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States Should Think Twice Before Refusing Any Response to EPA's Clean Power Rules

By Daniel Selmi

March 2015

Executive Summary: The date is approaching for EPA to finalize its rules for controlling carbon dioxide emissions from existing power plants, and states are contemplating their responses to those rules. A number of commentators have recommended that states "just say no" to EPA and refuse to prepare state plans complying with the rules. Some states are considering bills and a few have enacted laws that would make it difficult for their state environmental agencies to prepare responses that EPA could accept. In turn, EPA has announced it will release a "federal implementation plan" (FIP) for states that fail to submit legally adequate plans.

Daniel P. Selmi, a professor of law at Loyola Law School, Los Angeles, and a visiting scholar at the Sabin Center for Climate Change Law, has written an essay arguing that states should think carefully before "saying no" and refusing to submit a complying plan to EPA. The essay discusses five consequences of not participating: (1) EPA must impose FIPS that will probably focus on power plants, and states will cede regulatory control to the federal government; (2) Ratepayers likely will fare worse under a FIP than under a state-crafted plan; (3) Temporizing now and deciding to prepare a compliance plan later will involve delays in extracting the state from the FIP; (4) Late compliers may lose important opportunities for efficient compliance and informational benefits that accrue from participating at the outset; and (5) "saying no" to avoid a predicted political backlash is unnecessary. Finally, the essay argues that, because the need to respond to climate change will not disappear, states are better off beginning now to plan their transition to a power system with reduced carbon emissions.

The Sabin Center for Climate Change Law develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the legal profession and the public with up-to-date resources on key topics in climate law and regulation. It works closely with the scientists at Columbia University's Earth Institute and with a wide range of governmental, non-governmental and academic organizations.

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1. THE "JUST SAY NO" SCHOOL OF THOUGHT

The Environmental Protection Agency's (EPA's) proposed rules for existing power plants play a central role in the Obama Administration's plans for regulating greenhouse gas emissions to prevent climate change. The rules, technically known as the "Existing Source Performance Standards,"[1] will require a major effort from many states to change their methods of producing electricity, disrupting the status quo in an area long the province of state public service commissions. Not surprisingly, the proposed rules generated an avalanche of comments to EPA ranging from full support to vehement opposition, with the commenters also staking out positions on various technical issues. Law firms are raising questions about the rules' validity and gearing up to take part in the inevitable litigation over them.

The high-profile debate has led some critics of the rules to argue that states should oppose them by simply opting out of the entire regulatory process and refusing any response to the rules.[2] The movement has even acquired a slogan: "Just Say No."[3] While the slogan is borrowed from Nancy Reagan's anti-drug message in the 1980s, it still has the same forceful ring to it. And "saying no" would give states the satisfaction of telling Washington off for its intrusive regulations.

Some states have begun to embrace the "Just Say No" idea by considering legislation that, to varying degrees, would hobble the adoption of state plans complying with the upcoming

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[1] Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Power Plants: Emission Guidelines for Greenhouse Gas Emissions from Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34830 (June 8, 2014).

[2] *EPA's Uncertain FIP Power Drives Competing Lobbying on State ESPS Plans*, Climate Daily News (Dec. 1, 2014) http://insideepaclimate.com/climate-daily-news/epas-uncertain-fip-power-drives-competing-lobbying-state-esps-plans ("States are facing competing pressures over whether to submit plans to comply with EPA's proposed standards to cut greenhouse gases (GHGs) from the power sector, with many in the industry urging states to submit plans or risk strict federal mandates, while conservative critics are urging states to ignore the requirement in a bid to test the agency's uncertain federal implementation plan (FIP) authority.")

