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How Much Would the EPA's Greenhouse Gas Rule Cool the Earth?

BY ART FRAAS AND RANDALL LUTTER

The U.S. Environmental Protection Agency recently issued a landmark proposal to limit carbon dioxide emissions from existing fossil fuel-fired power plants in an effort to combat climate change. Surprisingly, the agency's analysis of its proposal fails to say how much global warming the proposal would prevent.

Fossil fuel-fired plants that power air conditioning, lighting, laptops, and plug-in vehicles are the biggest source of greenhouse gases in the United States. Regulating emissions from those plants is the best opportunity for the Obama administration to deliver on its promises to combat climate change. Yet the EPA's analysis of its proposal, which runs 376 pages, provides questionable estimates of the dollar benefits in 2030 of the climate change averted—\$30 billion—without estimating the projected change in the global average temperature from the proposal.

The EPA's benefits estimates rely on the tons of carbon emissions reduced by its proposal and federal estimates of the "social cost of carbon" (SCC). The SCC represents total global damages from all foreseeable future climate change associated with one ton of carbon emissions. This estimate, however, is contentious.

Massachusetts Institute of Technology economist Robert Pindyck wrote in the Fall 2013 *Journal of Economic Literature* that "models [used to estimate the SCC] have crucial flaws that make them close to useless as tools for policy analysis." He added that "the models' descriptions of the impact of climate change are completely ad hoc, with no theoretical or empirical foundation." He noted that arbitrary assumptions about certain inputs, such

as the choice of discount rate, have huge effects on the SCC estimates.

The SCC also relies on an assumption quite rare in government analyses of regulatory policies. It includes benefits to foreigners *as well as* Americans, while the typical approach focuses only on effects on Americans. The Obama administration elsewhere has estimated that benefits to foreigners could range from 77 to 93 percent of the global climate benefits in the SCC.

The EPA has previously provided quantitative estimates of the various measures of climate change averted by regulation. In a 2012 regulation setting emissions standards for light-duty cars and trucks, the EPA stated that as a result of the emissions reductions from the rule, by 2100 "the global mean temperature is projected to be reduced by approximately 0.007–0.018° C, and global mean sea level rise is projected to be reduced by approximately 0.07–0.16 cm." The Cato Institute's Paul Knappen-

berger and Patrick Michaels estimated that a comparable amount of warming would be averted by the EPA's proposed utility rule—about 0.018° C in 2100—using a publicly available model developed by academic researchers with support from the EPA and other organizations.

Global issue / The modest and even insignificant size of those projected effects reflects the huge inertia present in the planet's climate and, more importantly, the limited effect of unilateral U.S. action. Actions by other countries—especially China and India, where emissions are growing—are essential to efforts to reduce global warming. The U.S. Energy Information Agency predicts that virtually all growth in global emissions of carbon related to energy use—the single biggest source of greenhouse gases—will occur in countries that are not industrialized democracies. Under current policies, such countries will account for more than two-thirds of global emissions by 2040, and China and India are responsible for the lion's share of that emissions growth.

It is unclear how the EPA's action may affect efforts by other countries to limit emissions. On Nov. 11th, President Xi of China and President Obama jointly announced new emissions targets:

The United States intends to achieve an economy-wide target of reducing its carbon emissions 26%–28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%.

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China intends to achieve the peaking of [carbon dioxide] emissions around 2030 and to make best efforts to peak early and intends to increase the share of non-fossil fuels in primary energy consumption to around 20% by 2030.

The idea that Chinese carbon emissions will peak around 2030 is not new. Researchers affiliated with the Lawrence Berkeley National Laboratory made projections of peaks by 2030 in 2013. Further, the shift in electricity generation toward non-fossil fuels is driven by China's concern with extreme local air pollution. China's announcement thus does not appear to represent much change relative to recent forecasts. But it is new that the Chinese president has endorsed such a peak as a goal, even if—as our Resources for the Future colleague Nathan Richardson has noted—the endorsement does not legally bind anyone now or in the future.

