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EPA's Illegitimate Climate Rule

Hidden from Voters, Contrary to Congressional Intent, and Crafted by Special Interests
By William Yeatman*

EPA has decided to push a rule that was drafted behind closed doors by powerful, wealthy Washington lawyers and lobbyists at the Natural Resources Defense Council [NRDC]. Let's be clear, NRDC is a wealthy, elite, powerful lobbying machine with more influence over decision making in Washington than any ordinary U.S. citizen. They have millions, which gives them access. The EPA turns a deaf ear on those that don't.

Sen. John Barrasso (R-Wyo.) to EPA Administrator Gina McCarthy, July 23 2014¹

On June 2, the U.S. Environmental Protection Agency (EPA) issued a proposed rule under the Clean Air Act, the Clean Power Plan, to regulate greenhouse gas emissions from electricity generation.² If finalized, the rule would constitute an unprecedented usurpation of power by the EPA from the states and fundamentally overhaul the electric industry. In fact, Congress never approved such a gross expansion of the regulatory state and President Obama never vetted this power grab with voters. Most troubling of all, the rule was written by powerful special interests that helped get the president elected. Given these realities, the Obama administration's Clean Power Plan is an illegitimate exercise in executive authority.

The Clean Power Plan Is a Gross Expansion of EPA Power at Expense of State Prerogatives. The Clean Power Plan represents an unrivaled expansion of the EPA's regulatory authority. Oversight of electricity markets has been the exclusive preserve of the states since the New Deal; to this end, the 1935 Federal Power Act limits the reach of federal energy regulators to "only to those matters which are not subject to regulation by the States."³ The Clean Power Plan would fundamentally alter this regime, by placing energy policy nationwide under the EPA's thumb.⁴

For both everyday operations and long term planning, almost all states are guided by the principle of least cost.⁵ The EPA's Clean Power Plan would radically undermine states' discretion to give priority to economic considerations in overseeing their electric systems. Instead, states would be forced to give priority to the agency's climate goals, which are tailored for each state based on four "building blocks":⁶

- Building Block 1: A 6 percent efficiency improvement to each existing coal-fired power plant;
- Building Block 2: Operating combined cycle natural gas plants at 70 percent capacity utilization;
- Building Block 3: A green energy production mandate calculated regionally;

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- Building Block 4: A 1.5 percent annual reduction in electricity demand.

Under the EPA's longstanding interpretation of the Clean Air Act, only the first building block would be permissible, because it is limited to the regulated entity in question—coal fired power plants. The agency has never before attempted to use a sector-based standard to impose a systemic “beyond the fence” regulation like the Clean Power Plan.⁷

States are not required to implement the precise policies embodied in the building blocks, but they are responsible for emissions reductions commensurate with these policies. If a state fails to comply, the EPA is empowered to impose a federal plan.⁸ In this fashion, the proposed Clean Power Plan grants the agency the authority to impose a green energy production quota or even require participation in a regional cap-and-trade energy rationing scheme.⁹

EPA's Clean Power Plan Lacks Congressional Authorization. Major media outlets repeatedly have used the word “obscure” to describe Clean Air Act Section 111(d),¹⁰ under which President Obama's Clean Power Plan is supposedly authorized. The modifier is apt. At 291 words, §111(d) is a relatively tiny provision in the Act, a proportion that befits its limited purpose (as intended by the Congress).

In fact, §111(d) is defined primarily by what it is *not*. The foundational air quality regulatory regime established by the Clean Air Act is the National Ambient Air Quality Standards program¹¹ (NAAQS), which addresses six “criteria” pollutants.¹² The other major air quality program for stationary sources in the Act targets hazardous air pollutants from industrial categories.¹³ The objective of §111(d) is to regulate existing sources of pollution that are *not* “criteria” pollutants, and thus subject to a NAAQS, or hazardous air pollutants.

