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Slow & Steady: A Gradual Approach to Federalization of Grid Regulation

Purba Mukerjee*

In the absence of meaningful state-level solutions, there is a pressing need for federal action to address regional and global environmental issues like ozone pollution and climate change. Answering this call, the Environmental Protection Agency has recently promulgated aggressive regulations under the Clean Air Act. These rules entail federal reach into traditional areas of state authority, particularly in the energy sector, and the Supreme Court has indicated that it might tolerate such strong-handed federal control where states have been shirking their statutory responsibilities. However, in light of the legal shift towards federalization of energy regulation, this Note cautions against initial federal regulations that dramatically constrain states’ discretion in electricity and environmental planning. Such an approach would constitute an abrupt shift from state to federal jurisdiction over aspects of the electricity grid. Because states still have an important role in ensuring electricity reliability and affordability, this Note proposes that federal agencies, when occupying areas of traditional state control for the first time, promulgate rules and standards that still preserve much of states’ regulatory flexibility. Then, in subsequent regulations, federal agencies can expand their reach by setting more stringent standards and limiting state options for compliance. This will allow for more enduring and effective federal regulation and enable both states and the federal government to ensure a clean, affordable, and reliable electricity grid.

Introduction

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INTRODUCTION

On a hot afternoon in June 2013, President Barack Obama began his address to Georgetown University with a perhaps unintentional—yet symbolic—gesture: the president removed his suit jacket and rolled up his sleeves. He then announced his plan to “lead the world in a coordinated assault on a changing climate.” Expressing frustration with congressional failure to pass meaningful climate change legislation, the president emphasized that global warming is “a challenge that does not pause for partisan gridlock.” Given the urgent nature of global warming, the recently re-elected president asserted that he would exercise his executive authority to the fullest extent in order to fight climate change, unveiling his “national climate action plan.” As part of this plan, President Obama directed agencies such as the Environmental Protection Agency (EPA) to rigorously assert the authority that Congress had already delegated to them.

The president then declared the first battle in this war on climate change: “changing the way we use energy.” He explained that 40 percent of the country’s carbon emissions come from electricity generators. Armed with the
Supreme Court’s blessing to regulate greenhouse gases under the Clean Air Act (CAA or Act), the president announced that he would direct the EPA to use its CAA authority to “put an end to the limitless dumping of carbon pollution from our power plants.”

With its 2007 decision in Massachusetts v. EPA, the Supreme Court adopted a broad interpretation of “air pollutant” under the CAA and paved the way for the EPA to answer President Obama’s call to action in his “assault” on climate change. In Massachusetts v. EPA, the Court declared that the term “air pollutant” encompassed “all airborne compounds of any stripe.” This meant that greenhouse gases met the definition of “air pollutant” under the Act, and that the EPA had a “statutory obligation” to regulate them as such. Responding to Massachusetts v. EPA, the EPA made its first attempts at regulating greenhouse gas emitters: (1) the Tailpipe Rule, setting greenhouse gas emissions standards for cars and trucks; and (2) the Tailoring Rule. The Tailoring Rule covered both polluters that had a long history of regulation under the Act and greenhouse gas emitters that had not previously been subject to CAA requirements because they did not emit substantial quantities of conventional air pollutants. Most recently, the EPA proposed the Clean Power Plan in 2014.

As the EPA charges forward with the tremendous task of regulating carbon emissions for the first time, the agency is reaching into an area of traditional state authority: electricity generation. These new regulations raise two major questions. First, how will courts respond to federal reach into traditional areas of state regulation? Second, how does this change affect states and their ability to regulate the electricity grid?

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8. The president referred to the Supreme Court’s landmark decision, Massachusetts v. EPA, in which the Court held that the EPA had a “statutory obligation” to regulate greenhouse gases. See 549 U.S. 497, 534 (2007).
10. See Massachusetts v. EPA, 549 U.S. at 528–29.
11. Id. (emphasis added).
12. Id. at 529, 534.
15. Id.
With respect to the first question, in 2014 the Supreme Court in *Utility Air Regulatory Group v. EPA* indicated that it is unwilling to stand behind the EPA’s attempts to tackle climate change by regulating polluters that had not been historically subject to CAA requirements.\(^\text{18}\) The Court vacated portions of the Tailoring Rule because it was concerned that the EPA was “laying claim to extravagant statutory power over the national economy.”\(^\text{19}\) But earlier in the same session, the Court had handed down another decision, *EPA v. EME Homer City Generation, L.P.*, in which a six to two majority gave deference to the EPA’s direct regulation of electricity generation.\(^\text{20}\) The regulation was a bold move by the EPA because the agency traditionally regulates electricity generation under the CAA through the states, and not by direct federal control.\(^\text{21}\)

The EPA regulation at issue in *EME Homer* pushed the limits of federal authority to address another formidable air quality problem: interstate ozone pollution.\(^\text{22}\) The interstate ozone pollution problem is similar to carbon pollution in many respects. First, both problems arise from a disconnect between activity that generates emissions and resulting environmental impacts. Interstate ozone pollution has a geographic disconnect: emissions are generated in one state and blown by the wind to harm air quality in other states.\(^\text{23}\) As a result, downwind state citizens suffer the consequences of short-term ozone exposures, such as lung damage and asthma.\(^\text{24}\) Carbon pollution has both a geographic and temporal disconnect: the impacts of accelerated climate change are felt globally rather than locally, and these impacts are not immediate—noticeable only decades, even centuries, into the future.\(^\text{25}\)

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\(^{18}\) See *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2436–38 (2014). The Supreme Court upheld the EPA’s Tailoring Rule with respect to the historically regulated sources, but vacated the EPA’s regulation of sources that had not been otherwise regulated under the CAA. *Id.* at 2447–48.

\(^{19}\) *Id.* at 2444.


\(^{25}\) Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the *Clean Air Act*, 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1). The EPA found that “human-induced climate change” from greenhouse gas emissions has impacts on a global scale. *Id.* Additionally, the EPA found that the effects of these emissions are observable on a timescale of decades to centuries. *Id.*
The disconnect between generation activity and air quality effects may partially explain the second similarity between the greenhouse gas and interstate pollution problems: the dearth of robust regulations for addressing them. The EPA has been struggling over the past twenty years to control interstate pollution, and its rules have only achieved mixed results. Since a downwind state’s ozone problem arises from emissions that have travelled great distances and from a broad geographic region beyond state boundaries, it has been difficult for the EPA to allocate blame to particular states and accordingly determine emissions budgets and control requirements. Similar challenges arise for regulating carbon pollution because emissions have a global, rather than local effect and impacts are detected gradually and in the future.