India, whose emissions are the fourth largest in the world and growing at 5 percent annually, seems unlikely to adopt greenhouse gas controls as a result of the EPA rulemakings. At the September United Nations climate summit, India was not represented by its prime minister, but by its environment minister, Prakash Javadekar, who said, “India remains committed to pursuing a path of sustainable development through eradication of poverty, both of income as well as energy.”

The EPA is issuing greenhouse gas regulations partly because Congress has not been able to agree on what to do to control U.S. emissions that increase risks to the global ecosystem. An administrative agency acting without express congressional authorization ought to meet the highest standards of accountability and transparency when analyzing policy proposals. The power plant emissions proposal analysis fails to meet those standards.

The EPA should immediately report, as it has previously done, how much global warming its new proposed rule would avert by specific dates, such as 2100. Such information is essential to giving Congress and the public the full information they need to see and navigate the long, hot road ahead. 

Explaining Delays in Regulatory Publication

BY SAM BATKINS AND IKE BRANNON

After a proposed new regulation finishes winding its way through the procedural morass that is required before it can take effect, it does not immediately have the force of law. The federal government has to formally publish a notice in the *Federal Register* announcing to the world that a new regulation is afoot.

This ultimate step does not entail any complicated procedure. In the aftermath of the September 11, 2001, terrorist attacks, when the regulatory state was moving with uncommon alacrity to ensure that copycat hijackings never occurred, regulations issued by a federal agency would get published within hours of being approved by the White House's Office of Information and Regulatory Affairs (OIRA).

However, that is far from customary. These days, regulations that have garnered the OIRA imprimatur can languish for weeks or even months before appearing in the *Federal Register*. For instance, in April 2014, Sen. James Inhofe (R-Okla.) speculated that the U.S. Environmental Protection Agency intentionally delayed the publication date of its greenhouse gas standards for new power plants in order to avoid a vote under the Congressional Review Act until after the fall elections. According to Senator Inhofe, the EPA intentionally held the proposal for 66 days.

There has been extensive research attempting to discern the magnitude and cause of the delays that federal agencies face as they navigate the regulatory process. Few dispute the notion that more expensive and controversial regulations invite greater scrutiny during the inter-agency review process, lengthening the time it takes for such regulations to get OIRA approval. However, less effort has gone into determining what affects the fate

of rulemakings after the new rules leave OIRA. Is there something else besides sheer politics that causes an administration to delay the formal publication of a rule that has survived its regulatory process?

Strategic delay / In order to answer the question of why regulations face lengthy publication delays after OIRA review, we examined all major and “economically significant” final rules (those that have an economic effect of greater than \$100 million annually) published between August 2004 and August 2014. That constitutes a total of 491 rules from 17 cabinet agencies.

We compared this “publication delay” to several independent variables: the length of the OIRA review, the number of comments received, and status under the Unfunded Mandates Reform Act (UMRA), which we used as a proxy to indicate whether the rule imposes significant compliance costs. We also included the number of pages the rule ultimately took up in the *Federal Register* when published, which we interpreted as a proxy for complexity, and whether the rule was published during a congressional recess or in an election year. As we previously pointed out in these pages, rulemaking tends to speed up markedly during presidential election years, regardless of the party in power (“No ‘Midnight’ after this Election,” Spring 2013).

As shown in Table 1, the average delay between approval and publication in our sample was just under 17 days, but there was a high degree of variation between agencies. Not surprisingly, the EPA easily outpaced all other agencies, with an aver-

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age publication delay of 45.9 days—more than double the overall average. Former OIRA official and current Rutgers University professor Stuart Shapiro opined that the delay is clearly strategic: “Because the EPA has the most controversial rules, it has the most need for strategic timing with the release of its rules.” On the other end of the spectrum, the Departments of State and Veterans Affairs made haste whenever OIRA approved their major rules, with publication delays of merely 6 and 5.5 days.

The best proxy we have to capture how controversial is a proposed regulation is the number of comments received on the rule. Table 2 shows the results of a regression we ran on the data. We found a positive and significant relationship between the number of comments received on a rule and the time it took for the final regulation to be published.