Not surprisingly, applications of this catch-all provision have been few and far between. Since implementing regulations were first promulgated in 1975, the EPA has used §111(d) to regulate four pollutants from five source categories.¹⁴ Moreover, it has never been controversial. Many of the agency's approvals of state plans to meet §111(d) requirements were promulgated as “direct final rules,” which the agency only uses when it's confident the matter is ultra-mild and no one will object. (The length of EPA approvals of State plans averages two pages in the *Federal Register*.)¹⁵

It is inconceivable that Congress would have intended for this “obscure,” rarely used provision of the Clean Air Act to empower the EPA to usurp state oversight of electricity markets as practiced since the New Deal. As the Supreme Court has explained, “Congress...does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes.”¹⁶

Finally, and perhaps most importantly, the 111th and 112th Congresses repeatedly considered legislation that would have implemented a national climate change mitigation plan. Each time, the legislation failed in a bipartisan fashion. In 2009, for example, 20 percent of the Senate *Democratic* caucus wrote to Sen. Barbara Boxer (D-Calif.) informing her that they could not support her cap-and-trade bill.¹⁷ If the people's representatives failed to enact climate policy via the legislative process, why are unelected bureaucrats imposing such policy using the regulatory process?

EPA’s Clean Power Plan Lacks Any Electoral Mandate. It is bad enough that the Clean Power Plan grossly expands federal power absent a clear congressional mandate. But the rule also lacks electoral approval of any sort.

President Obama avoided climate change during his reelection campaign. This made sense, insofar as public opinion polls indicated the American electorate gave ultra-low priority to global warming.¹⁸ In fact, Obama actually tried to outflank challenger Mitt Romney to his right on energy policy, claiming that Romney was anti-coal and never once mentioning global warming during the presidential debates.¹⁹

It was only after President Obama was reelected—and he no longer faced electoral scrutiny—that he announced his Climate Action Plan, which directed the EPA to promulgate greenhouse gas regulations for existing power plants.²⁰ Simply put, the EPA’s climate rules were hidden from voters, as the president refused to subject his climate policy to voter scrutiny.

EPA’s Clean Power Plan Was Crafted by Special Interests. The Clean Power Plan was hidden from voters and contravenes congressional intent—but the EPA did not ignore *all* outside parties in crafting this policy. Three well-connected employees of the Natural Resources Defense Council (NRDC) wrote the Clean Power Plan’s “blueprint,” according to *The New York Times*.²¹

NRDC’s reported access at the EPA is alarming, in light of its naked participation in electoral politics. In 2003, NRDC started a 501c(4) advocacy group, NRDC Action Fund, to “work to educate and mobilize voters.”²² During the last election cycle, “NRDC Action Fund primarily operated by encouraging its donors to donate directly to candidates or environmental advocacy groups,” according to *The Washington Post*. NRDC is also involved in LeadingGreen, a new collaboration of environmental groups that will steer donations to federal candidates and enlist the help of major donors in lobbying elected officials.²³

Political spending by special interests is but one manifestation of a phenomenon known as “regulatory capture,” whereby an agency is coopted by an outside group.²⁴ Another is the existence of a virtual revolving door between special interests and agencies. In this regard, NRDC is well represented among EPA political appointees.²⁵ The spoils of regulatory capture include policy making prerogatives like the NRDC’s “blueprint.”

NRDC’s intimate involvement in the creation of the Clean Power Plan is starkly ironic, because NRDC, only seven years earlier, had argued before the D.C. Circuit Court of Appeals that the EPA does not have the authority to issue regulations for power plants pursuant to Clean Air Act §111(d). So, NRDC formerly argued that the Clean Power Plan is illegal.²⁶ That is quite a flip-flop, even for lawyers.

Conclusion: What Can Congress Do? Hidden from voters, contrary to congressional intent, and crafted by special interests, the Clean Power Plan is a textbook example of EPA’s regulatory capture by NRDC. In the face of this outrageous regulation, what is Congress to do? Following is a brief list of ideas of possible non-legislative action that could be accomplished by any Member of Congress without a vote.

- Request the Energy Information Administration to study impact on retail electricity prices of running all combined cycle natural gas power plants at 70 percent capacity utilization.²⁷

- Request the Congressional Research Service to investigate what an EPA federal implementation plan would look like under a “beyond the fence” electric system-wide Clean Air Act §111(d) regulatory regime for greenhouse gases.²⁸
- Support the Senate Environment and Public Works minority’s information requests from the EPA and NRDC about the extent of their collaboration.²⁹
- Participate in the regulatory process by commenting on the rule.