Finally, this regulatory void means that both of these problems are urgent. Interstate air pollution has been diminishing air quality and interfering with the environmental compliance of downwind states for decades. Carbon emissions have yet to be closely regulated. As President Obama told Georgetown University, even though electricity generation accounts for 40 percent of the nation’s carbon emissions, there are no federal regulations limiting these emissions, and “power plants can [ ] dump unlimited amounts of carbon pollution into the air for free.” There is an urgent global need to curb carbon dioxide (CO₂) production as soon as possible in order to slow the pace of climate change.

These three factors—generation-impact disconnect, regulatory void, and urgency of the problem—all seemed to move the Court in EME Homer to support the EPA’s attempt to control interstate air pollution by directly regulating power generators. Perhaps, looking ahead to the EPA’s attempts to regulate carbon emissions, the EME Homer decision signals a federal judiciary that is willing to recognize a preeminent federal role in addressing difficult environmental challenges. In fact, some commentators looked to the Court’s

26. See infra Part II.A.
28. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,514.
29. Dittman, supra note 23, at 206.
30. See Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (one of the EPA’s earliest attempts to regulate greenhouse gas emissions); see also Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2447 (2014) (overturning the Tailoring Rule’s regulation of sources that emit only greenhouse gases and not other conventional air pollutants under the CAA).
31. Clean Power Plan, 79 Fed. Reg. 34,830, 34,843 (June 18, 2014) (finding that in 2012, power generation accounted for 38.7 percent of the nation’s carbon dioxide (CO₂) emissions).
32. Georgetown Address, supra note 1.
33. The Court expressed concern that “[a]ir pollution is transient, heedless of state boundaries,” and that downwind states had been bearing the negative externalities of upwind states’ economic activity. EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1593 (2014). Additionally, “[t]hree times over the past two decades,” the EPA had been trying to give effect to the CAA’s Good Neighbor Provision and deal with the “complex challenge” of interstate air pollution. Id. at 1593, 1595.
holding in *EME Homer* as a sign that the Court would defer to the EPA’s initial attempts to regulate carbon given its similar characteristics to the interstate pollution problem.\(^3^4\)

With the Supreme Court seemingly receptive to more aggressive federal environmental regulation, and with a president who has directed his agencies to “assault” major environmental issues like climate change, where does this leave states? This Note focuses on this question and investigates how the Court’s reading of the CAA in *EME Homer* impacts the federal-state distribution of regulatory authority over the electricity grid. The Note proposes that, in future attempts to regulate air quality, the EPA should take an approach that is more sensitive to the balance of federal and state jurisdiction over the grid. The Note further cautions that federal regulations that suddenly disrupt the federal-state distribution of regulatory power may frustrate the nation’s ability to maintain a reliable, affordable, and clean electricity grid.

The proposal here is that the federal government should make an initial entry with conservative regulatory reach, setting flexible standards and being careful not to dramatically upset the distribution of federal-state authority over the electricity grid. Once an initial federal regulation has touched upon traditional state authority in energy regulation, the federal government can slowly expand its reach with more stringent standards and greater constraints on state regulatory power to achieve environmental goals. This argument does not go so far as to say that federal regulation should preserve the state-federal distribution of authority over the electricity grid, and this is not a Note about energy federalism. The discussion here is about the pace and process of federalization of grid regulation. This Note proposes that when entering an environmental regulatory void, particularly when there are implications for the power sector, federal agencies should take a tempered approach to occupying areas of traditional state authority. This Note posits that such an approach will make for more efficient and enduring regulatory changes.

Part I of this Note provides context with an overview of the federal-state distribution of regulatory authority over the electricity grid. Next, Part II examines the Supreme Court’s *EME Homer* decision in detail. Finally, Part III explores how the Court’s reading of the CAA in *EME Homer* too abruptly disturbs the federal-state balance in energy regulation and how this undermines the possibility of moving the nation towards a safe, clean, and resilient energy future. Part III concludes by recommending that the EPA—and the federal judiciary in reviewing EPA rules—should be sensitive to the traditional

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distribution of energy regulatory authority and proceed “slow and steady” in the transition towards direct federal regulation.

I. REGULATING THE ELECTRICITY GRID: THE BALANCE OF FEDERAL AND STATE AUTHORITY

Justice William Brennan of the Supreme Court once proclaimed that “[m]aintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom.”35 In the most basic terms, the electricity grid has three major components: electricity generation, transmission through high voltage lines, and distribution to consumers through lower voltage lines.36 Setting limits on both federal and state regulatory power over the electricity grid is especially challenging because the grid is a highly integrated, interconnected structure that does not easily map onto traditional power divides between states and the federal government.37 Due to the incompatibility of the grid structure with geographic state boundaries and the legal limits of federal and state power, there is a “well-documented tension” between states and the federal government over electricity regulation.38 This Part provides context for this tension by laying out the basic framework of electricity regulation in this country.

A. State Grid Regulation

At the state level, several different agencies, each with distinct mandates, are responsible for ensuring that state citizens receive reliable, affordable, and safe electricity.39 This subpart provides a brief overview of two major actors: state public utility commissions and environmental agencies.

Public utility commissions (PUCs) are charged with ensuring reliable and affordable power service.40 Electricity can come from either investor-owned utilities, publicly owned utilities, or utility cooperatives, but investor-owned utilities provide the majority—70 percent—of the country’s electricity.41 State PUCs closely regulate investor-owned utilities and have the authority to approve or disapprove of plans such as retiring old plants, investing in new generation, or improving metering systems.42 This authority grants PUCs a

39. Triple Bottom Line, supra note 21, at 3.
40. Id. at 10.
42. Scott, supra note 41, at 375.
major role in shaping a state’s electricity generation landscape and grid infrastructure.43

State PUCs primarily regulate electric utilities through rate-setting.44 Rate-setting is a result of the “regulatory compact,” in which states grant a utility a monopoly over service in an area, and in return, the utility agrees to offer affordable service to ratepayers, under PUC oversight.45 Thus, by approving or disapproving a utility’s proposed rate for electricity service, a PUC determines to what extent it will allow the utility to recover for investments in new generation, distribution lines, or other infrastructure.46 This is the traditional electricity regulation model and is still used by approximately half of the states.47

In the remaining states, the PUCs do not directly regulate generation but still have authority over other aspects of the grid, like distribution lines.48 However, PUCs in these states often indirectly regulate electricity generation through approval authority over long-term power purchase agreements.49 Because of the huge capital investment required for building new generation, investors often first require long-term power purchase agreements from utilities before backing construction of a new plant.50 Thus, even in restructured states, PUCs have some control over the electricity generation landscape.

