

## 4 Big Sticking Points Of The Clean Power Plan

By **Juan Carlos Rodriguez**

*Law360, New York (October 22, 2015, 8:44 PM ET)* -- The Obama administration is pinning much of its hope that the U.S. can establish itself as a climate change leader on its just-finalized Clean Power Plan, but the U.S. Environmental Protection Agency's rule will face legal challenges from opponents who will cite limits on the EPA's authority and the regulation's alleged negative economic impact.

Those opponents will be able to file lawsuits attacking the rule on Friday, when the rule — which aims to cut carbon emissions from power plants — is published in the Federal Register, and several states and a variety of industry groups are expected to immediately pounce.

Here are four elements of the CPP that have its detractors up in arms:

### **EPA Authority**

The EPA has cited Section 111(d) of the Clean Air Act as the basis for its authority to create the plan, but critics have already made clear they don't agree with that assessment of the statute. The main argument from opponents will likely be that Congress never gave the EPA the authority under the act to encourage emission-control methods, known as Best Systems of Emission Reduction, outside the fenceline of a power plant, such as switching from coal-fired to gas-fired power and increased renewable energy use.

"What EPA does here by suggesting that the way to control emissions from coal fired power plants is by reducing their operation and shifting their generation to natural gas units or to renewables, is create a standard of nonperformance for those coal units — In other words, don't run them, and shift your production outside the fenceline to something that a utility might own, or that someone else might own," Thomas Lorenzen, a partner at Crowell & Moring LLP, said Thursday.

He said owners or operators could find themselves being compelled to invest in renewables like wind or solar power, which are all things that are beyond the fenceline of a coal- or gas-fired power plant. That breaks the mold of what everyone associated with the power generation sector — from businesses to the EPA to attorneys in the field — has traditionally understood the BSER to be.

But Joanne Spalding, chief climate counsel at the Sierra Club, said the EPA has little to worry about in regard to its authority to implement the rule. She said the U.S. Supreme Court has already said, in its 2011 ruling in *American Electric Power Co. Inc. v. Connecticut*, that EPA is the agency that is tasked with regulating greenhouse gas emissions from existing power plants and that Section 111(d) of the Clean Air

Act gives the agency the authority to do that.

“The EPA is exercising its authority in a way that is quite similar to rules that it has adopted in the past that were setting a nationally applicable, uniform standard for each subcategory of fossil, steam and gas plants,” Spalding said.

### **Economic Impacts**

Another bone of contention between plan opponents and supporters is what effect it will have on the U.S. economy. Critics point to the Supreme Court’s 2014 ruling striking down the EPA’s permitting programs for greenhouse gas emissions from stationary sources, in which Justice Antonin Scalia said he was skeptical of the agency’s discovery of “unheralded power” in a “long-extant” statute to regulate a significant portion of the economy.

With coal plants on the decline and a race to replace their power-generating capacity with renewable or other less polluting sources, states that are heavily reliant on the coal industry, as well as businesses, have complained that the rule will severely curtail their ability to operate, and many even force them out of the market.

One of the earliest challengers to the EPA’s rule, Murray Energy Corp., as well as several states, repeatedly told the D.C. Circuit about the dire economic consequences they foresaw as a result of the rule. While the court didn’t reach the merits of those arguments before dismissing the challenges as premature, it is a safe bet that they’ll come up in future litigation.

However, Richard Saines, a partner at Baker & McKenzie LLP and head of the firm’s North America climate change and environmental markets practice, said that argument may be overstated.

“I think it’s going to be much less dramatic of an impact than some might suggest, because this sector is transforming itself with or without the Clean Power Plan,” Saine said.

He said the levelized cost of renewables has come down over the past few years to become equal to, and in some instances competitive with, that of traditional energy sources.

“The pace of technological innovation and the change in the industry as a whole is happening at such a rapid pace,” he said. “And it’s being led in part by regulation, but mostly by technological innovation. And that is going to be what enables there to be a smooth transition from an economic standpoint. Because it is the future.”

### **State Implementation**

The EPA imposes tight deadlines on states to come up with implementation plans for the rule, and that could lead to trouble, according to Kevin Desharnais, a partner at Mayer Brown LLP.

The plan calls for existing power plants to slash their greenhouse gas emissions by 32 percent from 2005 levels by 2030, and sets a 2018 deadline for states to submit implementation plans, and a 2022 deadline to start showing emissions cuts.

“I think the implementation is going to be very difficult. The response is that there’s a long lead time before things need to be fully implemented. But at the same time states are currently expending

resources to deal with this given the uncertainties surrounding the legality of the rule and the changes that were made between the proposed and final versions,” Desharnais said.

According to the National Conference of State Legislatures, legislatures in at least 31 states have introduced bills or resolutions related to the Clean Power Plan and power plants carbon dioxide emissions regulations. Some legislation would require a legislature’s approval of a state plan prior to its submission to EPA. Others would completely restrict a state agency’s authority to submit a plan without legislative approval.

Oklahoma Gov. Mary Fallin issued an executive order in April barring the state from submitting a state implementation plan. Several other governors, including Indiana Gov. Mike Pence, have voiced their opposition to the rule.

If states don’t come up with their own plan, they’ll be stuck with a federal implementation plan. The EPA has outlined two approaches in the draft FIP that will also be published Friday: a mass-based emissions trading system that would simply rely on the quantity of pollution emitted; and a rate-based system that relies on individual rate-based limitations on sources and includes credits generated from zero-emitting facilities that rely on the sun, wind and water for electricity production.

### **Electricity Grid Reliability**

Some states and industry groups have also warned that potential coal plant shutdowns necessitated by compliance with the Clean Power Plan will result in electricity grid instability.

The North American Electric Reliability Corp. said in November 2014 that the projected power plant retirements resulting from the EPA’s plan — mainly coal-fired plants — represented many gigawatts of power generation capacity, dwarfing the currently available capacity reserves.

While replacement generation facilities will be built over time to make up for this shortfall and maintain an adequate reserve margin, attempting to do so in the timeframe set by the EPA plan could present a “significant reliability challenge,” according to the organization.

And the the Electric Reliability Council of Texas, which oversees the power grid covering most of the state, said earlier this month that the final version of the plan will likely lead to the retirement of about 4,000 megawatts of coal-fired generation capacity — about 6 percent to 7 percent of the state’s total power reserves. That was far less than ERCOT’s previous estimate that up to 8,700 megawatts of coal capacity could be retired, but is still enough to cause concern, it said.

The EPA did make some concessions in the final Clean Power Plan in trying to reduce reliability concerns, including pushing back the interim compliance deadlines for states; a so-called reliability safety valve in which grid operators can petition the agency for temporary waivers or adjustments to the emissions requirements or compliance deadlines; and allowing states to submit their plans for a reliability review.

--Additional reporting by Keith Goldberg. Editing by John Quinn and Kelly Duncan.