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Climate change by administrative law?

Joseph F. C. DiMento is professor of law and social ecology at UC Irvine.



On Feb. 9, the U.S. Supreme Court acted to prevent the implementation of a rule of the Environmental Protection Agency, based on the EPA's authority under the Clean Air Act, to require that states make cuts in greenhouse gas emissions from producers of electricity in the states. Mainly the rule would mean major restrictions on older coal fired plants, with the probable closing down of some of them. Commonly called the "Clean Power Plan," the rule gave EPA the power to force states and coal-fired power plants by 2030 to cut carbon dioxide emissions by about a third.

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Rulemaking is the process in U.S. law wherein agencies establish rules through procedures usually directed by the Administrative Procedures Act. In that process, provisions of a statute are converted to detailed requirements, standards for example, after a notice and comment review period. It is an essential tool in U.S. law and a pillar of U.S. environmental law. Congress simply could never address the topics of environmental protection at the level of detail required to guide agency and private sector actions. The rule adopting the Clean Power Plan is available at 80 Fed. Reg. 64,662-64,964.

Two dozen states and industry strongly opposed the rule, even though to reach its goals several options were available to the states, including "cap-and-trade" programs; and there was considerable flexibility in the compliance schedule. In fact, no cuts in emissions are required before 2022. The opposing groups called the Obama administration's actions a war on coal. Under a process also authorized under U.S. administrative law, they sought to have the rule postponed with the idea of ultimately having it overturned by the courts. The EPA's action was classified as a power grab. In the words of Harvard law professor Laurence H. Tribe, who argued against the rule, it was a targeted attack on the coal industry that would have serious negative economic effects, including massive layoffs and bankruptcy. UC Berkeley scholars reported that it took less than 12 hours for the Clean Power Plan to become the most heavily litigated environmental regulation of all time.

Specifically, the challenges were that:

(1) The rule is in excess of the agency's statutory authority, goes beyond the bounds set by the U.S. Constitution, and otherwise is arbitrary, capricious, an abuse of discretion, and not in accordance with law;

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California Supreme Court

State high court mulls parole for juvenile offenders

The state Supreme Court will decide whether the Constitution requires parole hearings for juvenile offenders with lengthy prison terms.

Corporate

California Workers' Compensation Institute names new GC

Ellen Sims Langille, an equity shareholder at Finnegan, Marks, Theofel & Desmond APC in San Francisco, will take the legal helm at Oakland-based CWCI in April.

Judges and Judiciary

Judge admonished for ex parte chat with prosecutor

Santa Clara County Superior Court Judge Stuart Scott has received a public admonishment from the state Commission on Judicial Performance.

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(2) based on statutory interpretations (in part linked to imprecision in drafting of the Clean Air Act because of differences in the House of Representatives and the Senate versions), the EPA could not regulate power plants under the section of the act upon which it was relying; and

(3) the rule unlawfully extends into areas traditionally under the domain of states - beyond the agency's authority to act.

By a 5-to-4 vote, with the more liberal Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan voting to deny the application, the Supreme Court ruled that the EPA's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" were "stayed" pending review in the U.S. Court of Appeals for the D.C. Circuit and possible (likely) future Supreme Court consideration. The stay order means that the rule will not go into effect until the legal challenge is decided; the regulations are "on hold." Earlier in the year, a panel of the D.C. Circuit had unanimously denied a stay. The five justices staying the guidelines included Justice Antonin Scalia, who died four days after the order. There was no written opinion by either the majority or the dissent explaining the basis for the decision.

This type of ruling is rare especially in light of the fact that there was already an expedited schedule to reach the merits of the case at the appeals court level. In fact, no case could be found, including by the states seeking the stay, wherein the Supreme Court had granted a stay in similar circumstances involving a generally applicable rule. Under a different, less politicized court, legal analysts would have predicted that the process would play out and the Supreme Court would not have become involved at this stage.

What does the order mean for the ultimate fate of the Clean Power Plan?

Domestic, within the U.S. On the one hand, it suggested an orientation toward the merits of the case, a concern for the overreach of executive power. After all, the test for a stay is difficult to meet: Among other requirements, the petitioner must make a strong showing that it is likely to prevail on the merits of its appeal and that, without relief, it will be irreparably injured.