[3] *See* Peter S. Glaser et al., *EPA's Section 111(d) Carbon Rule: What if States Just Said No?*, The Federalist Society (Nov. 2014). See Aaron Larson, *States Can "Just Say No" to the EPA's Carbon Rule, Expert Says*, Power Magazine (Feb. 10, 2015), http://www.powermag.com/states-can-just-say-no-to-the-epas-carbon-rule-expert-says/.

regulations. For example, Kentucky enacted a law requiring its environmental regulators to adopt separate state standards of performance for controlling carbon dioxide emissions from existing power plants that burn both coal and natural gas.[4] The legislation might prohibit the state from adopting an approvable plan under the upcoming power plant regulations.[5] South Carolina is considering a resolution that would "urge" the state's environmental department not to prepare or submit a plan to EPA until the legality of the new rules is decided,[6] while a similar bill proposed in Kansas would prohibit state agencies from drafting a response until all litigation is resolved.[7] The Colorado Senate passed a bill that would cut the state's renewable energy requirement in half.[8] Various other states are considering action.[9]

The "Just Say No" slogan is pithy, and as an immediate political response, states may be tempted to follow its advice by taking legislative or executive action that prevents or hinders the state from responding to the upcoming rules. Before taking that step, however, states should carefully consider the consequences. If they do so objectively, it becomes apparent that opting out of the process at this point can result in significant disadvantages.

[4] Ken. Rev. Stat. Ch. 224 Section 2(3).

[5] Erica Peterson, *What Kentucky's New Law on Carbon Dioxide Emissions Actually Means,* (April 14, 2014), http://wfpl.org/what-kentuckys-new-law-carbon-dioxide-emissions-actually-means/ (quoting a statement released by the Kentucky Energy and Environment Cabinet that "[D]epending on how the bill is interpreted, it might indeed limit flexibility in developing a state-specific plan that would be approvable by EPA. . . .")

[6] H. 3570, S. Carolina Gen. Ass., 21st Sess., (2015-2016).

[7] Peter Hancock, *Kansas Bills Aim to Stall EPA's Clean Power Plan*, Lawrence Journal-World (Feb. 19, 2015), http://www2.ljworld.com/news/2015/feb/19/senate-bills-aim-stall-obamas-clean-power-plan-kan/.

[8] Lynn Bartels, *Senate Republicans Slash Renewable Energy Standards on Initial Vote*, Denver Post (Feb. 3, 2015), http://www.denverpost.com/news/ci_27451572/senate-republicans-slash-renewable-energy-standards-initial-vote.

[9] *See, e.g.*, S.B. 1365, Va.(2015 Legislative Session). As passed by the Virginia House of Delegates after previous Virginia Senate approval, the bill would bar the Department of Environmental Quality from submitting a state plan to EPA until both the Senate and House have approved it.

2. VACATING THE FIELD: FIVE CONSEQUENCES TO CONSIDER

2.1 Ceding Control to the Federal Government

If EPA adopts the existing source rules, the Clean Air Act does not require states to respond. The Act's language in Section 111 is seemingly mandatory: states "shall submit to the Administrator" a plan which establishes standards of performance for existing sources.[10] However, courts have found the analogous language in Section 110 for state implementation plans to be directory, not mandatory, and the same result would obtain under Section 111.[11] A state can, indeed, "Just Say No" if it so chooses.

However, the Clean Air Act imposes specific consequences on a state that refuses to comply. In that instance, EPA must adopt a "Federal Implementation Plan," or "FIP," for that state; the requirement is mandatory.[12] The plan must impose the same level of control that the state refused to adopt. In the past, EPA has been reluctant to impose large-scale FIPs, but the power plant rules are different. EPA has already announced that it will release a draft FIP this June.[13]

Thus, under current federal law, a state that refuses to prepare a plan in response to the EPA's power plant rules will cede control over environmental regulation of energy production in that state to a federal agency in Washington. That consequence is not one that most states would welcome, particularly when they can avoid it.

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[10] 42 U.S.C. § 7410(a)(1).

[11] District of Columbia v. Train, 521 F.2d 971, 983-84 (D.C. Cir. 1975) (citing Plan for Arcadia v. Anita Associates, 379 F. Supp. 311 (C.D. Cal. 1973) *aff'd* 501 F.2d 390 (9th Cir. 1974)). Even if the statute was construed as mandatory, additional considerations under the Tenth Amendment would arise. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997).