Notes

¹ Senate Environment and Public Works Committee hearing entitled, “Oversight Hearing: EPA’s Proposed Carbon Pollution Standards for Existing Power Plants,” July 23 2014 (self-taken transcript), http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=8655ed9-03ac-bb36-cab8-7913ec6c2b94

² 79 *Federal Register* 34829 <http://www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf>

³ 16 U.S.C. §824(a).

⁴ The most useful and concise summary of the proposed summary is Raymond Gifford, Gregory Sopkin, and Matthew Larson, “State Implementation of CO2 Rules: Institutional and Practical Issues with State and Multi-State Implementation and Enforce, Wilkinson, Baker, Knauer LLP White Paper, July 2014 <http://www.wbklaw.com/uploads/file/Articles-%20News/White%20Paper%20-%20State%20Implementation%20of%20CO2%20Rules.pdf>

⁵ Almost all states undergo some sort of multiyear utility planning, usually known as Integrated Resource Planning, under the purview of state regulatory bodies. Ongoing operations entail the optimal management of electricity generating units, known as generation dispatch.

⁶ The Clean Power Plan “building blocks” are described in Section VI of the proposed rule.

⁷ The agency refuses to even concede the unprecedented scope of the Clean Power Plan. Instead, EPA officials stress the rule’s “flexibility” by rote. Consider the following statement, by the Partnership for a Better Energy Future, in July 21 Letter to the EPA Administrator Gina McCarthy: “EPA is pursuing a regulatory standard on one industry source (fossil fuel power plants) based on potential actions taken well beyond the source’s physical location and controlling authority, and in many cases by entities that are not directly subject to regulation under section 111 of the Clean Air Act. This structure raises significant legal and practical questions regarding the viability of the rule. EPA has to date failed to answer such questions, and provided little to no information regarding what authority it is relying upon to institute such an expansive regime...”

⁸ The EPA’s authority to review State implementation plans for Clean Air Act §111(d) compliance is spelled out in the agency’s Final Procedures for Implementation of §111(d), 40 FR 53340, <http://www.globalwarming.org/2014/05/23/primary-document-dump-fridays-deep-background-into-epas-impending-climate-plan-for-existing-power-plants/>.

⁹ In light of how the EPA’s calculated the “building blocks” for the Clean Power Plan, there is virtually no limit as to what the agency could impose on the states. See William Yeatman, “What Would a Federal Implementation Plan Look Like under EPA’s Impending Climate Plan for Existing Power Plants?,” *GlobalWarming.org*, May 23, 2014, <http://www.globalwarming.org/2014/05/23/what-would-a-federal-implementation-plan-look-like-under-epas-impending-climate-plan-for-existing-power-plants/>.

¹⁰ Leon Billings, “The Obscure 1970 Compromise That Made Obama’s Climate Rules Possible,” *Politico*, June 2, 2014, http://www.politico.com/magazine/story/2014/06/the-obscure-1970-compromise-that-made-obamas-climate-rules-possible-107351.html?ml=m_t1_2h#.U9O6oPldXrf; and Coral Davenport, “Brothers Battle Climate Change on Two Fronts,” *New York Times*, May 10, 2014, http://www.nytimes.com/2014/05/11/us/brothers-work-different-angles-in-taking-on-climate-change.html?_r=2

¹¹ 42 U.S.C. §7409.

¹² Ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide, lead.

¹³ 42 U.S.C. §7412.