State PUC action intersects with environmental regulation because PUCs must consider to what extent utilities can recover costs for investing in environmental control measures.51 Thus, to best protect both utility companies and ratepayers, PUCs need to remain informed of shifting environmental standards and policies in the state. PUCs are highly risk-averse in guaranteeing affordable rates and therefore require regulatory certainty before approving environmental control investments.52 Only a few PUCs even allow utilities to cite prospective environmental policy developments as a basis for cost recovery of new pollution control technologies and infrastructure.53

PUCs are not the only state-level agencies that work to ensure that ratepayers get clean, affordable, and reliable electricity.54 State environmental agencies develop, implement, and enforce both state and federal air quality standards.55 In developing state plans for meeting federal standards,
environmental agencies make decisions about which types of energy generation to favor and which should bear more of the compliance burden.\textsuperscript{56} These decisions shape the state’s electricity generation landscape. State environmental laws can also influence utility investment decisions.\textsuperscript{57} State environmental agencies have permitting authority and make determinations about whether a proposed energy project will be in compliance with state and federal environmental standards.\textsuperscript{58} Additionally, some states have energy commissions, which develop states’ energy policies such as energy efficiency implementation or renewables development, which can shape utility investment decisions.\textsuperscript{59}

These state agencies—PUCs, environmental protection agencies, and energy commissions—are not the only agencies at the state level that directly and indirectly shape state energy policy, but they are the main players in electricity regulation.\textsuperscript{60}

\textbf{B. Federal Grid Regulation}

In 1935, Congress amended the Federal Power Act and granted the federal government jurisdiction over “the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce.”\textsuperscript{61} Through the Federal Power Act, Congress was also careful to limit the scope of federal power, expressly denying federal jurisdiction “over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce.”\textsuperscript{62} Congress reserved these powers for the states.\textsuperscript{63}

Beyond the Federal Power Act, Congress has created a federal role in some other aspects of energy regulation.\textsuperscript{64} For example, under the Public Utility Regulatory Policies Act of 1978, Congress required utilities to purchase co-generation and renewable power from small generators that are not utility-owned.\textsuperscript{65} Furthermore, the Energy Policy Act of 2005 attempted to give the federal government backstop siting authority for the construction of new

\begin{flushleft}
\begin{itemize}
  \item \textsuperscript{57} \textit{Triple Bottom Line, supra note 21, at 15.}
  \item \textsuperscript{58} \textit{See id. at 17.}
  \item \textsuperscript{59} \textit{See id. at 3.}
  \item \textsuperscript{60} \textit{See id. at 10.}
  \item \textsuperscript{61} \textit{Federal Power Act, 16 U.S.C. § 824(b)(1) (2012).}
  \item \textsuperscript{62} \textit{See id.}
  \item \textsuperscript{63} \textit{See id. This statement is a generalization for the purposes of this discussion. For example, the federal government has jurisdiction over hydropower projects on navigable waters where Congress has Commerce Clause jurisdiction. Id. § 797(e).}
  \item \textsuperscript{64} \textit{See Energy Innovation, supra note 17, at 1354–55.}
  \item \textsuperscript{65} § 824a-3.
\end{itemize}
\end{flushleft}
interstate transmission. Additionally, Congress has passed legislation that creates more indirect means of federal regulation over the power sector. For example, through environmental statutes like the CAA, the federal government sets national air quality standards that require power generators to incorporate certain control technologies to advance state compliance.

Federal agencies implementing congressional statutes have been careful not to reach too far into traditional areas of state electricity regulation, namely intrastate generation and transmission. Similarly, the federal judiciary has been reticent to allow federal agency reach into traditional areas of state power regulation.

II. PERTURBING THE BALANCE: EPA V. EME HOMER CITY GENERATION, L.P.

The urgency and broad geographic scope of modern environmental problems often require an assertive federal response. In the air pollution context, this might mean federal reach into activities and parties that have long been under state control. For example, to control interstate air pollution, the EPA’s Transport Rule directly regulated utility-scale generators, which are traditionally regulated directly by states. In reviewing the Transport Rule, the Supreme Court in EME Homer indicated that it is willing to tolerate such a regulatory reach by the EPA. This Part examines the legal and regulatory background behind the EME Homer case, and then explains the Court’s decision and its implications for federal authority under the CAA.

66. § 824p.


68. See Alice Kaswan, Controlling Power Plants: The Co-Pollutant Implications of EPA’s Clean Air Act § 111(d) Options for Greenhouse Gases, 32 VA. ENVTL. L.J. 173, 184–85 (2014); Energy Innovation, supra note 17, at 1353–54 n.43.

69. Energy Innovation, supra note 17, at 1355.

70. For example, the Supreme Court in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission found that the Atomic Energy Act, which Congress enacted to promote nuclear power, did not preempt California’s statutory moratorium on developing new nuclear plants. 461 U.S. 190, 221–23 (1983). The Court found that by passing the Atomic Energy Act, Congress had preserved state authority to limit nuclear power and had “continued [the] preservation of state regulation in traditional areas.” Id. at 222–23. Similarly, the Fourth Circuit in Piedmont Environmental Council v. Federal Energy Regulatory Commission narrowly interpreted the federal backstop siting authority for interstate transmission under 16 U.S.C. § 824p, because the court found that Congress “did[] not . . . intend[] to bring about the sweeping transfer of jurisdiction” from states to the federal government. 558 F.3d 304, 313 (4th Cir. 2009).


