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President Obama tackles climate change without Congress

Michael B. Gerrard

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With a majority of the House of Representatives hostile to regulatory action on climate change, President Obama announced in his January 2013 State of the Union address, and again shortly thereafter in his second inaugural address, that he would use his existing statutory authority to move on what he called a threat to future generations. The president followed through on June 25 with a detailed action plan.

This article describes the principal elements of The President's Climate Action Plan and the progress so far in implementing it.

Power plants – Coal-fired power plants are the largest source of greenhouse gas (GHG) emissions in the United States, and President Obama has put the U.S. Environmental Protection Agency (EPA) on a timetable to regulate them. Indeed, the most prominent action EPA has taken since issuance of the plan is a proposal to control for the first time GHGs from new power plants. This was the revision and reissuance of a plan first proposed in April 2012.

The new proposal, issued on September 20 (the very day of the deadline set by the president), would establish new source performance standards (NSPS) for new fossil fuel plants. One standard would limit GHG emissions from new natural gas-fired plants; another slightly higher standard would limit them from new coal-fired plants. Modern combined cycle natural gas plants could meet the standards, but coal plants could not unless they employed carbon capture and sequestration (CCS), a method of capturing the GHGs before they leave the smokestack, piping the gas to underground reservoirs, and storing them there, presumably for at least centuries. Though billions of dollars have been spent on developing CCS technology, and a number of pilot plants have been built and commercial-scale plants are under construction, so far there are no such units actually in commercial operation anywhere in the world. Moreover, CCS would have a large “parasitic load”—it would consume so much electricity to operate that substantially more coal would have to be burned in order to get the same net power output.

There is no clear timetable for adoption of the final rule. Whenever that happens, it will surely be met by a barrage of litigation; that occurs whenever EPA issues a major new regulation. However, even if the rule survives, it is not clear whether it would have much effect on GHG emissions. That is because almost no one is building new coal-fired power plants in the United States anyway, due primarily to the low price of natural gas and to stringent new standards for the emissions of conventional air pollutants and mercury.

Of much greater environmental significance would be GHG standards for existing coal-fired power plants. Hundreds of such plants are still operating that were built in the 1950s and 1960s and that were grandfathered from most requirements of the Clean Air Act of 1970 and its 1977 and 1990 amendments. President Obama has directed EPA to regulate these plants as well. However, while EPA may regulate new plants directly under section 111(b) of the Clean Air Act, a different section—111(d)—applies to existing plants. It is much more convoluted. EPA issues guidelines, and it is then up to each state to adopt its own plan for implementation of the guidelines (or another set of actions that would meet the same objectives). These guidelines may well vary from one state to another, depending on each state's own mix of fuels and generation resources. It is possible that EPA will employ a variety of legal theories to use section 111(d) to create a multi-state emissions trading system. If any states do not adopt plans that are satisfactory to EPA, then EPA may issue its own federal plans instead. All of this will surely generate even more litigation than the standards for new plants: more steps are involved, more is at stake (since these rules would affect many actual facilities), and more legal theories are available to mount challenges. Moreover, while EPA has considerable experience in issuing standards for new plants, the provisions of section 111(d) for existing plants have been used so rarely that David Doniger of the Natural Resources Defense Council called it the "40-year-old virgin" of clean air regulation. Jean Chemnick, *New power plant rule running late, with major changes possible*, Greenwire, Mar. 18, 2013, <http://www.eenews.net/greenwire/stories/1059978031>.

President Obama has directed EPA to propose guidelines for existing plants by June 1, 2014, to finalize them by June 1, 2015, and to give the states until June 30, 2016, to submit their implementation plans. By that time, the president will have less than seven months remaining in office, and the inevitable implementation challenges and litigation will play out under his successor. The government shutdown of October 2013 and the sequester-induced funding cuts did nothing to help EPA adhere to this ambitious timetable, and many controversial EPA rulemakings have taken eight or even more years to reach fruition.

