

EPA's Power Plant Carbon Emission Rulemakings

Key Legal Issues

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Overview

- ▶ EPA's suite of carbon dioxide (CO₂) regulations controlling emissions from the electric power sector under Clean Air Act section 111 are certain to be challenged.
- ▶ The primary legal questions remain, even though the contours of the rules have changed.
- ▶ Major legal questions:
 - *Does EPA have threshold legal authority?*
 - *Does the Clean Power Plan unlawfully displace state regulatory authority?*
 - *Does EPA's BSER approach present jurisdictional issues?*
 - *Does EPA's BSER determination exceed the Agency's authority under section 111?*
 - *Has EPA properly determined BSER – is BSER achievable, etc.?*

Threshold Legal Authority

- ▶ **Is regulation of coal-fired EGUs barred because of MATS?**
 - House vs. Senate versions of section 111(d)
 - House version would bar regulation of EGUs already regulated under section 112 (MATS rule)
- ▶ **Has EPA promulgated the required predecessor section 111(b) rule?**
 - The final new, modified, and reconstructed source rule is susceptible to challenge based on EPA's reliance on partial carbon capture and sequestration as the basis for determining the "best system of emission reduction" for new coal-fired EGUs.

Cooperative Federalism

- ▶ Do EPA's binding emission rate standards and state goals impermissibly displace state authority to issue section 111(d) "standards of performance"?
 - Section 111(d)(1) imposes the initial obligation to "establish[] standards of performance" for existing sources on *states*
 - EPA assumes this obligation *only* if a state fails to submit a "satisfactory" plan
 - EPA's role is to issue *guidelines* and *evaluate state plans*
 - States are authorized to consider – "among other factors" – "*remaining useful life*" when applying a standard of performance "to any particular source"

Jurisdiction

- ▶ **Does EPA's grid-wide approach to BSER present jurisdictional issues?**
 - Do the rules affect energy dispatch?
 - Is EPA's proposed attempt to regulate energy dispatch barred based on FERC's jurisdiction over dispatch?
 - What ability do states have to regulate dispatch in light of regional transmission organization/independent system operator roles?
 - How much control do individual EGUs have over re-dispatch and the distribution of electric generation?
 - Do the rules account for key infrastructural, market, reliability, or other issues affecting states' ability to implement EPA's proposed BSER?

Best System of Emission Reduction (BSER)

- ▶ **Does EPA's BSER determination exceed its authority under CAA section 111?**
 - BSER is traditionally limited to technological or operational improvements at a "source"
 - Pre-1990, statute referred to "best *technological* system of continuous emission reduction"
 - BSER does not traditionally capture beyond-the-fence measures
 - Is BSER impermissibly outside the fenceline?
- ▶ **Is BSER achievable?**
- ▶ **Does BSER adequately consider costs and energy requirements?**
- ▶ **Does BSER go too far if it sweeps in the entire electricity sector?**
- ▶ *See UARG v. EPA (2014).*

Questions?

