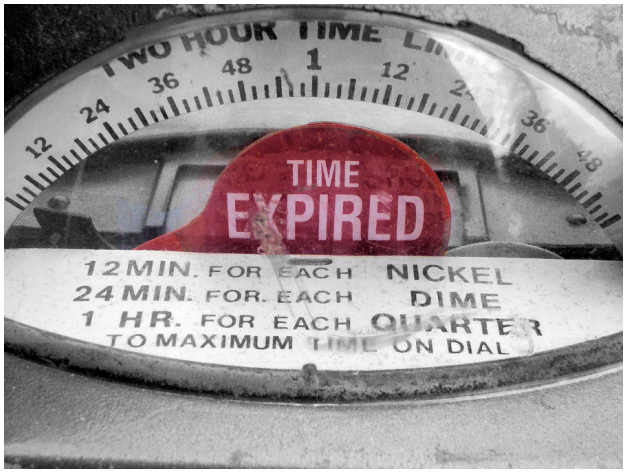
Challenges to EPA's emergent program to regulate greenhouse gas (GHG) emissions under Clean Air Act section 111 continue to mount. Recently, the Attorneys General of 19 states sent a joint letter to EPA arguing that because EPA failed to finalize its proposed New Source Performance Standard (NSPS) for GHG emissions within one year—as the Clean Air Act requires—EPA must withdraw the proposed rule. Withdrawal of the NSPS proposal not only would delay stringent regulation of GHG pollution from new power plants but also could disrupt EPA's proposed Clean Power Plan, which sets forth a controversial program for regulation of GHG emissions from existing power plants, and is predicated on a valid NSPS. These two rules are key to controlling U.S. climate emissions.

Does the opponent-states' argument hold water? **If EPA fails to meet the statutory deadline for promulgating an NSPS, is vacatur of the proposal the appropriate remedy? In other words, *can a proposed Clean Air Act rulemaking expire?***



Background

EPA's Clean Power Plan and corresponding NSPS have been sources of considerable discussion here on LegalPlanet. As a quick review, Clean Air Act § 111 authorizes EPA to list categories of stationary sources, such as fossil-fuel-fired power plants, that contribute significantly to dangerous air pollution. Within one year of listing, EPA must propose an NSPS for new facilities in each category. An NSPS sets "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction" (CAA § 111(a)(1)). Section 111(b)(1)(B) requires EPA to finalize a proposed NSPS within one year:

> [T]he [EPA] Administrator shall publish proposed regulations . . . for new

> sources. . . . After considering [public] comments, **he shall promulgate, within one year after such publication, such standards** with such modifications as he deems appropriate.

Proposing an NSPS for new sources of GHGs triggers EPA's and states' shared responsibility to regulate existing facilities under §111(d). EPA's regulations clarify that EPA must publish a §111(d) rule concurrently with or after promulgating an NSPS (40 CFR § 60.22). In other words, a valid NSPS is an essential precursor to regulation of existing sources.

EPA proposed an NSPS for GHGs from new power plants in January 2014. The proposal envisions that new coal- or pet-coke-fired power plants would install partial carbon capture and storage (CCS) technology, and new large natural gas plants would incorporate the most efficient combined-cycle technology. Six months later, in June 2014, EPA proposed the Clean Power Plan, which I have described in detail previously.

Notably, we are now several months past the one-year anniversary of the NSPS proposal. In January, just before the one-year deadline, EPA announced its intention to finalize the NSPS and the Clean Power Plan together in mid-summer 2015. EPA stated that the agency needs extra time to coordinate interconnections between the rules (*but see* Ann's prior post suggesting EPA may have delayed finalizing the NSPS in order to make it more difficult for opponents to challenge the rules).

State Challenges to EPA's §111 Program

State and industry opponents have already filed lawsuits seeking to block the Clean Power Plan (*see* In re: Murray Energy Corp., No. 14-1112; West Virginia v. EPA, No. 14-1146). Opponents have also commented vigorously on the NSPS and Clean Power Plan proposals. In their joint NSPS comments, opponent-states argue that the NSPS proposal "suffers from numerous fatal flaws and must be withdrawn." In short, opponent-states contend that CCS cannot constitute the best system of emission reduction for coal-fired power plants (Ann discussed this issue in a prior post). Opponent-states also complain that EPA failed to docket the proposal's accompanying Notice of Data Availability and Technical Support Document until several weeks after the comment period began. In response, EPA extended the comment deadline by several months. The extension notwithstanding, opponent-states maintain that "[u]nless the proposal is withdrawn and properly reissued, it risks being overturned" (p. 12).