[12] Coalition for Clean Air v. Southern California Edison Co, 971 F.2d 219, 224 (9th Cir. 1992) ("We begin with the language of the provision: 'The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator . . . disapproves a State implementation plan submission in whole or in part.' This language is not, by its terms, limited to EPA's disapproval of 'newly submitted' SIPs or SIPs 'submitted under the 1990 Amendments.' Instead it refers to disapproval of state implementations plans generally, either in whole or in part. EPA must promulgate a FIP within two years of such disapproval, unless the state submits and EPA approves revisions to the SIP that correct the deficiency.").

[13] *See* U.S. Environmental Protection Agency, *EPA Fact Sheet: Clean Power Plan and Carbon Pollution Standards*, 2, http://insideepaclimate.com/sites/insideepaclimate.com/files/documents/jan2015/epa2015_0029.pdf (listing Summer 2015 as the date EPA "plans to propose a federal plan for meeting Clean Power Plan goals. . .").

What will the FIP look like? No one can precisely know at this time. But there is a likely possibility.

The upcoming power plant regulations will adopt an "emission guideline" for the state, a number limiting the total carbon dioxide emissions from power plants.[14] Many have argued that, in setting this standard, EPA lacks legal authority to consider sources, alternatives, or demand reductions that originate outside the power plants themselves, i.e. that are "outside the fence" of the plants.[15] However, even if EPA does consider that wider array of factors in establishing the emission guidelines for states, as it claims authority to do, a likely scenario for the FIP is that EPA will impose the required carbon dioxide limits solely on power plants.[16] EPA might consider avoiding any regulation "outside the fence" as a more conservative and thus more defensible position. The agency unquestionably has authority to set limits for power plants, and those types of limits would be easier for EPA to administer.

These limits are likely to be severe, perhaps on the order of a thirty percent reduction, and under such a FIP the legal responsibility to attain the reductions would lie solely on the power plants. If so, and absent other action by the state to reduce emissions elsewhere, the plants must meet those limits or face enforcement actions from EPA or possibly from citizens groups.[17] Of course, the state and its utilities could challenge the FIP's legality in court. Still, the state's inaction could very well result in EPA imposing the legal mandate entirely on the power plants, and they are certain to be quite disturbed about that outcome.

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[14] *Carbon Pollution Emission Guidelines, supra* note 1, at 34895.

[15] *See, e.g.*, Hannah Northey, *Manufacturers Decry Clean Power Plan, Threaten to Take Flight*, Greenwire (Feb. 23, 2015) http://www.eenews.net/greenwire/stories/1060013860 (noting that the Industrial Energy Consumers of America had submitted comments to EPA "arguing that the agency doesn't have the authority to regulate greenhouse gas emissions 'outside the fence'. . .").

[16] *See* Bob Sussman, *The Clean Power Plan: Will States Choose to Comply?* (Jan. 20, 2015) http://www.brookings.edu/blogs/planetpolicy (suggesting that "the FIP's requirements would likely fall entirely on power generators. . . ").

[17] John Siciliano, *EPA Vows to Address State Fears Over Citizen Suits Stemming from ESPS,* Inside EPA Climate (Feb. 19, 2015) ("EPA's acting air chief Janet McCabe is acknowledging concerns from state and federal officials that states could face citizen suits seeking to enforce provisions of their plans to comply with the agency's greenhouse gas (GHG) standards for existing power plants and is vowing to address the concerns and preserve states' flexibility. . . .").

2.2 Protecting Ratepayers

Another argument for "saying no" to the power plant rules centers on concern over impacts on the state's ratepayers. The long-term cost of the rules is disputed at this point. EPA predicts that cost increases will be moderate, while some sources affected by the rules envision disastrously high rates. Those cost estimates remain to be sorted out.

