EPA's budget.

I certainly would not recommend that Colorado create a plan that establishes authority that EPA itself does not have. Having said that, I see value in the passage of SB15-528 because it would ensure the PUC's oversight and actions to ensure that rates stay competitive and reliability is maintained. Given the price increase and reliability risks in question, it makes good sense that SB15-528 requires both PUC approval followed by the General Assembly's approval because it will ensure that the public may participate in a transparent process and Colorado legislators have oversight over the submission of any plan.

I would like to leave you with one thought as you further deliberate SB15-528 and negotiations ensue regarding the version of the bill the General Assembly is willing to pass. Prepare yourselves for the worst with a contingency plan, but do not create a capitulation plan. Even if EPA's rule could move the needle on climate change, which it cannot, and even if EPA had the legal authority to proceed with this rule, which it does not, Coloradans should not be coerced into prematurely creating and submitting a plan that, due to its federal enforceability, functionally cedes your sovereign control over your electricity system to regulators in Washington, D.C. that were not elected by Coloradans.