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Potential Enforcement Implications and Liabilities Associated with EPA's Proposed Greenhouse Gas ESPS Rule

We have received several questions regarding the potential enforcement and liability issues implicated by the Existing Source Performance Standards ("ESPS") rule that the Environmental Protection Agency ("EPA") will release this summer. If finalized as proposed, the ESPS would risk the expansion of federal authority for enforcement actions in this sphere against States as well as numerous parties who bear no relationship to the sources that are the intended subject of § 111(d) of the Clean Air Act ("CAA"). It also could expose States and these third parties to legal action under the citizen suit provisions of the CAA by non-governmental organizations ("NGOs") seeking to compel such enforcement actions.

Specifically, the rule proposes that either States or a wide range of private actors beyond fossil fuel electricity generators be responsible for achieving emission reductions targets for greenhouse gases ("GHGs") set by EPA. In the proposed rule, EPA has taken the position that a broad array of entities that can be pursued to achieve GHG reductions under the ESPS rule also could be held legally liable if those reductions are not realized. Further, EPA has taken the position in the proposed rule that both the agency *and* NGOs can sue to enforce the obligations that are imposed as a result of the final rule.

Federal and Private Party Enforcement of the Clean Air Act

Although States have primary authority for enforcing the CAA,[1] the federal government also retains substantial enforcement authority. Under the CAA, when a State implementation plan ("SIP") under § 110 is approved by EPA, the SIP becomes federally enforceable.[2] EPA may then, after a 30-day notice, issue orders to a private party imposing administrative penalties for violating the SIP or requiring compliance with the SIP's violated provisions.[3] EPA may also bring an enforcement action in federal court against private parties seeking injunctive relief and damages for non-compliance with the SIP, again after a 30-day warning.[4] If EPA finds that "violations of an applicable [SIP] are so widespread that such violations appear to result from a failure of the State … to enforce the [SIP] effectively," EPA can take over enforcement of the SIP from the State, in which case the 30-day warning period for both administrative penalties and civil actions is eliminated.[5] A person who knowingly violates a SIP after the 30-day

[1] *See, e.g.*, *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 491 (2004).

[2] EPA has specifically stated that it intends § 111(d) SIPs to be federally enforceable, as well. *See* 79 FR 34830, 34844 (2014); EPA, *State Plan Considerations*, Technical Support Document, 17 n.17 (2014).

[3] *See* 42 U.S.C. § 7413(a), (d).

[4] *See id.* § 7413(b); *see generally Gen. Motors Corp. v. United States*, 496 U.S. 530 (1990) (enforcement action by EPA against private party).

[5] 42 U.S.C. § 7413(a)(2).

warning period, or after EPA takes over enforcement of a SIP from a State, can face criminal penalties, including up to five years in prison for a first offense.[6]

Private parties also can bring enforcement actions for violations of SIPs. "[A]ny person" may sue any other person (including "any … governmental instrumentality or agency to the extent permitted by the Eleventh Amendment") for a violation of a "standard, limitation, or schedule" established in a SIP.[7]

The Broad Reach of EPA's Proposed Beyond-the-Fence Line/Portfolio Approach

In the proposed ESPS, EPA seeks for the first time to regulate "outside the fence line" of emitting facilities and deep within areas of traditional State prerogative such as electricity dispatch and the energy efficiency of corporate, residential, and government buildings. Specifically, EPA has endorsed a "portfolio" approach under which responsibility for achieving EPA's greenhouse gas emissions reduction targets are assigned to a wide variety of private entities.[8] For example, EPA proposes that States meet their GHG reduction targets in part by shifting electricity dispatch from coal-fired electrical generating units to natural gas combined cycle units or renewable or nuclear energy generation.[9] EPA also proposes that States achieve part of their required greenhouse gas emissions reductions by implementing various energy-efficiency measures, such as energy-efficient "building energy codes" and "state appliance standards," which in turn could impact private offices, residences, and government buildings.[10]