However, in the short term under a FIP, a state's ratepayers would very likely fare worse than they would under a state-crafted compliance plan. The Clean Air Act employs the state plan as its central implementation mechanism, and a principal reason for that choice is to maximize state autonomy and flexibility in choosing pollution controls. States are more familiar than EPA with the pollution sources in their jurisdiction and have better information about both their operations and the opportunities for controlling emissions. EPA is simply not in as good a position as a state to identify and adopt a mix of responsive measures that would minimize costs.[18]

Of course, even if a FIP imposed controls solely on power plants, a state could comply by adopting a broad series of measures that would lower carbon dioxide emissions sufficiently to meet those limits on the power plants. Perhaps this mix, which could encompass use of renewables and demand reduction, would be cost-efficient. But the state's need to act quickly at this point -- to get "up to speed" after boycotting the process until then -- jeopardizes the cost efficiency of this type of response. In contrast, a state that participates in the process from the outset can make cost efficiency a high priority and is more likely to succeed in avoiding the higher costs from the FIP.

2.3 The Consequences of Temporizing

A state might view action that "just says no" as an interim rather than final response. The state could decide to temporize for now, perhaps awaiting the outcome of litigation over the rules

[18] See, making the same point, Brian Potts, *How The GOP Might Raise Your Electric Rates,* Real Clear Energy (Feb. 3, 2015) ("[M]any Republican-run states could actually cause their electric rates to go up significantly if they opt for a federal plan, rather than developing a state plan themselves . . .").

before filing a plan.[19] Even if EPA imposed a FIP, the state could come up with a plan later and submit it to EPA.

But there are drawbacks to this strategy that center on the time needed to extract a state from the FIP's requirements. First, the state would have to create and adopt its own plan. Unquestionably, the power plant regulations will require fundamental changes in energy production over a lengthy period of time, and because the state has not participated in the process until this point, it would now be starting from scratch.

Fashioning the plan will take time. It almost certainly involves coordination between two state agencies -- the state's environmental agency and its public service commission -- and other entities will be involved, including public power producers. And if the state chooses to use any of EPA's "building blocks,"[20] such as re-dispatching plants, incorporating renewables, or reducing demand, to ameliorate the burden on its power producers, these would have to be worked out. Finally, the state would have to utilize the procedures required by state law to adopt the plan.

EPA has given states one year to comply with the new rules, with possible extensions to two or three years, and many states have complained that this time period is too short. So a state that has now decided to submit a plan would require a significant amount of time to formulate it.

After receiving the plan, EPA would evaluate its compliance with the rules. The agency might well have questions, as it usually has with submissions of state implementation plans under the Clean Air Act, and if so, there would be a period of "back and forth" communications with

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[19] See *FERC's Clark Urges States to Delay Climate Plans Until EPA Issues FIP Guide*, Climate Daily News (Nov. 5, 2014).

[20] *Carbon Pollution Emission Guidelines*, *supra* note 1, at 34836. EPA's proposed rules identify four building blocks for constructing strategies to reduce CO2 emissions:

> 1. Reducing the carbon intensity of generation at individual affected EGUs [Electric Utility Generating Units] through heat rate improvements.
>
> 2. Reducing emissions from the most carbon-intensive affected EGUs in the amount that results from substituting generation at those EGUs with generation from less carbon-intensive affected EGUs (including NGCC [Natural Gas Combined Cycle] units under construction).
>
> 3. Reducing emissions from affected EGUs in the amount that results from substituting generation at those EGUs with expanded low- or zero-carbon generation.
>
> 4. Reducing emissions from affected EGUs in the amount that results from the use of demand-side energy efficiency that reduces the amount of generation required.

EPA. Then, assuming EPA was satisfied with the submittal, that agency would set in motion a rulemaking process to approve the state plan.

The point is that, if a state has initially opted out but later changes its mind, it would not receive immediate relief from the FIP. Instead, the FIP would remain in effect for an uncertain amount of time until EPA's final approval of the state plan.

2.4 Pros and Cons of Late Compliance

A state might see some advantages to being a "late complier" with the new EPA rules. In the period after EPA adopts the power plant rules, other states will grapple with finding solutions to meet the rules' requirements and with the transition steps needed to comply with them. A state sitting on the sidelines during this time could learn from the experience of these other states and perhaps avoid some of the pitfalls that they encountered.

But there are two important factors to weigh against that perceived benefit. First, to a great extent each state's response to the rules will be idiosyncratic. The response will depend on variable factors unique to individual states such as the fuel sources for existing power plants, the age of the plants, the dispatching options, the system reliability, the possible alternative sources of renewable energy, the ability to reduce demand, etc. These variables mean that, while some efficiency may result from seeing what other states have done, much of the state's response will be *sui generis*.

