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OPINION | REVIEW & OUTLOOK

The EPA Deserves a Stay

The agency tries to run out the clock on its 'Clean Power' diktat.

Environmental Protection Agency Administrator Gina McCarthy in Washington on Sept. 17. *PHOTO: LAUREN VICTORIA BURKE/ASSOCIATED PRESS*

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President Obama's palace revolution on climate won't come off peaceably after all, as 26 states and dozens of business groups this week filed suits against his takeover of the carbon economy. For all Mr. Obama's eco-abuses, the legal reckoning now at hand is the most important.

On Aug. 3 the Environmental Protection Agency finalized the so-called Clean Power

Plan, or CPP, which orders states to reorganize their energy systems from power plants to electric outlets. But the EPA waited no fewer than 81 days until Oct. 23 to publish the rule in the Federal Register, a delay that matters in administrative law because publication formally opens the plan to judicial review. The average lag for the EPA this year on all other major rules is 27 days.

The EPA is stalling for time because the Obama crowd knows that states must rush to start the slow, capital-intensive and irrevocable transition away from fossil fuels over the next year or so to meet their 2020 "interim" targets. Even if the CPP is repealed by the next Administration, or junked by the courts, they're hoping to intimidate the states and dictate the U.S. energy mix for a generation.

So the 26 Attorneys General and business lobbies are asking the D.C. Circuit Court of Appeals for a stay that would enjoin the CPP while the judiciary considers the legal merits. This would be unusual. Conventional regulatory litigation spools out over the years, with judges tending to defer to rule-makers.

But the EPA has invited more scrutiny by deliberately exploiting this deference. Its thinking is that if the energy reality on the ground shifts while the courts move at the snail's pace, then losses are irrelevant. For instance, the Supreme Court overturned a mercury-emissions regulation earlier this year, albeit when it was too late. When the EPA published the rule in 2011, the low-ball prediction was that coal use would fall by less than 1%. Instead it plunged by 12% in 2012 alone and continued to drop.

Thus EPA Administrator Gina McCarthy could brag on Bill Maher's show that however the Court ruled, "Most of [the utilities] are already in compliance, investments have been made, and we'll catch up. We're still going to get at the toxic pollution from these facilities." So much for the rule of law.

The Clean Power plaintiffs can demonstrate immediate and permanent injury. The EPA's own models show utilities will shed 233 coal-fired power plants in 2016 alone, or 20% of the grid's remaining coal generation. Some marginal generators like rural electric nonprofit cooperatives may go under.

The plaintiffs are also likely to prevail on the legal merits, both statutory and constitutional. The 2,000-page CPP is conjured from a couple hundred words in a subsection of a 38-year-old statute about "best systems of emissions reduction." Traditionally this has meant technology that can be installed on a given site, like scrubbers.

Now the EPA is rewriting the definition to direct states to regulate "outside the fence line" of power plants well beyond the best tech. They must not only decommission sources of carbon energy, but they must also run the green gamut from mandating a new fleet of wind and solar, building new transmission lines, creating more efficiency subsidy programs for consumers and much else. On a rewrite so grandiose, the EPA has earned a stay and deserves no administrative deference.

Such a claim of authority with no limiting principle will naturally expand over time. Under the pretext of regulating power plants, can the EPA instruct states to adopt green-city building codes that curtail the use of CO2-heavy cement? How about an organic fertilizer mandate for agriculture, or controls on "enteric fermentation"—er, flatulence—in cattle and other livestock? The EPA has entertained all of these possibilities in draft documents, and no sphere of public or private life will be spared.

Oklahoma Attorney General Scott Pruitt best limns the larger constitutional stakes. He grounds his argument in the Supreme Court's anti-coercion doctrine, which teaches that the feds cannot commandeer sovereign state resources. The EPA says state agencies must rewrite their laws and programs to carry out orders from Washington headquarters, or else it will impose a more draconian federal plan. The Supreme Court reversed ObamaCare's Medicaid expansion mandate because it denied states "a legitimate choice whether to accept the federal conditions." One irony is that even if EPA weren't rewriting black-letter law to bullrush the CPP, the rewrite itself would be unconstitutional.

The CPP will undermine growth, consumer incomes and U.S. competitiveness in ways that will be difficult for the next President to reverse, if he or she is so inclined. Perhaps this time the courts will give the EPA's willfulness more than the customary wink and nod.