Potential Consequences for Enforcement against Private Parties

In the proposed ESPS rule, EPA asserts that it has the same authority to enforce SIPs adopted under § 111(d) of the CAA as it does SIPs adopted under § 110.[11] Assuming EPA has and acts pursuant to this claimed authority, the scope of activities and parties subject to EPA enforcement action would be vastly expanded. (While EPA emphasizes that the ESPS would not explicitly *require* States to undertake any beyond-the-fence line measures as part of a compliance plan, it is widely agreed that few, if any, States will be able to achieve the proposed targets without requiring private parties beyond-the-fence line of electricity generators to achieve

[6] *Id.* § 7413(c).

[7] *Id.* § 7604(a)(1), (f)(4).

[8] *See* 79 FR at 34902-03.

[9] *Id.* at 34856-58.

[10] *Id.* at 34872.

[11] *See id.* at 34903, 34913; EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* 4 (2014), *available at* http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf. Strictly for purposes of this analysis, this white paper assumes EPA has the authority it claims notwithstanding the limited role assigned it under § 111(d) and the limited enforcement authority assigned to the agency in that statute. The validity of EPA's assumption is beyond the scope of this white paper, and nothing in this white paper should be interpreted as conceding EPA's position or waiving any argument that EPA lacks the authority under Section 111(d) that it claims in the Legal Memorandum.

significant emission reductions.)[12] For example, making parties beyond actual generating units responsible in a SIP for GHG reductions would potentially permit EPA to bring enforcement actions and impose penalties against any facility that failed to comply with the SIP's dispatch obligations—even if such failure was due to unforeseen demand or severe weather events impacting renewable generation. Furthermore, under EPA's view, if States include energy efficiency measures in their SIPs, such measures would become "federally enforceable."[13] Thus, under EPA's approach, the agency would, depending on the specific SIP requirements, potentially be able to impose administrative penalties on, or bring a federal court lawsuit against, local building owners who fail to achieve a SIP's energy-efficiency requirements.

Potential Consequences for Enforcement against States

Under EPA's position, EPA could seek to enforce against a violation of one or multiple requirements within a State's SIP even if the State itself finds that those requirements need to be modified because they are unworkable, ineffective, or too costly.[14] That is because an "existing SIP remains" the governing standard "even after the State has submitted a proposed revision" until EPA approves a new SIP.[15] Once EPA approves a State's initial SIP under the pending rule, therefore, the State would be "locked in" to that SIP's requirements until the State submits a new SIP and it is approved by EPA—a process that often takes years.[16] Furthermore, in the proposed rule, EPA made clear that it would not approve changes to a State's SIP if those changes "reduc[e] the required emission performance for affected EGUs specified in the original approved plan."[17] Even if a State legislature changes the State laws underlying an approved SIP (for example, by modifying an energy efficiency or renewable portfolio standard), EPA would likely argue that it still had power to enforce the SIP as originally enacted.[18]

EPA's position with respect to its authority in these scenarios is not unique, and in fact tracks the agency's view of its authority under currently operational SIPs adopted under § 110 of the CAA. However, the beyond-the-fence line structure of the ESPS and associated effort to impose compliance obligations on private parties make the implications of EPA's position

[12] Indeed, EPA itself has determined that only a relatively small percentage of the proposed emission reduction targets are achievable by "inside-the-fence" reductions. *See* 79 FR at 34861.

[13] *Id.* at 34903.

[14] We understand that many States include cost-based safety valves in their current energy-efficiency regimes. We are doubtful, however, that EPA would approve a SIP under § 111(d) that includes a safety valve permitting a State to deviate from its emissions target in any significant way. *See id.* at 34851 ("EPA is … proposing that in their plans … states may not adjust the stringency of the goals set by the EPA").