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- ¹⁴ William Yeatman, “Primary Document Dump Fridays: Deep Background into EPA’s Impending Climate Plan for Existing Power Plants,” *GlobalWarming.org*, May 23, 2014, <http://www.globalwarming.org/2014/05/23/primary-document-dump-fridays-deep-background-into-epas-impending-climate-plan-for-existing-power-plants/>.
- ¹⁵ William Yeatman, “Primary Document Dump Fridays: Every EPA Review of State 111(d) Submissions,” *GlobalWarming.org*, May 30, 2014, <http://www.globalwarming.org/2014/05/30/primary-document-dump-fridays-every-epa-review-of-state-111d-submissions/>.
- ¹⁶ *Whitman v. American Trucking Association*, 531 US 457, 468 (2001).
- ¹⁷ William Yeatman, “Memo to Washington Post: Opposition to Cap-and-Trade Is Bipartisan,” *GlobalWarming.org*, April 1, 2011, <http://www.globalwarming.org/2011/04/01/memo-to-wapo-opposition-to-cap-and-trade-is-bipartisan/>.
- ¹⁸ See Rebecca Rifkin, “Climate Change Not a Top Worry in U.S.,” *Gallup*, March 12 2014, <http://www.gallup.com/poll/167843/climate-change-not-top-worry.aspx>; and Climate Change: Key Data Points from Pew Research, *Pew Research Center*, January 27, 2014, <http://www.pewresearch.org/key-data-points/climate-change-key-data-points-from-pew-research/>.
- ¹⁹ William Yeatman, “On Energy Policy, Debate Obama Bears No Resemblance to Real-Life Obama,” *GlobalWarming.org*, October 17, 2012, <http://www.globalwarming.org/2012/10/17/on-energy-policy-debate-obama-bears-no-resemblance-to-real-life-obama/>.
- ²⁰ President Barack Obama unveiled his administration’s Climate Action Plan during a June 25, 2013, speech at Georgetown University, <http://www.bloomberg.com/news/2013-06-25/-we-need-to-act-transcript-of-obama-s-climate-change-speech.html>.
- ²¹ Coral Davenport, “Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint,” *New York Times*, July 6, 2014, http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html?_r=1.
- ²² See NRDC Action Fund “about” Web page, <http://www.nrdcactionfund.org/about/>.
- ²³ Juliet Eilperin, “Two Environmental Groups To Create Political Alliance,” *Washington Post*, April 14, 2014, <http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/14/two-environmental-groups-to-create-political-alliance/>.
- ²⁴ See William Yeatman, “Deadline Citizen Suits: An Idea Whose Time Has Expired,” *Appalachian Natural Resources Law Journal*, Vol. 8 (2013-2014), p. 51, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470127.
- ²⁵ See William Yeatman, “Regulatory Capture Comes Full Circle at the EPA,” *GlobalWarming.org*, May 15, 2014, <http://www.globalwarming.org/2014/05/15/regulatory-capture-comes-full-circle-at-the-epa/>.
- ²⁶ William Yeatman, “On Key Clean Air Act Interpretation, NRDC Cynically Reverses Itself,” *GlobalWarming.org*, June 14, 2014, <http://www.globalwarming.org/2014/06/14/on-key-clean-air-act-111d-interpretation-nrdc-cynically-reverses-itself/>. The D.C. Circuit, in *New Jersey, et al., v. EPA*, 517 F. 3d 574 (D.C. Cir. 2008) did not adjudicate NRDC’s argument regarding whether EPA, as a threshold matter, has the authority to regulate power plants under Clean Air Act §111(d). Opponents of the Clean Power Plan will no doubt bring this argument to bear. See Brian Potts, “The EPA Doesn’t Have the Legal Authority to Adopt Its New Power Plant Rules,” *Forbes*, March 25, 2014, <http://www.forbes.com/sites/realspin/2014/03/25/the-epa-doesnt-have-the-legal-authority-to-adopt-its-new-power-plant-climate-rules/>.
- ²⁷ In most electric markets west of the Mississippi, natural gas plants are used sparingly, due to relative fuel costs. Congress should discern what would be the retail rate impact of substituting natural gas as a base load fuel source.
- ²⁸ As proposed, the EPA’s federal implementation plan’s powers over the electricity sector are virtually boundless. Unfortunately, the agency has been unwilling to elaborate on its proposed powers. See FN7.
- ²⁹ During a July 23, 2014, Senate hearing, Sen. John Barrasso (R-Wyo.) challenged the EPA and NRDC to comply with the Committee’s information requests, in order to ascertain the extent to which the agency has been captured by green special interests. See FN1.