

NEWS

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McConnell Pushes 'Just Say No' Campaign Against EPA's Clean Power Plan

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By Andrew Childers and Anthony Adragna

March 4 — Senate Majority Leader Mitch McConnell (R-Ky.) urged states not to comply with the Environmental Protection Agency's Clean Power Plan, elevating a tactic that has been debated recently among opponents of the proposed rule.

States should “hold back” plans for complying with the rule, which would set carbon dioxide emissions limits for existing power plants, to allow litigation over its legality to proceed and to allow Congress more time to act, McConnell wrote in an op-ed piece March 3.

“Think twice before submitting a state plan—which could lock you in to federal enforcement and expose you to lawsuits—when the administration is standing on shaky legal ground and when, without your support, it won't be able to demonstrate the capacity to carry out such political extremism,” McConnell wrote in Kentucky's the Lexington Herald-Leader. “Refusing to go along at this time with such an

extreme proposed regulation would give the courts time to figure out if it is even legal, and it would give Congress more time to fight back.”

Refusing to comply with the rule once it's finalized, a tactic that has been dubbed “just say no,” has been debated recently by legal scholars and opponents of the EPA regulations.

Some academics and attorneys argue that states refusing to develop their own plans to comply with the Clean Power Plan will only be hurting their own ratepayers because the EPA will be forced to issue a federal plan that is less flexible and more costly.

“The benefits of saying no are really twofold,” Brian Potts, an attorney at Foley & Lardner LLP, told Bloomberg BNA March 4. “One is politics, and two is it makes EPA’s life harder and it makes it less likely the Clean Power Plan will succeed,” Potts said. “The flipside is you hurt your ratepayers.”

Potts had argued that states choosing not to develop their own plans likely would face larger rate increases under federal plans in a Feb. 3 editorial in Real Clear Energy.

Up to 20 States Could Forgo Plans

However, he predicts between 15 states and 20 states could forgo developing their own compliance plans, forcing the EPA to issue federal plans.

The proposed Clean Power Plan (RIN 2060-AR33) would establish unique carbon dioxide emissions rates for the power sector in each state. The EPA rule would be implemented by states, which would determine how best to achieve the emissions targets.

However, if states choose not to develop their own plans, the EPA will issue a federal implementation plan (FIP) for them. The agency said it plans to issue a draft federal plan this summer when it finalizes the Clean Power Plan to guide states in developing their own state implementation plans.

Rule Called 'Unfair,' 'Probably Illegal.'

McConnell called the proposed rule “unfair” and “probably illegal” and added that it would have a negligible impact on the global environment but cost thousands of jobs.

The Senate majority leader argued the EPA won't accept state plans that deviate much from its ideological agenda, meaning it won't make much difference if states submit their own plans or must instead follow a federal implementation plan designed by the agency.

“As they have in the past, opponents of EPA’s efforts to clean up air pollution exaggerate claims about the potential impacts of the rule on reliability and costs,” the EPA said in a March 4 statement. “The fact is that EPA is following the law and developing a flexible program, building on successful efforts in states across the country to move to cleaner sources of energy.”

McConnell, a staunch opponent of the EPA rules, has previously pledged to use a number of congressional approaches to fight the regulations, including standalone legislation and the appropriations process which he described as his “best tool”.

Said Administration Has 'Ideological Agenda.'

“The Obama administration is still threatening to impose its own—presumably more draconian—plan on any state that doesn't do as it's told,” McConnell wrote. “Since the Obama administration has already decreed that it will be the judge of whether a plan is acceptable or not, it's hard to see the White House agreeing to much that diverges from its ideological agenda.”

Rather than commit resources to compliance at this point, states instead shouldn't embark on the “costly process of complying” until there is greater clarity from courts and Congress, McConnell said.

McConnell's editorial was endorsed March 4 by Sens. Jim Inhofe (R-Okla.), chairman of the Senate Environment and Public Works Committee, and David Vitter (R-La.) in comments to Bloomberg BNA.

Just Say No

McConnell is the most prominent official to endorse the “just say no” effort, which has been debated by legal scholars since it was raised in a November 2014

Federalist Society white paper written by Peter Glaser, Carroll W. McGuffey III and Hahnah Williams Gaines, who are all attorneys at Troutman Sanders LLP.