[15] *Gen. Motors Corp.*, 496 U.S. at 540; *see also United States v. Cinergy Corp.*, 623 F.3d 455, 459 (7th Cir. 2010) (same); *Envtl. Defense v. EPA*, 467 F.3d 1329, 1337 (D.C. Cir. 2006) (same).

[16] This can be even more difficult for a State that participates in a multi-State SIP. In such instances, the State may have to secure the approval of its partners to change the SIP, or undertake to somehow extricate itself from the multi-State SIP.

[17] 79 FR at 34917.

[18] *See Cinergy*, 623 F.3d at 457-59 (SIP continues to govern even after State has modified underlying State law).

unprecedented: EPA's approval of a SIP entails the loss of a significant portion of a State's authority to regulate power production, distribution, and consumption within the State and to adjust its energy policies as economic circumstances within the State change. Under EPA's view, all contents of new § 111(d) SIPs would be subject to this loss of authority, ranging from core compliance responsibilities of State air regulators or utility commissions to details as minor as emissions monitoring and verification systems.

Additionally, EPA contemplates suing States themselves for non-compliance with their SIPs. In the proposed ESPS rule, EPA requested comments on a proposal permitting a State to submit a SIP "includ[ing] an enforceable commitment by the [S]tate itself" to implement state programs to achieve the necessary reductions in greenhouse gas emissions, thus shifting responsibility for those reductions from outside-the-fence line parties to the State itself.[19] While such a SIP might spare outside-the-fence line parties from direct EPA enforcement, it would also, in EPA's view, subject the State to enforcement actions by EPA and liability for penalties under the CAA.[20]

Potential Consequences for Citizen Suits

EPA's expanded enforcement authority under the pending rule also could authorize environmental NGOs to bring enforcement actions.[21] As noted, under the CAA's "citizen suit" provision, private citizens may sue for violation of an approved SIP.[22] EPA has asserted that the pending rule permits NGOs to use the citizen suit provision to sue entities regulated under State SIPs.[23] NGOs have made public their intent to use the citizen suit provision to enforce compliance with § 111(d) SIPs.[24]

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[19] 79 FR at 34902.

[20] *Id.* It is far from clear that the CAA permits such imposition. For instance, there is an argument that a State's failure to achieve adequate emissions reductions as the administrator of its SIP does not constitute a "violation" of the SIP as required before liability may be imposed. *Cf., e.g.*, *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (finding that the Endangered Species Act's "term 'violation' does not include the [Secretary of the Interior's] failure to perform his duties as administrator of the [Act]"). This issue is beyond the scope of this white paper and is subject to the same caveats identified in footnote 11.

[21] For purposes of this analysis, this memorandum assumes that NGOs have the enforcement authority asserted by EPA and NGOs. *See also supra* n.11. The validity of this assumption is beyond the scope of this white paper and is subject to the same caveats identified in footnote 11.

[22] *See* 42 U.S.C. § 7604(a), (f)(4).

[23] The types of SIP violations about which NGOs may sue may be limited by the CAA, which permits citizen suits only for violation of a "standard, limitation, or schedule" established by a SIP. *Id.* § 7604(f)(4). NGOs, however, are certain to advocate the broadest possible reading of this provision, and EPA's proposal states that "citizens would also have the ability to file citizen suits to compel enforcement of state plan obligations." *State Plan Considerations*, *supra*, at 17 n.17.

[24] *See, e.g.*, Comments of Sierra Club and Earthjustice to EPA at ES-8 (Dec. 1, 2014), http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-24029 (SIPs "must also be federally enforceable against affected sources, by EPA and through citizen suits.").