Another positive explanatory variable is the number of pages in the regulation. Intuitively, this might make sense, although we discount the EPA’s reason for this, which is that a rule’s length and complexity make the logistics of publishing the rule and getting a written version prepared and distributed somewhat time-consuming. Responding to questions about the EPA’s delayed regulations, EPA press secretary Liz Purcia stated that “EPA follows routine interagency and internal processes to ensure that formatting, consistency, and quality control issues are addressed before any rule package is published in the *Federal Register*.” Apparently, the VA has better editors than the EPA.

A more complete answer undoubtedly lies in the inherent nature of the EPA’s regulations, which tend to be controversial, impose significant compliance costs, and are generally lengthy and complicated rule-makings that necessitate spending a significant amount of time at OIRA. Those variables are not entirely independent: as review times increase, more comments flood into the agency, the page length escalates, and UMRA is triggered, the more likely the rule will have a publication delay greater than the overall agency average of 16.9 days.

In general, we find the model predicts a delay that is within five to seven days

TABLE 1 AVERAGE DELAY IN PUBLICATION OF REGULATION

AGENCY	DELAY (in days)
Department of Agriculture	10.4
Department of Commerce	10.6
Department of Defense	8.3
Department of Education	9.3
Department of Energy	24.7
Department of Health and Human Services	11.5
Department of Homeland Security	14
Department of Housing and Urban Development	22.3
Department of Interior	7.9
Department of Justice	29.8
Department of Labor	24.3
Department of State	6
Department of Transportation	18.2
Department of Treasury	21.6
Department of Veterans Affairs	5.5
Environmental Protection Agency	45.9
Social Security Administration	17.5
Agency average	16.9

of the actual delay. For instance, a 2012 rule, “Joint Rulemaking to Establish 2017 and Later Model Year Light Duty Vehicle GHG Emissions and CAFE Standards,” spent 42 days at OIRA, received more than 370,000 comments, triggered UMRA, was 578 pages, and took place during an election and a congressional recess. The EPA delayed the rule’s publication by 48 days, compared to our model’s prediction of a 41-day publication delay.

For other rules, the regression yields even more accurate predictions of delay, coming within two to four days. For instance, in 2011 the Department of Energy published an efficiency standards rule for fluorescent lamp ballasts. Our model predicts that a rule with the same amount of review time (15 days), the same volume of comments (27), an equivalent number of pages (83), and that triggered UMRA like the efficiency rule did, should have a delay of 14 days. The ballast rule had an actual publication delay of 16 days.

Our findings also confirm what we noted in our Spring 2013 article, namely

that publication delays virtually vanished during the so-called “midnight” period after Election Day and before the next president takes office. (The only such period in our sample was between Election Day 2008 and President Obama’s inauguration.) The average publication delay during that interregnum was just 12.5 days, or significantly below the agency average.

Curiously, election years and congressional recesses were not statistically significant factors in the model. Some of the inevitable regulatory delay that occurs in election years may occur elsewhere—agencies may delay submitting regulations to OIRA, for instance, or else drag out the negotiations with OIRA in getting a regulation through the system.

All administrations try to bury bad news as best they can. While any major regulation approved by

Congress must ostensibly pass some cost-benefit standard, rules invariably necessitate some measure of compliance costs for the affected industries and a modicum of pain and frustration to boot. To lessen the blowback, administrations strive to release those rules at a propitious time so that the public’s attention is elsewhere. We suggest that the Obama administration has been especially keen on timing the formal release of new regulations for one political reason or another—which is certainly the

TABLE 2 REGRESSION RESULTS

VARIABLE	LOG DELAY	
	Coefficient	P-Value
Log of Review	0.093***	0.006***
Log of Comment	0.040**	0.034**
Log of Pages	0.262***	0***
UMRA	0.277***	0.003***
Election Years	0.019	0.803
Recess	0.058	0.449

, * indicate statistically significant at 5 and 1 percent levels, respectively. R²: 0.231

prerogative of any White House and is far from unique.

Conclusion / Our model suggests that it is somewhat easy to anticipate what sorts of factors will serve to delay a rule's eventual publication. That knowledge may be of little comfort to businesses that must spend money to comply with those rules and regulations. We suggest that the very publication of this analysis may serve to lessen the political games that administrations play with the timing of final regulations, by shedding a light on the factors that determine such delays.