Equally important, opportunities might be lost during the interim period. For example, regionally based, multi-state compliance efforts make a great deal of sense when dealing with electric generation, and EPA has encouraged them. Those types of possibilities, however, may not be as available to late-complying states. A state that has invested earlier in crafting a detailed regional response will not want to cede any of its advantages to a state appearing "on the doorstep" at a later date. In short, the avenues for late compliance could be narrower.

Finally, if a state decides not to initially participate, information losses will occur during any period before it determines to comply. A spokesperson for a long-established trade group of electric utilities recently characterized the power plant rules as "without a doubt, the most

significant environmental rulemaking ever to impact our industry."[21] EPA's release of the draft rules has stimulated a remarkably robust discussion of the existing power system, how it can be changed to emit less carbon dioxide, and the potential barriers to and difficulties with those changes. The information generated, which will further accrue as states decide on compliance paths, in the end will produce a much more complete picture of the undertaking.

Sorting through this flood of information is important, as claims about the rules' impacts vary substantially. For example, some states question their ability to employ additional renewable energy,[22] while the Michigan governor says that his state achieved "an aggressive [renewable portfolio standard] on time and at a lower cost than we expected."[23] To take a happy example, it might turn out that a state could attain the new standard set for it more easily than at first seemed possible.[24] In any case, accurate underlying facts must be separated out from the more politically or ideologically motivated assertions—whether those assertions are too pessimistic or too optimistic. However, if a state "just says no" and leaves the process, it will lose part -- perhaps a substantial part -- of the informational benefit of participating.

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[21] Edison Electric Institute, *EEI to Wall Street: The Future is Here*, (Feb. 11, 2015), http://www.eei.org/resourcesandmedia/newsroom/Pages/Press%20Releases/EEI%20to%20Wall%20Street%20The%20Future%20is%20Here.aspx (particularly criticizing the 2020 interim limits in the proposed rules).

[22] Letter from Public Service Commission, State of Montana to Gina McCarthy, Administrator, U.S.Environmental Protection Agency (Nov. 21, 2014) at 9 http://insideepaclimate.com/sites/insideepaclimate.com/files/documents/feb2015/epa2015_0361b.pdf (noting, among detailed comments about renewable energy, that "the growth of renewables in a portfolio is accompanied by an ever-intensifying set of operational, dispatch, and transmission challenges. . . .").

[23] Climate Daily News, *Bucking GOP Trend, Michigan's Governor Adopts Pragmatic Stance on ESPS* (Feb. 3, 2015).

[24] *See* National Assn. of State Energy Officials, *Incorporating Energy Efficiency and Renewable Energy Policies into Section 111(d) Greenhouse Gas Compliance Plans* (Feb. 2015), http://111d.naseo.org/incorporating-ee-and-re-policies-into-section-111d (examining existing policies for three states – Arizona, Minnesota, and Pennsylvania – relating to renewable energy standards and energy efficiency resource standards.); Lee Logan, *As States Retreat, NASEO Touts Current Policies for ESPS Compliance,* http://www.governorswindenergycoalition.org/?p=11799 ("[T]he study finds that existing policies would allow Pennsylvania to exceed the goal EPA has proposed and would get Minnesota close to meeting its ESPS target. Arizona's existing policies would achieve roughly 25% of it its target. . .").

2.5 Avoiding Political Fallout

Complying with the power plant regulations will change the composition and operation of energy production in a state, and prices for electricity may increase. One last argument for opting out is that, by doing so, a state can ensure that the political fallout for this consequence (and other adverse consequences as well) lies with the agency that caused it: EPA. Alternatively, the theory goes, if a state submits a plan to comply with the regulations, any backlash from that plan would then fall on state officials even though the plan is responding to a federal mandate.

