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Climate Change Obama Considering Power Plant Rule That Would Test Reach of Clean Air Act

by Mark Drajem, Jim Snyder, and Jonathan Allen

The Obama administration is considering rules to cut greenhouse-gas emissions from power plants that would reach beyond the plants themselves—an unusual approach that could run afoul of pollution control laws.

People familiar with the discussions say the administration is seeking steep reductions, as much as 25 percent, and allowing plants to meet them by controlling sources other than smokestacks—by expanding use of renewable energy, improving the efficiency of the grid or encouraging customers to use less power.

There is disagreement even within the administration about what's allowable under the Clean Air Act. Some administration attorneys are warning that the government could lose a legal challenge if it seeks to regulate beyond a plant's smokestack, the individuals close to the discussions, who spoke on the condition of anonymity, told Bloomberg.

The full mandate may be phased in over 15 years, as a way to soften the blow on utilities. The rules are expected to draw fierce resistance from coal companies and their allies in Congress, who warn of higher electricity prices and lost jobs.

“My gut tells me they're going to go down the path of desirability and not reliability, of what they'd like to see in a perfect world,” said Sen. Joe Manchin (D-W.Va.), a coal industry ally. “That's fine, but we're not there.”

“I'm sure there will be plenty of speculation between now and when the rule is released, but until that point, that's all it is—speculation,” said Thomas Reynolds, a spokesman for the Environmental Protection Agency.

25 Percent

The administration is reportedly considering an approach that would require a cut of 25 percent in emissions in two stages. In the five years starting in 2019, only limited reductions at the plants would be mandated. Deeper cuts to achieve the 25 percent reduction would be required from 2024 to 2029.

Power plants account for about 40 percent of the 2.2 billion tons of carbon dioxide released in the U.S. each year. The rules, which are scheduled to be released by the EPA on June 2, are eagerly anticipated by environmental groups, which are pressing President Barack Obama to make good on a pledge to take bold steps to control climate change.

Addressing climate change has become a priority for Obama as he heads into his final years in office and wants strong action on the issue to be part of his legacy. With Congress unlikely to act, the rules on carbon dioxide emissions promise to be the backbone of U.S. action on global warming for years to come. Obama may even unveil the power plant rules himself.

Legal Questions

The proposal is still under review at the White House and could change before it is released. It also is not clear what year the agency is using for a baseline, which is key to determining how deep the cuts will really be.

The complicated legal question boils down to whether the carbon limits should be based on what the power plants can meet by running more efficiently or whether operators can resort to external measures to reduce emissions—known as “going outside the fence.”

A mere tune-up of old coal plants is considered unlikely to yield the level of reductions environmental groups say is necessary.

“With all of the attention Obama is drawing to this rule, we would be surprised if the emission reductions were only 3 to 5 percent,” said Kyle Aarons, a senior fellow at the Center for Climate and Energy Solutions. Aarons said he doesn't know what's in the EPA's proposal.

Holistic View

The rules could achieve steeper cuts at a lower cost if the targets are based on a more holistic view of an electrical system—the operating generating units, power lines, opportunities for renewable energy and even reductions in use by customers. That may raise legal risks however.

“EPA would face significant litigation risk if it set an emissions guideline based on ‘outside the fence’ reductions occurring beyond the boiler room,” said Joseph Stanko, a partner at Hunton & Williams LLP, a Richmond, Va.-based firm that represents industry, including the power generator Southern Co.

The Natural Resources Defense Council has pushed for a systemic approach, saying utilities could cut their emissions by as much as 30 percent by 2020. The NRDC argued in an October 2013 analysis that the EPA used a system-based approach under Section 111 of the air act when it imposed pollution limits on municipal waste incinerators in the 1990s, and so would be on firm legal footing if it did so now.

Source Specific

“The heart of 111 is the standard of performance,” said Kate Konschnik, director of the Harvard Environmental Policy Center, who wrote a brief defending the use of a broad approach. “Nowhere in that definition is it source-specific.”

Recent federal court decisions also indicate that the EPA will have some leeway in developing its standards, Konschnik said. “They are not going to be second-guessed.”

Taking a broader view of what is achievable may be necessary because there isn't any commercially viable technology to remove carbon dioxide from the smokestacks of existing plants.

And a 25 percent cut over 15 years isn't an outrageous reach. With no greenhouse gas rules in place, carbon dioxide emissions from power plants fell 16 percent from 2005 to 2012, as the recession and a surge in the use of natural gas cut the use of coal for generation, according to EPA data.

Flexible Rules

Administration officials, including EPA Administrator Gina McCarthy, have stressed the rule will be flexible, giving states wide latitude to tailor programs to meet climate goals without jeopardizing the economy.

“We are going to show you that we were listening,” McCarthy said May 13 at an Association of Climate Change Officers event in Washington. “We are going to show you that you can get significant reductions from the energy sector in a way that's going to continue to provide reliable and cost-effective electricity, that is going to be continuing our quest to address the issue of climate change and that recognizes that we're all in this together.”