Macroeconomist Robert Lucas suggested in the 1970s that no economic

forecast can be consistently correct when it comes to forecasting interest rates. If the market perceived a forecaster's model as being somewhat reliable and it predicted that interest rates would fall by 1 percentage point tomorrow, the market's actions would conspire to make that happen more or less immediately.

Our model captures quite well the behavior of regulators when they need to publish a new regulation that has some modicum of controversy attached to it. Whether this model holds up over time or breaks down when the regulatory policy community—and the government—sees the quantification of what we suggest is baldly political activity remains to be seen. R

range of governmental bodies and established private organizations, including the European Union, World Health Organization, American Medical Association, U.S. National Academy of Sciences, Health Canada, and British Royal Society. In its "Statement by the ... Board of Directors On Labeling of Genetically Modified Foods," released in 2012, the American Association for the Advancement of Science (AAAS), the world's largest general scientific society, concluded from a review of the scientific evidence that consuming foods containing ingredients derived from genetically modified crops is no riskier than consuming the same foods containing ingredients from crop plants modified by conventional plant improvement techniques. Other organizations have reached similar conclusions.

One GMO-related public issue maturing in the U.S. public policy process concerns the mandatory labeling of foods containing GMO ingredients. According to the Center for Food Safety, a Washington, D.C.-based nonprofit organization, 64 countries now legally require some form of GMO retail food labeling, including the 28 member-nations of the European Union, but not (presently) the United States. If GMO retail food labeling is to become mandatory in the United States, its regulation would be the responsibility of the FDA.

Biotech regulation / Federal regulation of GMOs operates under a formal policy known as the "Coordinated Framework for Regulation of Biotechnology." GMOs are nationally regulated pursuant to health, safety, and environmental legislation governing conventional products and premised on the assumption that regulation of GMOs should focus on the nature of the products rather than the process in which they are produced. Under the Coordinated Framework, published in the *Federal Register* in 1986, the federal regulatory jurisdiction over biotechnology products is allocated among three governing agencies—the U.S. Department of Agriculture (plant GMOs), the U.S. Environmental Protection Agency (chemical substances

Mandatory Food Labeling for GMOs

◆ BY THOMAS A. HEMPHILL AND SYAGNIK BANERJEE

In 1994, the genetically engineered Flavr Savr tomato first appeared in American grocers' fruit and vegetable aisles. Since then, genetically modified organisms (GMOs) have proliferated in the U.S. food supply. The Grocery Manufacturers Association, an industry group representing over 300 major food, beverage, and consumer product companies, reports that 70–80 percent of the processed foods that American consumers eat today contain plants that have been genetically engineered. According to the U.S. Food and Drug Administration, such ingredients include cornstarch in soups and sauces, corn syrup as a general purpose sweetener, and cottonseed oil, canola oil, and soybean oil in mayonnaise, salad dressings, cereals, breads, and snack foods.

Crops grown using genetically modified technology require fewer pesticides and less water, and keep production costs down, reducing the price of crops used for food products by as much as 15–30 percent. As the editors of *Scientific American* note:

We have been tinkering with our food's DNA since the dawn of agriculture. By selectively breeding plants and animals with the most desirable traits, our predecessors transformed organisms' genomes, turning a scraggly grass into plump-kernelled corn, for example. For the past 20 years Americans have been eating plants in which scientists have used modern tools to insert a gene here or tweak a gene there, helping the crops tolerate drought and resist herbicides.

Consumer and environmental groups and organic farm organizations have alleged safety concerns about GMO food products and the chemicals applied on GMO crops in the United States. The scientific evidence for GMO foods, however, has been globally evaluated by a wide

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from genetically modified plants), and the FDA (GMO food)—in the same manner as conventional products, using existing laws and regulations governing conventional products.

The GMOs found in food, drugs, and biological products are regulated by the FDA under the Food, Drug, and Cosmetic Act and the Public Health Service Act. Since 1992, the FDA has been guided in its administrative responsibilities by the “FDA Statement of Policy: Foods Derived from New Plant Varieties.” In the overwhelming majority of cases, the policy directs the agency to treat foods derived from GMOs in the same way as those derived from conventionally bred plants, presuming that most foods derived from GMO plants would be “generally recognized as safe.” Also since 1992, the FDA places explicit responsibility on the manufacturer—not an independent scientific review board—to assure the safety of GMO foods. Since 1997, however, there has been FDA guidance to industry involving voluntary “consultation procedures” concerning the food safety of new proteins in new plant varieties, including those developed through genetic engineering.