Now, opponent-states argue that EPA's failure to promulgate the NSPS within one year renders the proposal "expired." In their March 25, 2015 letter, the opponent-states claim that:

> by failing to promulgate the final rule by January 8, 2015, **EPA has violated the mandatory duty established by Section 111(b)(1)(B) of the CAA.** Considering all of the grounds upon which this rule is likely to be overturned, and because the rulemaking threatens the citizens of the States, . . . **this Proposed Rule has expired. It must therefore be withdrawn**.

The states further argue that withdrawal of the NSPS proposal would require EPA to withdraw its Clean Power Plan proposal. The opponent-states support their position with two basic claims.

First, the states argue that Congress intended for the one-year publication deadline to counteract the fact that an NSPS final rule "uniquely" applies to any facility that commenced construction after the date of the NSPS proposal (vs. promulgation). Presumably, uncertainty about the content of the final rule would influence businesses to postpone any new facility construction during the proposal period. Opponent-states argue that "Congress specifically limited the time frame during which this uncertainty would be allowed by setting a precise one-year deadline within which EPA must act."

Second, the opponent-states maintain that EPA's delay is harming states by postponing the inevitable invalidation of the Clean Power Plan proposal:

> **[I]f EPA had finalized the Section 111(b) rule in January . . . that rule would likely be subject to invalidation in court . . . . Such court invalidation would in turn have further rendered unlawful the entire Section 111(d) rulemaking**, permitting the States to stop the ongoing waste of public resources in preparing Section 111(d) implementation plans.

In other words, if EPA would just go ahead and finalize the NSPS already, the opponent-states could challenge the rule as invalid and thereby halt the Clean Power Plan.

Should a Court Vacate EPA's Proposed NSPS?

Opponent-states' argument that the NSPS has expired is intriguing, but not altogether compelling. It seems unlikely that a court hearing this challenge would void the NSPS proposal. And as a threshold matter, I question whether the states would have standing to challenge the rule

1) What did Congress intend by including the one-year deadline?

A court hearing opponents' claims would have to decide "what Congress would have intended when EPA missed a statutory deadline" (*Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (2010)). Here, I think opponent-states' statutory construction argument must fail.

Notably, some states (e.g., New York, North Carolina, and Illinois) have laws declaring that state rulemaking proposals will expire if not adopted within one year. The federal Administrative Procedure Act (APA) contains no such limitation, however. And in the context of all sorts of statutory deadlines, the U.S. Supreme Court has long held "that if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not . . . impose their own coercive sanction" (*United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *see also French v. Edwards*, 80 U.S. 506 (1872)). Put simply, when agencies miss deadlines, federal courts do not impose an extreme consequence like vacatur unless the statue requires it. Courts have emphasized repeatedly that the appropriate response to a missed deadline is to "compel agency action unlawfully withheld or unreasonably delayed" (APA § 706). *See, e.g., Nat'l Petrochemical & Refiners Ass'n; Brotherhood of Ry. Carmen Div. v. Pena*, 64 F.3d 702 (1995).

As a general rule, federal courts have found that statutory deadlines are directory unless Congress clearly intended otherwise. Importantly, even where a statute uses the word "shall," the agency's failure to observe a procedural requirement does not necessarily invalidate agency action—especially where voiding agency action would be adverse to the public interest. As the Supreme Court confirmed in *Brock v. Peirce County*, 476 U.S. 253 (1986):

> "This Court has frequently articulated the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." . . . **We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake.** When, as

> here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

This caselaw review is admittedly cursory and blog-but-not-brief-worthy; but it is sufficient to make me doubt that a court reviewing the Clean Air Act would vacate a proposed §111 rulemaking due to delay. The Clean Air Act does not specify any particular consequence for noncompliance with the NSPS rulemaking deadline—or statutory deadlines in general. In fact, the Act's general language about rulemaking, §307(d), states that:

> No interlocutory appeals shall be permitted with respect to [EPA's] procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule **only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed** if such errors had not been made.