A. Legal Background: The CAA, Good Neighbor Provision, and EPA Rules

The CAA is structured on a cooperative federalism model, meaning that the federal government and the states act together: The EPA sets national air quality standards for the states, and states develop regulatory plans, or State Implementation Plans (SIPs), for meeting these standards.73 States have “wide discretion” in developing their plans.74 As long as a SIP complies with national standards, a “[s]tate may select whatever mix of control devices it desires,” including according special treatment to particular industries.75

Despite this broad discretion, states’ opportunities to regulate under the CAA exist against the threat of federal preemption.76 The Act includes a conditional preemption provision, section 110(c)(1), which subjects SIPs to EPA approval.77 If the EPA finds a SIP inadequate to meet national air quality standards, the EPA will promulgate a Federal Implementation Plan (FIP) until the state offers a compliant SIP.78

In 1970, Congress attempted to address the problem of interstate air pollution by including the Good Neighbor Provision in the CAA.79 As amended, the provision currently requires states to include “adequate provisions” to keep in-state sources from “contribute[ing] significantly to nonattainment in, or interfering with maintenance by, any other State” of any national air quality standard.80

In 1998, the EPA issued a rule in its first attempt to define the phrase “contribute significantly” in the Good Neighbor Provision.81 The EPA calculated the amount of emissions of nitrogen oxides that could be controlled through “highly cost effective” measures and deemed these to “contribute significantly” to downwind states’ nonattainment or failed maintenance.82 The rule outlined corresponding responsibilities for upwind states deemed to “contribute significantly” to downwind states’ nonattainment or maintenance of national air quality standards.83 Several states and industry members challenged this rule, alleging that it was impermissible under the CAA for the EPA to consider costs to set “significant contribution[s]” because the CAA calls for health-based standards.84 The D.C. Circuit held that the word

76. See § 7410(c)(1).
77. Id.
78. Id.
79. § 7410(a)(2)(D)(i).
80. Id.
82. Id. at 57,377–78.
83. Id.
“significant” was ambiguous, and that unless Congress explicitly precluded the use of cost considerations, the EPA’s approach here was permissible.\footnote{85}{Id. at 677–78.}

Later, in 2005, the EPA promulgated another rule under the Good Neighbor Provision.\footnote{86}{Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005) (to be codified at 40 C.F.R. pts. 51, 72, 73, 74, 77, 78, 96).} This time, the EPA defined an upwind state’s “significant contribution” by cost and other factors like “fairness” and “reasonable balance of state and local controls.”\footnote{87}{Id.} First, the EPA would screen states to which this rule would apply by calculating that state’s impacts on other states’ air quality.\footnote{88}{Id. at 25,191–92.} Then, the EPA calculated the reductions possible for this group of states as an entire region,\footnote{89}{Id. at 25,226–28.} and allocated emissions budgets amongst those states.\footnote{90}{Id. at 25,229–33.} Finally, the rule established a cap-and-trade program for the screened-in states to facilitate management and reduction of interstate air pollution.\footnote{91}{Id. at 25,273–89.}

When states and power producers challenged this rule, the D.C. Circuit vacated in North Carolina v. EPA.\footnote{92}{North Carolina v. EPA, 531 F.3d 896, 930 (D.C. Cir. 2008).} The court found that because the EPA assumed that all states took a regional approach to assessing upwind state contributions, “it never measured the ‘significant contribution’ from . . . [each] individual state to downwind [states].”\footnote{93}{Id. (quoting the Good Neighbor Provision) (emphasis in original).} For this reason, the D.C. Circuit held that the EPA was neglecting its statutory mandate to ensure that sources “within the State” were not “contributing significantly to nonattainment in . . . any other State.”\footnote{94}{Id.} The court ultimately allowed the rule to stay in place until the EPA promulgated a new rule consistent with its opinion.\footnote{95}{North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008).}

Responding to North Carolina, the EPA promulgated the Transport Rule in 2011, again attempting to define “contribute significantly.”\footnote{96}{Transport Rule, 76 Fed. Reg. 48,208, 48,210 n.4 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, 97).} Here, a “significant contribution” occurred anytime an upwind state’s emissions contributed 1 percent or more to a downwind state’s emissions for three national air quality standards.\footnote{97}{Id. at 48,236–37.} The twenty-seven upwind states found to be significant contributors were then subject to regulation under the Transport Rule.\footnote{98}{Id. at 48,255–56.} Then, for each of the three standards, the EPA imposed reductions requirements, based on cost, for each upwind state.\footnote{99}{Id.}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 677–78.
\item Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005) (to be codified at 40 C.F.R. pts. 51, 72, 73, 74, 77, 78, 96).
\item Id.
\item Id. at 25,191–92.
\item Id. at 25,226–28.
\item Id. at 25,229–33.
\item Id. at 25,273–89.
\item North Carolina v. EPA, 531 F.3d 896, 930 (D.C. Cir. 2008).
\item Id.
\item Id. quoting the Good Neighbor Provision) (emphasis in original).
\item North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008).
\item Id. at 48,236–37.
\item Id. at 48,255–56.
\end{enumerate}
\end{footnotesize}
Transport Rule, the EPA simultaneously promulgated a FIP that allocated the upwind states’ emissions budget amongst their power facilities.100

A group of states, industry groups, and labor organizations challenged the Transport Rule, and in 2012, a divided panel of the D.C. Circuit vacated the rule.101 First, the court found that the EPA had exceeded its authority because the Transport Rule’s allocation of emissions controls would require some upwind states to eliminate more than their own contribution to a downwind state’s air quality.102 Citing to its decision in North Carolina, the D.C. Circuit explained that it was impermissible for the EPA to require—through this cost-based allocation to the group of upwind states—the selected upwind states, as a region, to “share the burden of reducing other upwind states’ emissions.”103

Second, the D.C. Circuit vacated the Transport Rule because it found that after the EPA set the emissions reductions requirements under the Good Neighbor Provision, it should have allowed states to propose SIPs allocating emissions allowances amongst power producers.104 The court held that the EPA must quantify a state’s obligations under the CAA in order to trigger the requirement for a compliant SIP.105 Since the EPA had yet to quantify Good Neighbor Provision obligations for the states, it could not find SIPs inadequate for meeting those standards and could not promulgate a FIP.106

B. EPA v. EME Homer City Generation, L.P.

At the Supreme Court, a six-justice majority in EME Homer City found that the EPA’s interpretation of the ambiguous Good Neighbor Provision in the Transport Rule was reasonable and should receive deference.107 Thus, the EME Homer majority reversed the vacatur of the Transport Rule, and remanded other challenges to the rule back to the D.C. Circuit for further consideration.108