One factor that is not likely to interfere with the fulfillment of the president's pledge to regulate old and new plants—but that could otherwise affect EPA's ability to regulate GHGs—is the U.S. Supreme Court's grant of certiorari from a June 2012 decision of the U.S. Court of Appeals for the District of Columbia Circuit upholding numerous EPA actions on GHGs. (The case was called *Coalition for Responsible Regulation v. EPA* in the court below but is now called *Utility Air Regulatory Group v. EPA*. 684 F.3d 102 (D.C. Cir. 2012), *cert. granted*, 81 U.S.L.W. 3560 (U.S. Oct. 15, 2013) (No. 12-1146).) The Supreme Court chose—despite entreaties from many industry groups and anti-GHG-regulation states—not to review EPA's finding that GHGs pose a danger to human health and welfare or EPA's

regulation of GHGs from motor vehicles. However, the Supreme Court did agree to take up the applicability of the prevention of significant deterioration (PSD) program to GHGs. That program applies to a broad swath of stationary sources of air pollution (not just power plants) and requires adoption of best available control technology. The petitioners argue that application of the PSD program to GHGs would yield absurd results, as the Clean Air Act's numerical thresholds are so low that millions of sources would be swept into the regulatory net, and, therefore, EPA should apply the program only to air pollutants for which national ambient air quality standards have been met, thus excluding GHGs.

The PSD program is separate from the NSPS program discussed above, and if the Supreme Court were to keep to the question it presented, its decision would not affect the NSPS rules on coal-fired power plants. However, a decision against EPA would reduce its ability to go after other stationary sources and thus impede President Obama's objective of reducing overall GHG emissions. Just how much is unclear, because there is a dispute over whether such a ruling would apply to all facilities or only those that do not otherwise require a permit under the PSD program.

All these legal disputes highlight that use of the existing Clean Air Act is far from the ideal way to regulate GHGs. However, in the face of congressional inaction, it is the most potent tool now available to the president.

Energy systems – Though the air pollution regulations have garnered the most attention, the president's climate plan has many other elements. Several of them are aimed at reducing America's dependence on fossil fuels.

The Obama administration has devoted considerable attention and resources to advancing renewable energy technologies and promoting their use. The plan announced in June 2013 would take several additional steps. Among other things, it would encourage the development of hydroelectric power at existing dams, commit to greater use of renewable energy by the Department of Defense and by federally subsidized housing projects, and streamline the permitting and construction of new electric transmission lines to connect renewable energy sources with load.

Energy efficiency is another essential element of the plan. Already the tighter fuel economy standards for automobiles and light trucks, and separate ones for heavy-duty vehicles, are yielding major fuel savings that will save drivers thousands of dollars at the pump. The president also pledged further development of alternative fuel and electric vehicles (though one element, the future of the renewable fuel standard, is currently mired in controversy).

Appliances and buildings are major consumers of energy—and they present major opportunities for savings. The president pledged additional and tighter efficiency standards for appliances and federal buildings, more financial assistance for efficiency investments by businesses and homeowners, and an examination of how energy efficiency can be factored into the mortgage underwriting and appraisal processes.

Other GHGs – Though carbon dioxide gets most of the attention, the president’s plan also addresses other GHGs. The plan would encourage further movement away from hydrofluorocarbons (HFCs) in favor of more sustainable alternatives. Additionally, it would develop an interagency strategy for reducing emissions of methane from sources such as coal mines, landfills, and oil and gas development. (The extent and control of fugitive emissions from hydraulic fracturing for natural gas is a particularly contentious topic.)

Climate adaptation – The president’s plan recognizes that, despite all efforts to reduce GHG emissions, temperatures will continue to increase and the seas will continue to rise for many years. Thus resilience to the climate change that is coming is another focus. The president said he would direct federal agencies to support investments that would help communities and infrastructure withstand the consequences of climate change. He called for the adoption of disaster-resilience standards and the application of lessons learned from the response to Hurricane Sandy. Additional efforts would be made to manage droughts, reduce wildfire risks, and prepare for future floods.

Climate science and data – The plan would continue the development of a strong scientific basis for climate policy and include a particular focus on the development and utilization of data from multiple sources. It would also seek to disseminate scientific information in a way that would be most useful to affected publics.

International efforts – The plan calls for enhancing U.S. engagement with the other major economies of the world in cooperating on climate issues; for expanding bilateral climate cooperation with the key major emerging economies of China, India, and Brazil; for working with other countries in combatting short-lived climate pollutants including methane, black carbon, and HFCs; and for negotiating global free trade in environmental goods and services.

The final element of President Obama’s plan involves working toward an international climate agreement in 2015. Political obstacles will almost certainly prevent the president from going to the UN climate conference that year in Paris with as comprehensive a set of regulatory programs as many other countries are demanding, but implementation of his June 2013 plan will certainly be seen as a step in the right direction.

Tarrant Water District: Either a minimalist contractual decision or an invitation to hoard water

Sidney F. Ansbacher

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