

Megan has done a great job of explaining the background of the rules and summarizing the proposal in her blog posts. I just wanted to add a quick note about how EPA has structured its rules in light of possible legal challenges. The fundamental issue facing EPA is how to define the “best system” for reducing carbon emissions. Is it limited to technological upgrades at individual emitters? Or can it be broader, and if so, how broad? Industry is sure to argue that EPA can only set standards for individual plants that emit carbon, nothing more.

EPA responds to this argument in two ways. First, as Megan notes, states can use measures drawn from four “building blocks” — reductions at individual emitters, trading with other emitters, use of renewable energy, and energy efficiency. The first block corresponds to industry’s interpretation of the law. The second block is a bit broader, but the Supreme Court’s recent decision in *EME Homer* strongly supports its legality. So EPA asks for comment on the possibility of using only the first two blocks. It might decide to take this option, I suspect, if it loses really badly in a case currently pending before the Supreme Court, since that might be a signal of how the Court will approach these regulations. In any event, EPA is also making the building blocks legally severable, so that in the worst scenario it still has building block 1 in place even if it loses everything else.

Second, EPA has structured the emissions goals in a way that undercuts the distinction between “inside the fence” and “outside the fence” emissions reductions. The state goals are set as emission rates for fossil-fuel fired plants (on a statewide basis). The initial rate is set based on the first two blocks, but then the state gets to count avoided emissions through use of new renewables or energy efficiency as part of the plants’ output. Essentially, this counts emissions that are avoided through reduced plant utilization as part of a plant’s compliance. States are given the option of simply translating the emissions goals into a limit on the total mass of carbon emitted by its generators. In short, the goal is measured through the output and emissions of fossil-fuel plants, which they can essentially meet either by cutting back on carbon emissions per megawatt or by reducing their number of megawatts. The result is to deconstruct the significance of the “fence line” as a way of thinking about the program.

Overall, EPA seems to have done as good a job as possible of insulating the proposed rules from fundamental legal attack. That doesn’t guarantee success, of course. We’ll know more about the Supreme Court’s attitude when it decides the current case. It will be a bad sign if it strikes down all of the PSD rule that it is considering, whereas if it upholds even part of that rule it will be a helpful indication for EPA.