Justice Ruth Bader Ginsburg, writing for the majority, explained that the CAA requires the EPA to reduce pollution from upwind states in “amounts which . . . contribute significantly” to downwind states’ air quality compliance, and the statute is ambiguous in that it does not specify a particular metric for the EPA to use in determining those amounts.109 In light of this ambiguity, the Court held that the EPA’s use of cost-based allocations to set emissions reductions was a reasonable interpretation of the Good Neighbor Provision.110

100. Id. at 48,284–87.
102. Id. at 20.
103. Id.
104. Id. at 11–12.
105. Id. at 30–31.
106. Id. at 31.
108. See id. at 1610.
109. Id. at 1604, 1606.
110. Id. at 1607.
Second, the *EME Homer* majority found that because CAA section 110(c)(1) provides that the EPA can issue a FIP “at any time” within two years of finding a SIP inadequate, the agency was not required to offer states a fresh opportunity to submit SIPs for the emissions standards in the Transport Rule.\(^{111}\) The Court even read section 110(c)(1), the conditional preemption provision of the CAA, as imposing a “statutory duty” upon the EPA to issue a FIP within two years of finding a SIP inadequate, even if the finding of inadequacy was simultaneous with FIP promulgation.\(^{112}\) Finally, the Court noted that nothing in the statute required the EPA to offer states specific metrics before they could make their SIPs compliant with the Good Neighbor Provision.\(^{113}\)

### C. A Stronger Federal Role under the CAA

By endorsing the EPA’s FIP-first approach, the *EME Homer* Court tuned the language of the conditional preemption provision of the CAA to strengthen the federal role in national air quality control.\(^{114}\) This provision reads: “[EPA] shall promulgate a [FIP] at any time within 2 years” of finding a SIP inadequate to meet national air quality standards.\(^{115}\) The Court found that this provision rises to the level of a statutory duty: the EPA must issue a FIP within two years, a “strict time prescription,” of finding a SIP inadequate.\(^{116}\) Further, the Court held that since the EPA is authorized to issue this FIP “at any time” upon finding a SIP will not meet national air quality standards, even simultaneous promulgation of a FIP with new emissions control obligations is permissible.\(^{117}\) Justice Ginsburg explained that the CAA does not require the EPA to declare specific quantitative standards before states are required to comply.\(^{118}\)

This holding effectively narrowed the window of opportunity for states to act and expanded federal opportunity to act as soon as the EPA quantifies any emissions reductions responsibilities under the CAA.\(^{119}\) Such an interpretation of the conditional preemption provision of the CAA, which applies to other provisions of the Act, give the EPA broad discretion to define new emissions obligations, retroactively find that SIPs by definition are noncompliant with the new standards, and then proceed to directly regulate in traditional areas of state control.

\(^{111}\) *Id.* at 1600–01 (quoting 42 U.S.C. § 7410(c)(1) (2012)).

\(^{112}\) *Id.*

\(^{113}\) *Id.* at 1601.

\(^{114}\) *Id.* at 1600; *see also* § 7410(c).

\(^{115}\) § 7410.

\(^{116}\) *EME Homer*, 134 S. Ct. at 1600.

\(^{117}\) *See id.* at 1600.

\(^{118}\) *Id.*

\(^{119}\) *See id.* at 1600.
III. FEDERALIZING GRID REGULATION BY GRADUAL ENCROACHMENT

By reading the conditional preemption provision of the CAA to limit states’ and enhance the federal government’s opportunities to regulate, the EME Homer decision may have undermined the nation’s ability to smoothly and efficiently improve our electric generation landscape. This Note does not advance the view that federal regulators should exercise restraint to preserve traditional state areas of electricity grid control. Instead, it proposes that change would be more lasting, sustainable, and politically digestible if the shift towards federal energy regulation proceeded at a gradual creep, rather than by sudden perturbation to the nation’s electricity regulation framework. First, this Part explains how abruptly precluding states from their traditional roles in energy regulation could undermine the ability to make lasting and meaningful environmental change in the power sector. Second, this Part proposes that future EPA regulations touching on state jurisdiction over the power sector should initially be sensitive to the distribution of state-federal jurisdiction over the electricity grid.

A. Impacts of a FIP-First Approach

The EME Homer Court’s decision to uphold the EPA’s simultaneous promulgation of new emissions standards and a FIP—a “FIP-first” approach120—amplifies the federal-state tension over electricity grid regulation. Through the Transport Rule, the EPA made distributional choices regarding the upwind states’ newly defined emissions reduction obligations amongst state energy generators.121 This meant that the federal government, rather than state regulators, made the ultimate choices about which sources to favor and which to burden with more emissions obligations. Since states are the primary and direct regulators of electric utilities and electricity generation,122 and as this subpart explains, the Transport Rule FIP might have frustrated states’ energy planning to provide constituents with affordable, reliable, and clean power service.

When federal regulation reaches, for the first time, aspects of the electricity grid historically under state control, an initial rule should preserve a good degree of state discretion and flexibility to ensure a smooth and gradual shift towards federal regulation. Later federal regulations can increase the stringency of standards and drastically limit state discretion, but the initial rule should be sensitive to the historical state-federal distribution of authority over the electricity grid.

122. See Triple Bottom Line, supra note 21, at 3.
This subpart first recognizes the need for a federal solution to the interstate air pollution problem. It then discusses how abruptly restricting state regulatory authority, such as through a FIP-first approach, is not the appropriate remedy for punishing states ignoring CAA mandates. A sudden shift to federal regulation exacerbates state regulatory fracture with respect to energy and environmental planning and leads to regulatory inefficiency. Curtailing states’ opportunity to regulate through the FIP-first approach may undercut energy planning choices and policies that states have already made.

1. The Need for Federal Action

States’ long-time failure to comply with the Good Neighbor Provision could have been due to a lack of political will, the inability to acquire the requisite data to determine emissions control obligations, or a combination of the two. Regardless, decades of interstate pollution with downwind states absorbing the costs of upwind states’ economic activity indicated that federal action was necessary.123

First, to some degree, state failure to comply with the Good Neighbor Provision was due to a lack of quantified emissions budgets from the EPA and the difficulty of determining those at the state level. In the environmental context, states and local governments need federal-level quantitation.124 The geographic scope of some air pollution problems, like ozone, exceed the limits of state boundaries, and state analyses will not be at a scale that can accurately assess air quality.125 Additionally, states may not have the resources to perform the comprehensive and complex analysis and modeling necessary to understand which states are polluting, each state’s proportional contribution to regional air pollution, and the pollution controls that might most effectively and efficiently curb emissions.126 Federal data acquisition and analysis can be conducted at the scale and sophistication necessary to precisely allocate responsibility for emissions and determine appropriate control schemes.127 The D.C. Circuit, in reviewing the Transport Rule, explained that “there is no way for an upwind State to know its obligation without knowing its levels of air pollution in downwind States and then apportioning its responsibility for each downwind State’s nonattainment.”128 Thus, upwind states likely needed some federal

125. See id. at 614–15.
126. Id.
127. Id.
action to quantify their obligations before adopting control measures to meaningfully curb ozone levels downwind.