That paper questioned how stringent a federal implementation plan could be given that the EPA lacks statutory authority to require power plants to do more than improve how efficiently they operate. The EPA may not be able to require significant improvements in power plant efficiency because they would be cost-prohibitive, and a plan that limits how long coal-fired units could operate might jeopardize electricity reliability, the authors said.

"Certainly, EPA has imposed federal plans in the past. But EPA has never faced a situation where it will need to force a state to reengineer such an important sector of the state's economy with such potentially enormous consequences," the white paper said. "The outcome of a state's refusal to comply cannot be predicted, but it would leave the state no worse off than if the state begrudgingly agreed to become EPA's partner in producing potentially disastrous consequences for the state."

EPA Lacks State Flexibility

Throughout its extensive outreach efforts prior to and after proposing the Clean Power Plan, the EPA has stressed that the rule would give states the maximum flexibility to determine how best to achieve the proposed emissions rates for themselves.

The Clean Power Plan outlines four "building blocks" states could use to comply with the rule, including heat rate improvements at power plants, shifting generation from coal-fired units to natural gas, building new renewable energy generating capacity and investing in energy efficiency programs.

However, the EPA lacks the statutory authority to force states to invest in renewable energy or fund efficiency programs, Potts said. That means the agency would have to develop federal compliance plans that are likely to focus almost exclusively on preventing carbon dioxide emissions from coal-fired power plants, probably increasing compliance costs in those states.

Impact Examined of Federal Implementation Plan

Daniel Selmi, a professor of law at Loyola Law School, Los Angeles, and a visiting scholar at the Columbia Law School Sabin Center for Climate Change Law, also

argued in a March 3 report that the EPA could impose more severe emissions standards on power plants as part of a federal plan if it fears it lacks the statutory authority to impose other compliance options, such as demand reduction and renewable energy investments.

The federal plans could open up individual power plants to lawsuits by outside groups seeking to have the required emissions reductions enforced, Selmi said.

"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," he wrote. "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."

States Fear Wasted Effort

State air officials, who will be charged with implementing the Clean Power Plan, say the call to defy the EPA is driven by politics rather than practical concerns. State compliance plans are due a year after the rule is finalized, and air pollution officials already have begun discussing with the EPA what measures should be included in the plans.

"I have observed a Grand Canyon-like gap in the rhetoric from some elected officials to the level of effort and optimism that many state air pollution regulators are demonstrating in responding to the Clean Power Plan," Bill Becker, executive director of the National Association of Clean Air Agencies, told Bloomberg BNA March 4.

Becker said state officials have been meeting with the EPA for two years as it prepared and then proposed the Clean Power Plan. All of those efforts would be wasted if state officials ordered regulators not to develop their own compliance plans, he said.

It's a particular concern as the EPA has already given several indications that it plans to revise portions of the Clean Power Plan, particularly the interim emissions rate targets that states must meet beginning in 2020, in response to state concerns, Becker said.

Would be 'Wasted Effort.'

"All of that would be a wasted effort if Senator McConnell and others were successful in bringing this rule to a halt," Becker said.

McConnell's home state of Kentucky, for example, has already passed legislation that limits the tools that state air regulators may use to develop a compliance strategy to largely heat rate improvements at the power plants themselves.

"What we hear is, I'll stop short of saying it'll be a slam dunk for Kentucky, but it would have been far, far easier for Kentucky to comply if the legislature had not restricted its authority," Becker said.

Clint Woods, executive director of the Association of Air Pollution Control Agencies, said the EPA's upcoming model federal implementation plan, expected with the final rule, could provide states guidance on how to write their own compliance plans. That model could dictate how many states choose not to pursue their own plans, he said.

"The fact is that EPA is going to provide that model, and hopefully it's at a level of detail that provides all the information that states need to have to decide the best option for their states," Woods told Bloomberg BNA March 4.

To contact the reporters on this story: Andrew Childers and Anthony Adragna in Washington at achilders@bna.com and aadragna@bna.com

To contact the editor responsible for this story: Larry Pearl at lpearl@bna.com

Sen. Mitch McConnell's op-ed piece is available at http://www.kentucky.com/2015/03/03/3725288_states-should-reject-obama-mandate.html?rh=1.

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