The FDA, the lead federal agency tasked with overseeing the labeling of processed retail food, has the legal authority to prevent false and misleading labeling of foods and drugs. Because the FDA does not view genetically engineered food as materially different from traditional food products, there is no need to specifically label those products as containing GMOs or change the name of the food product. The FDA reasons that such labeling would imply to consumers that GMO food is inferior or unsafe. A name change would, however, be in order if a food derived from a genetically engineered plant is significantly different from its traditional counterpart, that the usual name no longer sufficiently describes the new food product, or if there is a safety issue such as the presence of allergens in the GMO food product.

FDA Commissioner Margaret Hamburg recently announced that the agency



plans on finalizing guidance on “Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering,” which was initially released for comment in the *Federal Register* in January 2001. This industry guide evaluates specific food labeling statements, such as “GMO free,” and offers guidance on what the FDA would and would not consider misleading statements. The “Voluntary Labeling Guidelines” are considered the “best practices” on an issue, and the food industry will generally consider it to be a compliance document because of the potential liability associated with noncompliance. A recent consumer survey of 1,000 participants conducted between March 28 and April 7, 2014, by the International Food Council found that 63 percent of Americans support the FDA’s current voluntary policy for labeling GMO foods, a percentage that is consistent with survey findings in previous years.

Pros and cons / Advocates of mandatory GMO retail food labeling argue that American consumers have a right to know what specific ingredients are in their processed foods, as well as an accurate quantity of those GMO ingredients. This transparency issue has particular saliency as to GMO food products for which serious personal health or environmental concerns have been raised by consumers or special interest groups. Furthermore, proponents of mandatory GMO food labeling emphasize “choice,” by which consumers

should have the right to decide what food ingredients they should be ingesting in the processed foods they eat—whether those foods contain GMOs or not.

Yet, according to the AAAS, critics of legally mandating GMO labeling of processed foods argue that it could “mislead and falsely alarm consumers” as “genetically modified crops pose no greater risk than the same foods made from crops modified by conventional plant breeding techniques.” The AAAS also reports that “each new crop must be subjected to rigorous analysis in order to receive [FDA] approval ... and if a new protein trial has been added, the protein must be shown to be neither toxic nor allergenic.”

Labeling requirements (including specific individual state-mandated GMO percentage thresholds) of GMO processed foods would impose a cost on all consumers—including those not desiring such information. The existing U.S. food system infrastructure—i.e., involving separate planting, storage, processing and packaging, and transportation—is inadequate to accommodate this segregation of GMO and non-GMO products and meet the legislative requirements of high non-GMO purity standards. Thus, the implementation of such requirements necessitates significant capital investment on the part of the GMO food processing industry and increases costs to the consumer. A 2014 Cornell University study, conducted by William Lesser of the Dyson School of Applied Economics and Management, concludes that New York state’s proposed mandatory GMO labeling bill would cost New York families an average of \$500 per year, echoing similar increases in the cost of food for consumers found in earlier studies undertaken in both Washington state and California.

With diminished economic prospects and high non-GMO purity thresholds, many food processors may decide to abandon genetically engineered food production. Previous experiences with mandatory GMO retail food labeling in the European Union, Japan, and New Zealand have resulted in grocery retailers eliminating

GMO food products from their shelves, largely because of consumer aversion to those products after mandatory labeling requirements were implemented.

Mandatory labeling successes / Over the last few years, anti-GMO advocacy groups have altered their political lobbying and advocacy advertising campaigns. They have shifted from focusing on the safety issues they allege are inherent to genetically engineered crops, to emphasizing the American consumer's right of "choice" in product selection and "right to know" what ingredients are in the processed food they eat. The political battleground between pro- and anti-GMO food interests regarding mandatory GMO retail food labeling has shifted from the federal government arena, where anti-GMO interest groups have had little legislative or administrative success since 2000, to the state government arena, where three states have recently passed GMO retail food labeling legislation.