Even if lack of federal-level quantitation and guidance prevented upwind states from limiting their downwind air quality impacts, there can be little doubt that upwind states have deliberately shirked their Good Neighbor Provision obligations. State PUCs have been historically reluctant to push utilities and ratepayers to internalize the environmental costs of electricity generation.129 By 2011, when the EPA promulgated the Transport Rule, only one-third of coal-fired plants in the country had installed sulfur dioxide scrubbers, a pollution control technology that had been around for decades.130 Those plants were responsible for 73 percent of national sulfur dioxide emissions—one of the two pollutants regulated under the Transport Rule131—and provided only 42 percent of the nation’s electricity service.132

Not only did many upwind states avoid accountability for the environmental costs of their electricity generation, many states actively transferred those costs onto other states and their constituents.133 These states exported air pollution downwind by encouraging utilities to install especially tall smokestacks that would enable wind to carry their emissions downwind and out of state borders.134 Since 1970, when the modern CAA was passed, coal-fired power plants have installed 429 tall smokestacks, facilitating their home states’ environmental compliance but corrupting air quality in other states.135

Thus, federal action was necessary because, for decades, upwind states had flouted their Good Neighbor responsibilities—sometimes even exporting pollution with impunity—and downwind states had long petitioned the EPA to enforce the Good Neighbor Provision.136 Regardless of whether states’ noncompliance with the Good Neighbor Provision was due to lack of regional air quality data or the more likely lack of political will to take environmental responsibility, federal action was necessary. However, in compelling state action with the Transport Rule, the EPA should have stopped at quantifying states’ Good Neighbor Provision obligations. The consequence of upwind states’ noncompliance should not have been to preclude them from proposing SIPs.

129. See Scott, supra note 41, at 391, 400.
130. Reitze, supra note 123, at 424.
132. Reitze, supra note 123, at 424.
133. Dittman, supra note 23, at 206.
134. Id.
135. Id. at 206–07.
136. See id. at 206–07, 212.
2. The Wrong Solution: FIP-First Regulation

There may be some cathartic satisfaction in punishing states for not taking responsibility for regulating earlier by denying the privilege of proposing SIPs. However, abruptly curtailing states’ regulatory authority is not an appropriate remedy when the electricity grid is involved. The grid is regional, and electricity that is produced in one state is frequently used in other states. The EPA’s Regulatory Impact Analysis for the Transport Rule recognized that the “effect on electrical generation in one state has spillover effects in other states.” Because of the interconnected nature of the electricity grid, changes and disruptions to the grid in one state will impact the service in surrounding states. For this reason, it is in the national interest to minimize regulatory disruption and to not suddenly preclude states from regulating as a punitive measure. States currently have a central role in grid regulation, and sudden shifts in regulatory jurisdiction could frustrate states’ ongoing energy planning.

a. Exacerbating State Regulatory Fracture

Denying states an opportunity to make distributional choices exacerbates state-level regulatory fracture. Agency fracture exists when several different agencies all regulate a common system or resource like the electricity grid. In the energy context, these agencies are charged with different, sometimes conflicting, statutory mandates. For example, a state PUC’s primary objective is providing affordable and reliable electricity service, while a state environmental agency is charged with protecting natural resources and citizens’ health and safety. Although there is value in maintaining specialized agencies and concentrating expertise to address discrete aspects of a complex system like the power grid, agency fracture is problem to the extent that these agencies do not communicate and coordinate to align their policymaking.

For example, a state PUC may be unwilling to approve utility investment in expensive emissions control technologies because it seeks a high degree of regulatory certainty for its approvals. The state environmental agency, meanwhile, controls and shapes the state’s approach to compliance with state

137. Stein, supra note 36, at 219.
140. See Triple Bottom Line, supra note 21, at 3.
141. See Freeman & Farber, supra note 139, at 839–40 (explaining how regulatory fracture between the dozens of state and federal agencies charged with regulating the Bay-Delta area in California made agencies “reactive and defensive, blocking the initiatives of their competitor agencies”).
142. Triple Bottom Line, supra note 21, at 52–53. Investor-owned utilities have an incentive to exaggerate the need for implementing pollution control technologies because this is one way for them to attract investment. Id. at 52. Since the costs of upgrading plants with new technologies are transferred to ratepayers, PUCs protect ratepayers from absorbing unnecessary costs by requiring regulatory certainty before approving such investments. Id. at 53.
and federal air quality standards. Without communication between the two agencies, PUC approval processes for power plant technology upgrades will be inefficient and may ultimately harm ratepayers with pollution controls that lag behind changing environmental standards. By staying informed of shifting environmental policies and maintaining regular dialogue with state environmental regulators, PUCs can protect ratepayers and utilities from losses on investments that do not ensure long-term compliance with increasingly stringent environmental standards. Thus, agencies that regulate the electricity sector must coordinate and harmonize their decision making to advance a greater policy of providing citizens with reliable, affordable, and clean energy.

Since agency coordination is so important, abruptly removing one area of decision making to the federal government frustrates state agencies’ ongoing efforts to synchronize their policies and minimize regulatory inefficiency. Interagency information exchange is likely more feasible and fluid when it occurs at one level of government—amongst state agencies, which are somewhat unified in advancing state policy goals. It will be more challenging for state agencies to coordinate with the EPA, a federal agency that moves at a different pace than state agencies and advances potentially conflicting national energy policy.