If ultimately overturned, the rationale that the final court opinion utilizes will need to be analyzed carefully: It might be necessary for a re-write of the regulation. Conceivably the opinion could be so sweeping as to dissuade the EPA, and the new administration, from pursuing the plan's approach to emissions reductions.

International. It is perhaps an exaggeration to say that the world is watching this esoteric administrative law process in the U.S. However, if the rule is ultimately overturned and alternative programs are not aggressively pursued, it will be more difficult for the U.S. to meet its obligations under the Paris Agreement: The pledge to the United Nations to cut U.S. net greenhouse gas emissions 26-28 percent by 2025 from the 2005 level. The White House announced after the ruling that it would honor its commitments to the Paris outcome and sign on to its obligations in April 2016, but the paths to those large numbers are cluttered with obstacles that opponents are creating.

There are several contingencies. The Court of Appeals is expected to hear arguments in the case in June. Almost certainly appealed whatever that decision, the Supreme Court would take up the case after President Barack Obama's term expires. The ultimate resolution of this case may well turn on the outcome of the next presidential election, in November of this year. If a new court, in light of the death of Justice Scalia, supports the rule, the plan can go into effect in a way that gives states time to meet the plan's goals. If the Clean Power Plan is overturned by the Supreme Court, naturally states would not be regulated by it. If the Supreme Court rules on the matter before a ninth justice is confirmed and the vote is 4-to-4, the opinion of the Court of Appeals would be upheld, and at this point we do not know for sure what that will be. Currently, it seems fair to conclude that the EPA's plan likely will not go into effect unless a Democrat wins the White House in November.

In any event, states can choose to implement the substance of the rule anyway. States like California are already acting in ways consistent with the rule, and even states challenging the rule may elect to develop a compliance plan in case the rule is upheld. Also, other executive and administrative actions are moving in the direction of

Law Practice

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Intellectual Property

Marvell settles patent suit for \$750 million

Santa Clara-based Marvell Technology Group Ltd. will pay \$750 million to settle an epic patent fight spanning nearly seven years with Carnegie Mellon University, the semiconductor company announced Wednesday.

Criminal

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U.S. Supreme Court

Justices should provide backup for our veterans

The U.S. Supreme Court will soon determine whether Congress intended to maximize the procurement contracts awarded to veteran-owned businesses with the 2006 Veterans Act. By **Jessica Ring Amunson and R. Trent McCotter**

Environmental

Climate change by administrative law?

On Feb. 9, the U.S. Supreme Court acted to prevent the implementation of an EPA rule requiring that states make cuts in greenhouse gas emissions from producers of electricity in the states. By **Joseph DiMento and Alejandro E. Camacho**

U.S. Supreme Court

Justices to look at when debtors can avoid debt

In March, the U.S. Supreme Court will hear arguments about whether debtors are allowed to transfer assets for less than equivalent value in exchange, without it being deemed fraud. By **Neal Salisian and Stephanie Chau**

significant emission reductions already. And market forces are making the case for alternative energy sources, even independent of concerns for environmental protection. Of course, with the possible election of a president opposed to the rule and his or her appointment of a Supreme Court justice who would vote to overrule it, the influence of individual state actions would be great. In light of the opposition of several states, however, national and international emissions goals for restraining global climate disruption may be difficult to achieve.

Joseph F. C. DiMento is professor of law and social ecology at UC Irvine. He writes on domestic and international environmental law and international public law, including most recently "Climate Change: What it Means for Us, Our Children and Our Grandchildren" (second edition; co-edited with Pamela Doughman) and "Environmental Governance of the Great Seas: Law and Effect" (with Alexis Hickman).

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Military Law

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Mergers & Acquisitions

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Labor/Employment

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U.S. Supreme Court

Chief Justice Tani Cantil-Sakauye logical choice to replace Scalia

Our nation should not suffer a deadlocked, eight-member Supreme Court unable to resolve major cases for a year or more. Obama should chose a nominee that responsible Republicans and Democratic senators could support. By **Terry B. Friedman**

Corporate Counsel

Erin Copeland

Chief Legal Officer San Manuel Band of Mission Indians Highland

Judicial Profile

Anthony Trendacosta

Superior Court Judge Los Angeles County (Monterey Park)

Litigation

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