On June 4, 2013, Connecticut passed legislation requiring that infant formula or baby food that is produced from GMOs be labeled as "produced with generic engineering" on the product. The GMO labeling of infant formula is to start July 1, 2015, and the compliance enforcement date is July 1, 2019. There is a provision that the labeling requirement is not to be effective until four additional states enact similar legislation, one of which must border Connecticut, and the total population of those states exceeds 20 million people.

On June 12, 2013, Maine passed legislation requiring that food and feed produced from GMOs and having a content of at least 0.9 percent GMOs is to have a disclosure statement of "Produced with Genetic Engineering." This law does not apply to alcoholic beverages, restaurants, unintentionally commingled products, and some other situations. The law also contains a provision that it will be repealed if a similar law is not adopted in at least five states or states with a combined population of at least 20 million people.

On May 9, 2014, Vermont became the first state to implement mandatory labeling of food that has been genetically engineered. Unlike the other two New England states, the Vermont legislature did not include a "trigger" provision restricting the effective date of implementation of the law contingent upon the legislative actions of other state governments addressing the issue of consumer labeling of GMO food.

Anti-GMO food interest groups have become actively involved in introducing state ballot initiatives on mandatory GMO retail food labeling west of the Mississippi River. In November 2012, California's Proposition 37 (requiring the mandatory labeling of GMO foods) was defeated by California voters by a narrow margin of 51.4 to 48.6 percent. Similarly, in a closely contested vote, the state of Washington's Initiative 522, also requiring mandatory GMO retail food labeling, was defeated in November 2013. This past November, Colorado's citizenry resoundingly voted down Proposition 105, with 66 percent of voters in opposition. The measure would have required the labeling of GMO retail food sold in the state with text reading "produced with genetic engineering." Oregon likewise voted down Measure 92, by a narrow margin of 1.2 percent of voters. The measure would have required GMO retail food labeling reading "produced with genetic engineering" on food and products sold in the state.

The Center for Food Safety, a Washington, D.C.-based anti-GMO group, reports that through last June, there were 35 new mandatory GMO retail food labeling bills introduced in 20 states, while during the two-year period of 2013-14, there have been over 70 bills and ballot initiatives introduced in 30 states.

Consumer perceptions / If we look at the overall picture of American consumer surveys over the last quarter century, most studies show that consumers are

- favorable to the concept of GMO food,
- do not know much about GMO food,
- respond positively to safety percep-

tions of GMO food when provided more information about it,

- resort to emotional biases to inaccurately process information when they see GMO labels, and
- desperately want GMO labels to be mandatory, oftentimes with consumer support exceeding 90 percent.

How this information is conveyed can affect how American consumers perceive it. If information is provided as objective and verifiable, such as "more than half of our groceries are genetically modified today," they have more of a learning and informative effect on the consumer. However, if presented with more alarming or vague language or labeling, they have a stronger likelihood of evoking stereotypes, risk perceptions, emotional schemas, and stigmatizing the label with negative perceptions, rather than adding any knowledge value for the consumer.

According to William Hallman, director of the Food Policy Institute at Rutgers University, the institute undertook a major survey of American consumer attitudes toward GMO foods in November 2013. Consumers were asked what information should be included on food labels that is not already there. Only 7 percent of survey respondents wanted GMO ingredients noted on retail food labels. But when presented with a list of possible information to include on retail food labels, 59 percent of survey respondents included GMO ingredients. When asked if GMO ingredients should be labeled, 73 percent said yes. "So which is it?" said Halman. "Is it 7 percent or 59 percent or 73 percent? It depends on how you ask the question."

Politics and labeling / The recent interest group lobbying efforts at enacting mandatory GMO retail food labeling legislation at the state level has had success, albeit limited, with Vermont being a "breakthrough" for anti-GMO advocates. Yet, state-level mandatory GMO retail food labeling legislation is problematic, entailing potential nightmarish industry regulatory compliance by the food and agricultural industries. As diverse regula-

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tory requirements of state legislation are enacted, the food industry will need to constantly readjust its labeling and business operating practices. For example, “non-purity” thresholds for GMO “contamination” of so-called non-GMO retail foods could differ from state to state, requiring multiple labeling requirements, improved crop separation operations, and different certification standards.

