Clean Power Lawyer Says IRA Provision Boosts EPA Regulatory Authority

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September 19, 2023 - A clean power lawyer is renewing arguments that a provision in the Inflation Reduction Act (IRA) bolsters EPA's authority to issue strong rules limiting power plant greenhouse gases, arguing the agency's proposal is legally durable despite contrary claims from others in the utility industry.

Kevin Poloncarz, a partner at Covington & Burling who represents power companies that generally support EPA's power plant GHG rule, made his case during a Sept. 19 event hosted by the Institute for Policy Integrity (IPI).

He underscored the IRA provision that added section 135 to the Clean Air Act requiring EPA to assess GHG cuts projected to occur from changes in domestic electricity generation and use through fiscal year 2031. The agency released that assessment Sept. 12, finding steep projected emissions cuts from the law's clean energy tax credits.

The provision also gives EPA $18 million "to ensure that reductions in greenhouse gas emissions are achieved through use of the existing authorities of [the Clean Air Act], incorporating" that GHG-reduction assessment.

That directive is "really important," Poloncarz said. "That's Congress, . . . [saying] 'You've got this authority, and we want you to use it to achieve reductions.'"

He also cited a January article from two key Hill staffers -- Greg Dotson and Dustin Maghamfar -- who argue in the Environmental Law Reporter piece that the IRA "not only leaves in place existing CAA regulatory authorities that apply to GHGs and other air pollution, in numerous respects it bolsters and enhances the effectiveness of those authorities."

Regarding the new section 135 of the air law, Dotson and Maghamfar write that "By requiring a 'reduction' that incorporates EPA's assessment, Congress is directing the Agency to use the authorities of the CAA to achieve greater reductions than would otherwise be achieved."

"This provision can be seen as a response to those who sought to convert the Supreme Court's decision in West Virginia into a categorical weakening of EPA's authority to use the CAA to reduce climate pollution," the paper argued.

In other words, Poloncarz at the IPI event argued that "IRA and everything that it achieves is the baseline, and Congress wants EPA to go further than that."

The new Clean Air Act section shows that "regulation isn't something that's just meant to follow what is happening as a result of tax incentives and expenditures, regulation is something that is meant to secure

reductions," Poloncarz continued, calling that provision the "gem" of the IRA "in terms of how it shows that legislation and regulation can complement one another."

He added that he consulted with Hill staffers about drafting the provision, "so I'm proud."

Also at the event, Tom‡s Carbonell, deputy assistant administrator for stationary sources at the EPA air office, broadly agreed that section 135 "does kind of reflect the expectation that we will be using our authorities to reduce greenhouse gases, and it's a helpful statement in that way." He carefully emphasized, though, that EPA's power plant and other rulemakings are working within the agency's statutory authority, and are not drafted to achieve specific climate goals.

"We're not energy regulators at EPA. We are focused on regulating pollution, protecting human health and the environment, and that's the lens through which we approach this work," Carbonell says.

Regulation After IRA

Jack Lienke, IPI's regulatory policy director who moderated the panel, recalled the group's conference last fall -- held just after the IRA's passage and a few months after the Supreme Court's decision in West Virginia v. EPA, which cited the major questions doctrine to block EPA power plant rules premised on shifting to cleaner generation.

At that point, "the conventional take seemed to be -- the era of regulating has ended, the era of spending has begun; goodbye neoliberalism, hello industrial policy, etc.," Lienke said.

And yet, "here we are a year later, and the reality is more complicated because, surprise, the Clean Air Act still exists, and EPA still has a legal obligation to regulate emissions of greenhouse gasses and other air pollutants from power plants and cars and all sorts of other sources."

Even so, he added that the "legally and economically appropriate design and stringency of those regulations is absolutely informed by the availability of IRA subsidies."

Poloncarz agreed that it "was a premature conclusion that regulation is dead, and I think there is a really robust role for all of us regulatory lawyers in this tax incentive-driven future."

Regarding EPA's May power plant GHG proposal, Carbonell said the agency received over 1.2 million comments. The agency is "quite busy these days reviewing those," and it is "looking to issue a final rule in this proceeding by spring of next year."

Carbonell said he could not respond to individual comments, but his characterizations of the proposal seemed to indicate that the agency is unlikely to completely reassess the rule's reliance on carbon capture and storage (CCS) and hydrogen co-firing.

"The intent of the proposal was to lay our best understanding of the opportunities that are available to reduce CO2 emissions from new and existing plants," Carbonell said. "We look carefully at CCS and hydrogen as the basis for standards for certain of those plants. It wasn't . . . the basis of the standards across the board. And we've put forward what we thought was the best information we had about availability of those technologies, how they could be ramped up over time, their effectiveness."

Meanwhile, Poloncarz at the event slammed the comments on the proposal from the Edison Electric Institute (EEI) that represents investor-owned utilities, arguing the group is misinterpreting key caselaw.

"EEI's comments have a very cynical view of what the Clean Air Act is intended to do. They reflect a view that is very at odds with how the [U.S. Court of Appeals for the District of Columbia Circuit] has interpreted section 111 for over a half century," he said, referencing EEI's view that the proposal is unlawful because it looks into the future when considering technology options.

The D.C. Circuit has "interpreted the [CAA] to be a technology-forcing rule, and they've always allowed, when EPA is determining what is achievable, EPA to look forward to project about the development of technology," Poloncarz argued.

Further, he expressed optimism that the rule would survive an expected court challenge. "I think that all of the deficiencies that the Supreme Court saw in the Clean Power Plan, none of those are present here," Poloncarz said. He explained that in West Virginia, the high court said EPA arbitrarily devised a cap on coal-fired generation, and then set a standard in order to meet that cap.

Here, EPA took a different approach, setting standards premised on the amount of emissions cuts achievable via using cleaner fuels or installing CCS, he said. While EEI focuses on the fact that CCS isn't yet used widely in the power sector, Poloncarz reiterated arguments that many Clean Air Act rules have mandated technologies -- such as scrubbers or selective catalytic reduction (SCR) in industrial boilers -- that were not widespread when EPA premised a rule on their use.

Carbonell similarly defended the rule as well within section 111's bounds. "We've basically established very traditional performance standards for CO2 from these different units that leverage technologies that we've deemed to be cost effective and available and that can be applied directly to those plants to reduce their CO2 emissions."

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