



Trump administration's Clean Power Plan repeal proposal is illegal

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The Trump administration's efforts to sidestep finalized regulations through stays or delays have so far met with judicial rejection in three straight decisions.

As these courts have concluded, such a deregulatory strategy violates settled law that administrative agencies are bound by their own finalized regulations until they undo them through a new full rulemaking process.

Environmental Protection Agency Administrator Scott Pruitt last week published a proposal to repeal the Obama administration's Clean Power Plan that similarly is headed for rocky shoals.

The plan, although stayed pending resolution of legal challenges, is a fully finalized regulation, setting in place a federal-state process to reduce greenhouse gas emissions contributing to climate change from existing power plants.

Pruitt's proposed repeal has been criticized for its skewed cost-benefit analysis reversals and climate progress losses. But this repeal proposal suffers from two related illegalities, perhaps springing from Pruitt's political focus on pleasing favored constituencies regardless of what the law actually allows. An eventual legal loss might still be a political win.

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First, the repeal proposal flunks law about what agencies must do if seeking to change policy. Just last year, the Supreme Court reiterated that an agency proposing a policy change must provide a “reasoned explanation for disregarding facts and circumstances that underlay” the prior policy. If there is an “unexplained inconsistency,” then the new action must be rejected.

A president’s policy leanings can influence but not displace an agency’s reasoned judgment. Any agency proposing to change a rule like the Clean Power Plan—and here it is a proposed complete repeal-- must engage with its past reasoning, past scientific and factual conclusions, statutory requirements and relevant court precedents. Agencies cannot ignore inconvenient law or facts or their own prior conclusions.

The Reagan administration tried such an unjustified deregulatory move to get rid of airbag and seatbelt requirements, and was rebuffed by the Supreme Court.

Trump’s EPA says it prefers to interpret the Clean Air Act differently than Obama’s and claims its approach is consistent with past EPA practices. For justification, it focuses mainly on claims of reduced burdens on coal-burning power plants.

The agency, however, barely mentions the massive factual record and EPA findings supporting the Clean Power Plan. It ignores past legal analysis, other binding statutory language, past industry comments supporting the Clean Power Plan’s design, as well as the Obama EPA’s extensive documentation of best state and business practices to reduce pollution while retaining flexibility and minimizing costs.

Pruitt’s EPA nowhere acknowledges the broad use of market-based mechanisms that reduce greenhouse gas pollution from power plants, the effects of increased use of natural gas and the nature of the integrated electricity grid — all of which underlay the plan. Pruitt’s EPA even purged contrary studies from its website, as if that would make them go away. It ignores post-2015 clean energy trends. The repeal proposal does not discuss or justify the lost pollution reductions that motivated the original rule and are the focus of the Clean Air Act, although an accompanying cost-benefit analysis quantifies the changes in a document that itself is skewed and deviates from its past analyses.

Perhaps Pruitt thinks EPA can sidestep the Clean Power Plan record and its own past contrary reasoning because it has not proposed anything to replace it. Supreme Court law says no.

The second legal infirmity links to this lack of a replacement rule and EPA hedging on whether it might eventually propose a replacement. As even some industry allies of Pruitt were warning, even if EPA could justify a repeal of the Clean Power Plan, the agency is obligated to propose an effective replacement due to three intertwined legal authorities.

First, the Supreme Court in three major decisions has stated that the Clean Air Act applies to greenhouse gases. Most recently, the Supreme Court specifically alluded to the agency’s power to regulate existing power plant emissions under the exact provision underpinning the Clean Power Plan. Pruitt’s EPA says nary a word about these authoritative Supreme Court precedents.

Second, EPA under the Obama administration issued a massive (and judicially upheld) “endangerment finding” that documented risks to

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human health and welfare posed by greenhouse gas emissions.

Third, this case law plus the endangerment finding — which remains a valid and binding regulation — together trigger a legal obligation to act, as Obama's EPA concluded. The Clean Air Act says EPA "shall" prescribe regulations for pollution sources causing such endangerment. And power plants, especially coal burners, undoubtedly are subject to this mandate. A repeal with no replacement is illegal.

EPA must explain why some new means to regulate power plant greenhouse gas emissions is legally and factually sound in comparison to the Clean Power Plan and its past reasoning. EPA cannot ignore the record and real-world trends, sidestep binding Supreme Court law, and disregard statutory mandates.

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