In my opinion, EPA's rulemaking delay would not meet this high bar—and neither would the docketing delays, for that matter.

More broadly, the structure of §111 and the Clean Air Act as a whole indicate that the one-year deadline was motivated by Congress' desire to swiftly control dangerous air pollution—not concern about inconveniencing industry. Note that Congress also included a one-year deadline for EPA to propose an NSPS after listing a new category of stationary sources. Even though listing a new source category does not create any "unique" uncertainty for listed sources, Congress still included a one-year deadline for the subsequent NSPS proposal, presumably to ensure that EPA would speedily set minimum standards for stationary source air pollution.

The 1990 Clean Air Act amendments further demonstrate that speedily controlling stationary source pollution was Congress' chief concern. Congress purposefully amended the statute to include NSPS promulgation schedules for source categories that EPA had listed under §111, but had failed to regulate by the statutory deadline (*see* §111(f)(1)). Other sections of the Clean Air Act reflect this same desire to see delayed rulemakings take effect as quickly as possible, and without coercive penalties for missed deadlines. For example, envisioning that EPA might fail to meet the statutory deadline for promulgating a rule to

control evaporative emissions from motor vehicle fuel, §202 would have required the EPA Administrator to "submit a statement to the Congress containing an explanation of the reasons for the delay and a date certain for promulgation . . . ."

Reinitiating the NSPS rulemaking process all over again with a new, identical proposal would merely delay control of dangerous air pollution—and potentially allow sly actors to begin new construction while escaping the more stringent emission controls that accompany qualification as a "new" facility under §111(b). A Congress so concerned about swift regulation of harmful emissions could not have intended the result opponents seek.

Overall, the Clean Air Act statutory text seems to suggest that the proper remedy would be for a court to require EPA to promulgate its §111 rules as quickly as possible. Because of the important public interest at stake (controlling dangerous air pollution), and given that a less coercive remedy is available, I think EPA would have a strong argument that a court should compel publication of the NSPS as quickly as possible rather than vacate the delayed proposal. And I further suspect a court would defer to EPA's judgment that it needs until mid-summer 2015 to coordinate and complete these incredibly complex and important rulemakings.

2) Standing—Are opponents injured by the delay?

Statutory construction aside, as a threshold matter, for a federal court to hear opponents' claim, opponents would have to demonstrate to the court that they are suffering a concrete, particularized, and redressable "injury in fact." As the U.S. Supreme Court stated in *Lujan v. Defenders of Wildlife*, plaintiffs must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Could the opponent-states meet this standing requirement?

The states argue that EPA's delay is harming them because they must "waste . . . public resources" on §111(d) implementation plan preparation until they have an opportunity to challenge and invalidate the NSPS. This line of argumentation is reminiscent of petitioner-states' creative, but ultimately unsuccessful standing arguments in *Coalition for Responsible Regulation v. EPA*. There, as readers may recall, petitioner-states argued that EPA was required to apply the CAA Prevention of Significant Deterioration (PSD) program's statutory emission thresholds immediately, even though EPA's Tailoring Rule lessened burdens on regulated sources, because the chaos that would ensue from immediate application of the thresholds would compel Congress to step in with "corrective legislation." The D.C. Circuit soundly rejected this line of argumentation.

Certainly, there are other important elements to a standing analysis. And in any case, courts do not always follow a logical pattern in their reasoning about standing—particularly in environmental cases and where states are petitioners. Additionally, I note that the Supreme Court in *Utility Air Regulatory Group v. EPA* reversed in part *Coalition for Responsible Regulation*—but Justice Scalia's analysis was muddled and lacking explicit analysis of standing.

Nonetheless, the D.C. Circuit's reasoning seems to apply here, too: that states may opt to prepare now for compliance with a forthcoming rule that could potentially be rendered invalid by a court in the future is not sufficient to establish standing. Whether the states would have standing is at least a question in my mind. An industry opponent who is delaying construction due to regulatory uncertainty seems better positioned to establish standing. Notably, the opponent-states did not mention any particular entity so injured; but it is conceivable that such an entity exits.

I welcome our LegalPlanet readers—many of whom have great expertise in administrative law and the Clean Air Act—to share your reactions to opponent-states' claims in the comments. *Can a proposed Clean Air Act rulemaking expire?*