This limited anti-GMO state level success has, however, elicited a legislative response supported by the pro-GMO food lobby (known as the Coalition for Safe Affordable Food). Rep. Mike Pompeo (R-Kansas) has introduced H.R. 4432, the Safe and Accurate Food Labeling Act, with 36 co-sponsors. The bill would amend the Food, Drug, and Cosmetic Act to preempt any state or local government requirement concerning GMO retail food labeling and set forth standards for any food label that contains claims that bioengineering was or was not used in the production of the food. Also under this bill, the FDA requires a mandated review (in lieu of the present voluntary review) of new biotechnology traits before they are introduced to the American consumer.

On June 12, 2014, a coalition of industry associations (including the Grocery Manufacturers Association, Snack Foods Association, International Dairy Foods Association, and the National Association of Manufacturers) filed a complaint in the District of Vermont court challenging the legality of the state’s new GMO retail food labeling law. Plaintiffs cite constitutional issues, including alleged violations of the First and Fourteenth Amendments, the Commerce Clause, and the Supremacy Clause, all pertaining to Vermont’s regulating national distribution and retail food labeling practices. They are requesting injunctive relief and a declaratory judgment invalidating the act.

While H.R. 4432 is sequestered in the U.S. House of Representative’s Subcommittee on Health and not likely to emerge in the 113th Congress, the 114th Congress will likely see a re-introduction of this or similar legislation and greater likelihood

of its passage, courtesy of Republicans gaining majority control of both houses of Congress this past November. For GMO advocates, either the passage of this bill or a declaratory federal judgment against the Vermont mandatory GMO retail food labeling law would prevent what they believe is an effort by anti-GMO activists to “balkan-

ize” this issue through a state-level solution. From the perspective of pro-GMO participants in the U.S. food and agricultural industries, if mandatory GMO food labeling is enacted into law at the state or federal level, it would have long-term, costly consequences for both American consumers and the food industry. R

Is The EPA’s Proposed Clean Power Plan Legal?

◆ BY BRIAN H. POTTS AND DAVID R. ZOPPO

One of the fundamental tenets of administrative law is that you cannot challenge a government agency’s rule in court until it is final. The reasons for this doctrine are obvious: agencies need time to consider public input on proposals before finalizing them, and courts do not want to waste their time reviewing mere proposals that could change once finalized. But, as with most legal doctrines, there is an exception: if the court decides that an agency does not have the power to issue the rule at all, the court can issue what is known as an extraordinary writ to halt the rulemaking in its tracks.

Last June 18th, the U.S. Environmental Protection Agency released what is undoubtedly its most significant proposed rule ever: its Clean Power Plan. If finalized, the rule would reduce carbon dioxide emissions from America’s power plants by 30 percent from 2005 levels by 2030. It would fundamentally restructure the nation’s electricity sector, requiring states to increase their use of renewables like wind and solar, lower electricity demand through energy efficiency and demand-side management efforts, and use significantly more natural gas and less coal to generate electricity.

Within hours of the release of the proposed rule, four attorneys from the national law firm Squire Patton Boggs filed a 46-page petition in the U.S. Court of Appeals for the District of Columbia Circuit on behalf of Murray Energy, the largest underground

coal mining company in America. The petition asks the court to issue an extraordinary writ because the text of the Clean Air Act (CAA) “unambiguously prohibits” the EPA’s proposal. Soon after, nine mainly Republican-run states filed an amicus brief in support of Murray Energy’s petition, claiming that it “is difficult to imagine a case where an agency’s non-final action is more obviously ‘in excess of the agency’s delegated powers’” from Congress. The states then followed up with their own lawsuit on the same grounds.

To some, those actions might seem like business as usual. After all, practically every major rule the EPA issues comes under fire from conservative politicians and affected industries. But amid all the rhetoric and political posturing, the question raised in this case is a good one, and one that we think everyone (including the EPA and supporters of climate regulation) should want the courts to decide now: does the EPA actually have the statutory authority to issue its Clean Power Plan?

