

✖ President Obama has a surprising amount of power to reduce greenhouse gases from the two largest categories of emitters, the transportation and electricity sectors, without getting Congress to act. He has already used that power to dramatically tighten fuel economy standards for passenger autos. But his ability to reduce emissions from the electricity sector — most importantly from existing power plants — appears to be on a slow track. His Environmental Protection Agency (EPA) [announced](#) last month that it is withdrawing proposed rules to regulate greenhouse gas emissions from power plants. If the President doesn't move relatively soon to reissue the rules, he may miss an historic opportunity to use his executive power to require power plants to reduce their greenhouse gas emissions. And his allies in the environmental community have lost patience: they've filed a [Notice of Intent to Sue](#) the administration for its failure to issue the rules and for unreasonably delaying the rulemaking process. A coalition of states has served its own [notice](#) as well.

Here's the complex background about the administration's power — indeed responsibility — to regulate greenhouse gases under the Clean Air Act. The U.S. Supreme Court's landmark decision in [Massachusetts v EPA](#) required the Environmental Protection Agency to determine whether greenhouse gases endanger public health and welfare (something the then-Bush Administration's EPA had refused to do). EPA made the so-called [endangerment finding](#) under the provision of the Clean Air Act — Section 202 — that regulates cars (mobile sources in techno-speak). The [new](#) fuel economy standards, requiring cars to achieve an average of 54.5 miles per gallon by 2025, are the result.

But the influence of Mass v. EPA didn't end with cars. Once EPA regulated greenhouse gas emissions from cars, other provisions of the Clean Air Act that apply to big industrial and manufacturing facilities — stationary sources in techno-speak — kick in. The Obama Administration has already developed greenhouse gas regulations under one of those provisions, called [New Source Review](#) under the Prevention of Significant Deterioration section of the act. Those regulations will require new facilities that emit large amounts of greenhouse gases to obtain permits that require the installation of the best available technology to reduce emissions. Existing facilities that engage in large modifications to their operations will also be required to obtain permits, but otherwise the regulations apply only to new facilities. The U.S. Court of Appeals for the D.C. Circuit has [upheld](#) the regulations against multiple legal attacks.

If the Administration were to stop with the regulations it has already issued, then all of the existing power plants, oil refineries and other major contributors to greenhouse gas emissions would remain unregulated unless they made significant changes to their operations. That's a real problem because, while it's important to get new facilities to operate with as low a carbon footprint as possible, a much bigger part of the problem comes

from old, often outdated industrial facilities like coal fired power plants and oil refineries. But Obama has another tool under the Clean Air Act, Section 111, that allows — indeed requires — him to regulate existing sources of greenhouse gases.

Section 111 requires the EPA to regulate emissions from categories of polluters like Electric Generating Units. The standards issued under Section 111 are called New Source Performance Standards and are usually limited to new sources when those sources are regulated elsewhere under the statute, including for typical air pollutants like nitrous oxide, lead, sulfur dioxide and particulate matter (the so-called NAAQS pollutants). But for pollutants that aren't considered NAAQS (and greenhouse gases are not regulated as NAAQS), Section 111(d) requires EPA to set minimum standards and have states issue plans to regulate non-NAAQS pollutants from **existing** sources. (For a helpful analysis see [here](#)). That's a big deal.

The Administration first issued proposed Section 111 standards for new Electric Generating Units in April of 2012 (after [agreeing](#) in [December, 2010](#) to issue them much earlier and failing to do so). But as I noted above, last month, just days before the rule was to be finalized, EPA [announced](#) it was withdrawing the proposed rules after loud complaints from the electricity sector.

So why did EPA's withdraw the proposed rule? Very likely for two reasons. First, Congress has yet to confirm Gina McCarthy to be the new EPA head. Republicans hate the proposed NSPS rules for electric generating units. Senator James Inhofe (R-OK), the Senate's leading climate denier, [has made clear](#) he won't support McCarthy unless she answers his questions about "the administration's war on fossil fuels." So withdrawing the rules for now takes a highly contentious issue off the table until she's confirmed. Whether the withdrawal of the rules will satisfy Republican Senators is not, of course, at all clear but McCarthy's confirmation battle seems to be a driving force behind the withdrawal.

There may also be concerns that the standards for electric generating units are [legally vulnerable](#). That's because the standards combine the regulation of gas and coal fired power plants into the same category and essentially ban new coal fired power plants by requiring technology that may not yet exist, at least at commercially viable prices. The Obama Administration may be looking to issue new rules for each category of plant separately (coal and gas) on the theory that no one is likely to build a new coal fired power plant in the near future regardless of the rules given large drops in natural gas prices.

Whether EPA's reasons for withdrawing the NSPS rules make either political or legal sense is debatable. What's not debatable, however, is that the Obama EPA may simply run out of

time to use its most powerful tool — Section 111d — to regulate existing plants. We still need to wait for new draft rules or the re-issuance of the previous rules that pertain to *new* plants. Then those rules will need to be finalized. Then we turn to potential rules for existing plants. EPA hasn't indicated any time table for the release of rules for existing plants and that process is certain to take a very long time. Once the draft rules are issued we'll need to go through the usual notice and comment period, likely to be long and contentious. Then the rules will need to be finalized. Once finalized, under Section 111d EPA will need to get states to issue plans to reduce existing source emissions. Imagine how long it will take to get Texas and Georgia and Virginia and West Virginia to come up with compliant plans that result in real emissions reductions.

Harken back, now, to the President's words about climate change in his State of the Union last January:

We can choose to believe that Superstorm Sandy, and the most severe drought in decades, and the worst wildfires some states have ever seen were all just a freak coincidence. Or we can choose to believe in the overwhelming judgment of science — and act before it's too late.

We're still waiting, Mr. President, for the action.