Additionally, if state regulators were operating under the assumption that a state’s environmental agency—not the EPA—would be allocating new emissions control burdens, abruptly shifting to the EPA making those choices may disrupt any planning that other agencies had done based on coordination with the state’s environmental agency. This might be particularly relevant in states like West Virginia and Indiana, where the PUCs have statutory mandates to encourage coal-fired generation. There, the state environmental agency likely burdens other industries with pollution controls to the advantage of coal-fired electricity generation, and the PUCs will operate on this assumption. In such a situation, imposing a FIP that disfavors coal-fired power will undermine the state agencies’ efforts to coordinate.

b. Disrupting Existing State Energy Policy

Through a FIP-first approach, state agencies must swiftly react to federal energy policy rather than making calculated, strategic moves to advance federal aims. This means that states will have to make hurried changes to comply with a FIP, limiting their ability to develop robust, long-term grid development and

143. See id. at 15.
144. See id. at 52–53.
145. Id. at 22.
146. See id. at 53–55.
147. See Energy Innovation, supra note 17, at 1383 (explaining that Indiana and West Virginia utility commissions have had statutory mandates to encourage the use of coal).
maintenance plans. Without time to make a planned shift to federal energy policy, states may implement short-term fixes with higher compliance costs and lose opportunities to capture benefits from environmental control measures taken already.

First, the EPA’s Regulatory Impact Analysis for the Transport Rule demonstrates that the FIP will inevitably lead to the retirement of some power generators.148 This means that state PUCs and other energy regulators, charged with maintaining consistent and reliable electricity service, must rapidly develop solutions to compensate for the loss of capacity to meet the states’ electricity demand. For example, states may need to decide whether to import more power in from out of state, requiring investment in more distribution or transmission lines, or build up more in-state generation to compensate for the retiring plants. Making these decisions hastily, without deliberation and coordination between agencies and neighboring states, will not lead to the best long-term energy planning.149

Additionally, utilities and ratepayers may not be able to fully benefit from air quality control investments already made, to the extent that these conflict with the FIP. For example, in the greenhouse gas control context, some state regulators have required dirty plants to offset their carbon emissions by planting trees or buying fleets of natural-gas-powered buses.150 Ratepayers and utilities may still be recovering from the costs of earlier programs like these, which were funded in exchange for the cheap power from keeping dirtier power plants running. With a FIP-first approach, these ratepayers may not have fully recovered the rate benefit of cheaper power and would be required to bear additional costs of new FIP compliance measures.

Warning of the significant impacts of the Transport Rule FIP on upwind states’ existing energy policies is admittedly a weak argument. The EPA’s Regulatory Impact Statement for the Transport Rule FIP demonstrates that it will not be particularly burdensome for the electricity grid nor will it materially change most states’ generation portfolios.151 However, the actual concern here is not with the real impacts of the Transport Rule FIP itself, but the implications of suddenly perturbing the distribution of federal-state regulatory

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149. Several Midwest states, by collaborating with each other on renewables development, have successfully built up wind energy capacity and the transmission infrastructure to support it. Alexandra B. Klass & Elizabeth J. Wilson, Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch, 65 Vand. L. Rev. 1801, 1832–36 (2012). However, hasty and reactive decision making will preclude opportunities for interagency coordination and energy resource planning. See Triple Bottom Line, supra note 21, at 52–55.
151. See Regulatory Impact Analysis, supra note 138, at 260. Still, some estimates predict that the Transport Rule (along with a hazardous air pollution rule) could force between 60 gigawatts and 340 gigawatts of coal-fired capacity to shut down, and require plants responsible for another 100 gigawatts of capacity to make expensive upgrades. See Reitz, supra note 123, at 428.
authority over the power grid. State agencies that regulate the power sector have been operating under assumptions about the scope and modes of their regulatory authority based on long-established practices. For instance, after the EPA quantifies air quality standards, states usually have the opportunity to propose a SIP before the EPA promulgates a FIP. Thus, sudden redistribution of regulatory authority over the electricity grid could disrupt existing state energy plans to the detriment of state utilities and their ratepayers.

Although the Transport Rule’s impacts on state energy schemes are probably minimal, the consequences of regulatory disruption through federal control in the EPA’s most recent proposed greenhouse gas regulation—the Clean Power Plan—has greater implications. This proposed rule seeks to regulate existing power plants’ CO₂ emissions. To calculate emission performance goals for existing sources, the EPA calculated reductions possible under several different strategies, including energy efficiency measures. If the EPA incorporates these reductions into state CO₂ performance targets, then the EPA will have extended its regulatory reach “beyond the fenceline” of power generation to electricity consumption, which is traditionally under state control. Compliance with CO₂ performance goals that incorporate energy efficiency requirements will upset many states’ energy regulation schemes and their regional energy agreements with other states.

B. Gradual Federalization of Energy Regulation

This subpart proposes gradual federal encroachment into traditional state authority over the power grid rather than a sudden disruption of the present federal-state jurisdictional balance. In the interstate air pollution context, gradual encroachment means that the appropriate repercussion for states flouting their CAA responsibilities should have been for the EPA to impose more burdensome pollution control obligations, not to curtail state regulatory power. Similarly, in the EPA’s initial attempts to curb greenhouse gas emissions from the power sector, the EPA’s Clean Power Plan should limit its reach by not incorporating energy efficiency measures as part of its state CO₂ performance goals. Gradual federal entry into zones of state energy regulation

152. The D.C. Circuit held that the FIP-first approach of the Transport Rule was an “unprecedented” application of the CAA, because states normally have the opportunity to propose SIPs once the EPA quantifies their emissions control obligations under the Act. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 28 (D.C. Cir. 2012), rev’d, 134 S. Ct. 1584 (2014).
154. Id. at 34,830.
155. Id. at 34,856, 34,871.
157. Id.
will make for smoother, more efficient, and enduring pollution control and energy policy shifts.

1. Gradual Federalization

Gradual federalization means that when the federal government enters a regulatory void with a rule that will touch upon traditional state control in the energy sector, the initial entry should be sensitive to federal-state distribution of authority over the power sector. Once the federal government has staked its initial claim in a regulatory space, then it can gradually expand federal reach and advance national environmental goals by imposing increasingly stringent and rigid requirements upon regulated parties. Such an approach could minimize regulatory inefficiency and disruption.

For gradual federalization, reach into state regulatory territory should be cautious to limit disruption of states’ energy policies and long-term grid planning. Practically, in the CAA context, this means promulgating rules in which states retain a good degree of flexibility and there is no overt or dramatic transfer of jurisdictional power from states to the federal government. This way, direct federal regulation comes gradually and with some level of notice to states and regulated parties, likely making the shift more politically digestible.158 Such an approach will slowly erode agencies’ reliance on and assumptions about the extent of their control over certain aspects of the power grid. Thus, state agencies will have time to gradually adjust to the shift in jurisdiction over the grid.

