

GHG Emission Standards for All Power Plants, Can EPA Do It?

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In his June 25 speech on climate policy, President Obama announced that he would direct the U.S. Environmental Protection Agency (EPA) to use its existing authorities under the Clean Air Act to develop greenhouse gas (GHG) emission standards for power plants.

The President described this element of his plan as one plank in an overall strategy to meet his administration's commitment in international climate negotiations: a reduction in U.S. GHG emissions of 17% from 2005 levels by 2020. Since existing power plants contribute about one-third of all U.S. GHG emissions, meeting the Administration's goal without addressing power sector emissions seems unlikely. The problem is that setting any GHG emission standards for existing power plants under the Clean Air Act is fraught with difficulties, both legal and practical.

Most observers expect EPA to use section 111 of the Clean Air Act to regulate power plant GHG emissions. This provision authorizes EPA and the states to set "standards of performance" for emissions from major emitting facilities. In fact, EPA has already proposed GHG performance standards for new power plants under section 111(b). A Presidential Memorandum issued concurrently with the President's speech¹ directs EPA to issue a new proposal for new plants by September 20, 2013.²

The Presidential Memorandum also directs EPA to develop GHG emission standards for *existing* power plants on an ambitious but less urgent timeframe. That would set new proposed rules by June 1, 2014, and conclude final rulemaking by June 1, 2015. Many commentators are already asking whether EPA can even regulate existing power plants under section 111(d).

The source of the confusion dates back to the 1990 Clean Air Act amendments, when the House and Senate passed different versions of amendments to section 111(d), but failed to reconcile the two versions in the House-Senate Conference Committee. As a result, both versions were signed into law. The Senate version seems to authorize EPA to regulate GHGs from existing power plants. But some commentators suggest that the House language precludes EPA from using section 111(d) to regulate existing power plants.³ Not surprisingly, EPA interprets the conflict to allow regulation of existing power plants but expects that question to end up in the courts.

Finally, there is a practical question. How can EPA set emission guidelines and performance standards when direct control technology for GHG emissions (such as carbon capture and sequestration) is not now commercially viable? It is difficult to see how the standards will be written and what measures will be identified to measure compliance. All told, the designs to be announced in September 2013 and in June 2014 and 2015 are likely to be new beginnings of the debate on how to develop GHG emission standards for power plants.

In his Memorandum, the President directed EPA to actively engage the states, energy companies, labor, and other stakeholders in a collaborative process seeking a steady, responsible national action to slow the effects of climate change. It promises to be a lively exchange.

¹See <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>.

²EPA is directed to revise this proposed rule for new power plants in light of the comments received.

³The 1990 House amendment to section 111(d) limits regulation of facilities that EPA already regulates to control air toxic emissions. Since EPA has already regulated toxic emissions (Mercury and Air Toxics rule), there is a question about EPA's authority.