Legislative disharmony / The answer lies in how the courts ultimately decide to interpret section 111(d) of the CAA, which the EPA cites as its sole authority for its

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Clean Power Plan. The problem is that if you pick up a statute book and read section 111(d), it says the EPA *cannot* use the section to regulate any plants that are already regulated under the agency's air toxics program. Mercury emissions from existing coal-fired power plants are already regulated under the air toxics program, so—as the EPA has acknowledged—a “literal reading” of section 111(d) would effectively prohibit the agency from issuing its Clean Power Plan in any form.

But the analysis may not be that simple. When Congress last updated the CAA in 1990, a Democrat-controlled congressional committee screwed up: they inadvertently failed to harmonize the House and Senate language in section 111(d) and both versions were signed into law. Only the House version ended up in the statute books, yet technically both versions are the law.

The difference between the House and Senate language is subtle but important. Unlike the House version, which focuses on whether *plants* are regulated elsewhere, the Senate version says the EPA can regulate existing plants using section 111(d) so long as the *pollutant* being regulated is not toxic. Carbon dioxide is not toxic to humans, so the Senate version gives the EPA the authority it wants.

Enter the EPA's lawyers, who argue that

industry House amendment significantly changed the scope of section 111(d) compared to its pre-1990 form and was included in the legislative history on a list of substantive changes to the CAA. By contrast, the pro-EPA Senate amendment merely updated a statutory cross-reference in section 111(d) and was included in the “Conforming Amendments” section of the bill, meaning it was a mere *clerical* amendment. Murray Energy and the states argue that such errors are common in complex, modern legislation and that courts ignore the clerical amendment when there is a substantive amendment available.

Even if the courts disagree on this point, there is another reason the EPA could lose. Because both amendments were signed into law, courts will generally attempt to give effect to both, if it is possible to do so. Although the House and Senate versions create different results for the EPA, they are not necessarily conflicting. The agency could use section 111(d) to regulate carbon dioxide (a non-toxic pollutant) from other types of sources that are not subject to the air toxics program (of which there are many). But the EPA's Clean Power Plan cannot comply with both amendments, which is why we think industry has the stronger argument.


Now or later? / So, if the EPA could lose, why should the agency and other supporters of climate regulation want the courts to decide now?

The answer is that delaying a decision will not help lower emissions, which

is supposed to be the EPA's goal.

For one thing, most states will ignore the EPA's proposal until it is finalized, and even then they will not need to start complying until 2020, which is too far off to significantly influence behavior anytime soon. On the other hand, if the EPA were to lose in court now, there might still be time before President Obama leaves office at the end of 2016 to mitigate the loss. For example, the EPA could decide that regulating carbon dioxide emissions is more important than regulating mercury emissions, and withdraw its mercury air toxics rule for some (or all) power plants, thereby potentially opening the door to section 111(d) regulation for those sources. Or the EPA could go after additional greenhouse gas reductions from other sources, like cars, which it is allowed to do under other parts of the CAA. Or the EPA could ratchet down regulation of other power plant pollutants (like sulfur dioxide) that would drive up the cost of coal-fired electricity as compared to other generation options.

Unfortunately, the EPA seems more concerned about winning the *Murray Energy* case than helping the environment. On November 2nd, the agency filed its brief in the case. Instead of asking the court to decide the issue now, the EPA asked the court to dismiss the case as premature. We think that was a mistake, and as supporters of reasonable climate change regulation, we hope the court looks past the EPA's procedural arguments and decides the question of the agency's authority under section 111(d) now.

At a minimum, answering the substantive legal question now—even if the EPA ends up losing—would save the agency, states, and industry the substantial amount of time and resources necessary to work on a large, complex, and contentious rule that may never actually materialize. And you never know—the court could find that section 111(d) gives the EPA the authority it wants, which would end this debate and allow states and the regulated community to focus on implementing the Clean Power Plan rather than trying to thwart it. 

the discrepancy between the House and Senate versions of section 111(d) creates a conflict that renders the statute ambiguous. And when a statutory provision is ambiguous, the courts defer to the agency's interpretation so long as it is reasonable. The EPA says its interpretation is reasonable because the 1990 amendments were aimed at expanding—not contracting—the agency's authority to regulate air pollution.

Murray Energy and its state allies disagree. They argue that the pro-