This "backlash" argument is dubious for two reasons. First, the upcoming rules do not present a situation where the federal government is trying to avoid responsibility for its actions. The so-called "Clean Power Plan" is the centerpiece of the Obama Administration's response to climate change, and it has widely advertised that fact.[25] No one thinks that states implementing the federal health care law are responsible for "Obamacare," and here very few are likely to mistake the source of the clean power rules.

Second, if state officials (and utility executives, for that matter) feel a need to publicize that they are complying with a federal mandate for which they are not responsible, they possess numerous tools to disseminate information. "Saying no" to EPA is hardly the only way to spread that message.

3. CONSIDERING THE LONGER TERM

The discussion above addresses some of the consequences of "just saying no." It assumes that EPA's existing source power rules will go into effect and that EPA will promulgate FIPs for non-complying states. But what if a court invalidates the rules or they never take effect for some other reason?

After EPA adopts the rules, litigation challenging them will unfold in the United States Court of Appeals for the District of Columbia Circuit and then quite likely in the Supreme Court.

[25] *See, e.g., State of the Union Address 2015* http://www.cnn.com/2015/01/20/politics/state-of-the-union-2015-transcript-full-text/index.html (promising the United States will double the pace at which it cuts carbon pollution).

Opponents argue that the courts will invalidate the rules, perhaps even on the ground that EPA lacks authority to adopt them (and so could not later re-adopt them). Then there is the 2016 presidential election: maybe a Republican president will repeal the rules or refuse to re-adopt them after they are judicially invalidated. Alternatively, the new president may refuse to impose FIPs or rescind them, even though the law makes them mandatory. So a state might be tempted to gamble that the rules ultimately will not go into effect, and the state can avoid complying with them.

Predicting the future is obviously difficult, even though parties affiliated with various interested entities now claim to know with certainty what will happen. But the ultimate question actually extends beyond whether the rules are upheld and take effect. That question is whether the issue of controlling carbon dioxide from power plants is likely to just disappear so that a state can continue on its present energy path.

The odds are quite high that it will not disappear, for the tide on this point has turned. Here are just a few very recent examples. The Senate has voted to confirm that climate change exists (albeit with senators offering different explanations for their vote).[26] The National Research Council just released a report from scientists from over 15 universities concluding that geo-engineering solutions to the climate problem were unlikely, and that the primary focus must stay on reducing emissions.[27] The long-term business-planning model is facing the issue. Apple has announced that it will spend around $850 million building a solar energy farm that will generate power for its California facilities.[28] Shell Oil management is supporting a shareholder resolution requiring the oil company to test its business model for compatibility with global warming targets.[29] And the power system in the United States is already changing rapidly, with fifty

[26] Laura Barron-Lopez, *Senate Votes That Climate Change is Real*, The Hill (Jan. 21, 2015), http://thehill.com/policy/energy-environment/230316-senate-votes-98-1-that-climate-change-is-real.

[27] The National Academies, Press Release, *Climate Intervention is not a Replacement for Reducing Carbon Dioxide Emissions; Proposed Intervention Techniques Not Ready for Wide-Scale Deployment* (Feb. 10, 2015), http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=02102015.

[28] Stan Ziv, *Apple Invests $850 Million in Solar Power, Citing Climate Change*, Newsweek (Feb. 11, 2015) http://www.newsweek.com/apple-invests-850-million-solar-citing-climate-change-306191.

[29] Damian Carrington, *Shell Urges Shareholders to Accept Climate Resolution*, The Guardian (Jan. 29, 2015), http://www.theguardian.com/environment/2015/jan/29/shell-urges-shareholders-to-accept-climate-change-resolution.

percent of the new generation capacity added in the last few years using renewable energy sources.[30]

The cumulative effect of these developments illustrates the real problem with the "Just Say No" school of thought: it assumes the problem will just go away. But it will not. How electricity is produced will have to change, if not through the new power plant rules then in some other manner that will necessarily involve the same issues.

By opting out now and refusing to work on the problem, states will not protect the long-run interest of their citizens. There are difficult problems to be faced in making the necessary transition. Better to start now than later.

[30] Edison Electric Institute, *supra* note 21. The press release also notes that 3.5 gigawatts of utility-scale solar capacity were installed in 2014.