2. Interstate Air Pollution

In addressing the interstate air pollution problems, gradual federalization means that the appropriate Transport Rule remedy for upwind states would have been for the EPA to set slightly more stringent emissions control obligations but preserve states’ opportunity to propose compliant SIPs. This is a more tempered approach because it would maintain state environmental agencies’ traditional decision-making authority in allocating emissions reduction responsibilities among state sources. The EPA’s quantification of Good Neighbor Provision obligations could have been enough to compel state action because it offered state PUCs the regulatory certainty needed to approve utility investment in air quality control technologies or cleaner electricity generation projects.

Still, there is a legitimate concern that after decades of failing to deal with interstate air pollution, states should not have an additional two years to

158. See Abbe Gluck, Intrasatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 YALE L.J. 534, 573 (2011) (explaining that in the context of using state implementation for national statutes, using states as initial implementers can help the public get more comfortable with the idea of federal regulation in an area before federal government expands its influence).
propose compliant SIPs. The EPA could instead have accounted for this delay by setting slightly more burdensome emissions reduction responsibilities rather than denying states a chance to amend or propose new SIPs. If these requirements were set too stringently, they would narrow states’ implementation options to the point that the EPA would be essentially directly regulating electricity generation anyway. However, given how modest the Transport Rule emissions control requirements were, there was likely some capacity for the EPA to set slightly more stringent standards without severely limiting state flexibility in making emissions reduction allocations amongst specific sources.159

3. The Clean Power Plan

In the Clean Power Plan, the EPA proposes quantifying state CO₂ performance goals by incorporating reductions achievable through energy efficiency measures.160 Like in the Transport Rule, the EPA would be potentially reaching into an area of energy regulation, demand-side management, which is traditionally a state function. Here, unlike in the Transport Rule, the EPA recognized the need to maintain a high level of state discretion and options for meeting federal emissions reduction burdens.161 The Clean Power Plan proposes state-specific goals, but the EPA is clear that it does not want to specify how states should meet those goals.162 The proposed rule claims that by “provid[ing] flexibility for states” in developing their carbon emissions control strategies, states can “achieve meaningful CO₂ emission reduction while maintaining the reliability and affordability of electricity.”163

The Clean Power Plan proposes giving states several options or “building blocks” for reducing carbon emissions, which broadly fall into three main strategies: controlling emissions from existing power plants; installing new, cleaner plants to replace old, carbon-intensive plants; and using demand-side management to meet reduction obligations.164 To set a carbon standard for each state, the EPA plans to incorporate emissions reductions using each of these three strategies.165 However, the agency maintains that states “would not be required to utilize each and every one of the measures.”166 To meet the Clean Power Plan standards, states would have the option of relying more heavily on one method and less on another, for example, by favoring energy efficiency

159. REGULATORY IMPACT ANALYSIS, supra note 138, at 254.
161. See id. at 34,832–33.
162. Id. at 34,833.
163. Id. at 34,832–33.
164. Id. at 34,835.
165. Id.
166. Id.
improvements over controlling emissions from existing power plants.\textsuperscript{167} Further, states could demonstrate compliance by utilizing strategies that were not even part of the EPA’s calculations for the CO\textsubscript{2} standard for that state.\textsuperscript{168}

The Clean Power Plan is an excellent example of gradual federal encroachment into areas of traditional state energy regulation: electricity generation and demand-side management. The proposed rule would allow states the flexibility of counting energy efficiency improvements, low-carbon generation, or any other mitigation measures the state chooses, towards meeting their CO\textsubscript{2} reduction targets. Then, if states begin demonstrating their energy efficiency reductions to the EPA, this will gradually establish a practice of the EPA reviewing state energy efficiency developments, for example, as compliance tools for controlling CO\textsubscript{2} emissions. Once this practice is established, the EPA will have made its initial reach to states’ demand-side management, and future carbon emissions rules can start to require, rather than allow, energy efficiency measures by incorporating these into state standards. Using this measured approach to incorporating energy efficiency reductions into state CO\textsubscript{2} standards will limit disruption of states’ ongoing programs and give state agencies the opportunity to adjust to federal reach into demand-side electricity regulation. In the Clean Power Plan, the EPA acknowledges the importance of initially maximizing states’ options for compliance with standards that reach areas of traditional state energy regulation:

EPA believes that the diverse range of measures encompassed in the [] building blocks allows states and sources to take full advantage of the inherent flexibility of the current regionally interconnected and integrated electricity system so as to achieve the CO\textsubscript{2} goals while continuing to meet the demand for electricity services in a reliable and affordable manner.\textsuperscript{169}

CONCLUSION

The interconnected and regional nature of the country’s power grid indicates that removing certain aspects of grid regulation from state governments to the federal level may be necessary. Regulating air emissions from power generators, where there is the possibility of environmental impacts beyond state borders, is just one example. Another example is in transmission siting.

There is a dire need for upgrading the nation’s aging transmission infrastructure.\textsuperscript{170} Although installation of renewables and low-carbon electricity sources is one of the Clean Power Plan’s building blocks and a powerful avenue for curbing carbon emissions, the nation does not have the

\textsuperscript{167} Id.

\textsuperscript{168} Id.

\textsuperscript{169} Id. at 34,836.

transmission infrastructure to accommodate large-scale development of large renewable energy projects. In the Northeast and parts of the West, the existing transmission infrastructure can barely accommodate the generation facilities it currently serves. Thus, building up transmission infrastructure to accommodate low- or zero-emission generation is another important battle in President Obama’s war on climate change.

States, which have primary transmission siting authority, have been very reluctant to approve transmission developments, and there are ongoing calls for enhancing federal authority over transmission. However, one commentator warns about regulatory fracture if there is abrupt federalization of transmission siting authority. If federal transmission policy rapidly clears the way for widespread transmission development without coordinating with state demand-side management policy, this may undermine state energy efficiency and conservation efforts. Therefore, abrupt federalization of transmission siting authority might ultimately undermine climate change goals.

Returning to President Obama’s call to federal agencies to take the lead in revolutionizing energy production and consumption, these agencies should also be cautious to limit sudden perturbations of federal and state jurisdiction over the power grid. Only then can states and the federal government together develop robust policies moving the country toward President Obama’s vision of “a low-carbon, clean energy economy” as “an engine of growth for decades to come.”

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.