NGOs may also sue EPA under the citizen suit provision to compel the agency to take desired action.[25] In theory, such a suit may be brought only to compel EPA "to perform any act or duty under this chapter which is not discretionary,"[26] which many courts have read to create only a "'narrow[]'" cause of action.[27] But in practice, EPA has often entered into settlement agreements with NGOs rather than defend the underlying lawsuits.[28] These settlement agreements often obligate EPA to take administrative action the NGOs desire, including issuing new rules—even though the settlement process lacks many of rulemaking's procedural protections.[29] Indeed, the pending ESPS rule itself is, at least in part, attributable to a 2010 settlement agreement between NGOs and some States on the one hand and EPA on the other.[30] Thus, if NGOs are not satisfied with a State's administration of its own SIP, they may sue EPA to require the State to amend its SIP or promulgate additional rules addressing what the NGOs perceive as shortcomings in the State's existing program.[31] Under EPA's usual practice, the agency may very well simply enter into a settlement agreement with the petitioning NGOs that obliges EPA to take action against the State or the newly regulated parties within it.

EPA also envisions that NGOs may sue the States themselves to enforce SIPs. For example, if a State itself makes "enforceable commitment[s]" to achieve emissions reductions, EPA has asserted that NGOs may sue such a State if it does not achieve its target reductions.[32]

An approved SIP under the pending ESPS rule could effectively give NGOs a seat at the table for decisions now made by the State alone. For instance, an NGO might sue an electric utility that it believed was failing to dispatch electricity or generate renewable energy in compliance with a SIP—even if the State did not share that belief—or that was unable to meet a SIP obligation due to unforeseen circumstances such as permitting delays or mechanical breakdowns. Likewise, for example, if a SIP required the continued operation of a nuclear power plant to meet emission-reduction targets (as EPA contemplates some SIPs will do, *see* 79 FR at 34870-71), an NGO may be able to sue the plant's operator (or the State) if the operator decides, with the State's permission, to shut the reactor down due to safety concerns that were not apparent when EPA accepted the SIP. An NGO could potentially sue local construction

[25] *See* 42 U.S.C. § 7604(a)(2).

[26] *Id.*

[27] *Am. Road & Transp. Builders Ass'n v. EPA*, 865 F. Supp. 2d 72, 81 (D.D.C. 2012), *aff'd*, 2013 WL 599474 (D.C. Cir. Jan. 28, 2013).

[28] *See, e.g.*, U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* 5 (2013), https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf (EPA entered into settlement agreements with advocacy groups at least 60 times between 2009 and 2012).

[29] *See id.* at 14 ("more than 100 of EPA's costly new rules were the product of sue and settle agreements" between 2009 and 2012).

[30] *See* Mot. Ex. A, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. Sept. 3, 2014) (Dkt. 1510480).

[31] It is unclear whether EPA will assert it also has authority to issue a "SIP call." *See* 79 FR at 34908.

[32] 79 FR at 34902. Although EPA has asserted this view, there are substantial arguments that the CAA does not permit citizen suits against States. *See, e.g.*, *Sierra Club v. Korleski*, 681 F.3d 342, 345-51 (6th Cir. 2012). This issue is beyond the scope of this white paper.

companies or building owners who fail to achieve a SIP's energy-efficiency requirements. Finally, NGOs can be expected to seek to have EPA disapprove SIPs that, in the NGOs' views, do not go far enough and should be required to achieve greater reductions in emissions through increased renewable energy purchases, or a higher level of energy efficiency penetration, even though such additional measures would fail a traditional cost/benefit test.

Conclusion

The unprecedented beyond-the-fence line structure of the proposed ESPS, combined with EPA's assertion that all measures in a § 111(d) SIP become federally enforceable, would substantially expand federal authority to enable enforcement actions against States as well as third parties separate and distinct from the fossil-fueled generating sources that are the subject of the § 111(d) rulemaking. It also could expose States to legal action under the citizen suit provisions of the CAA by NGOs seeking to compel such enforcement actions, as well as potentially exposing third parties themselves to citizen suits. The net result is that, if EPA's view prevails, approval of a SIP by EPA will entail the loss of a significant portion of a State's authority to regulate power production, distribution, and consumption within the State and to adjust its energy policies as economic circumstances within the State change.