

The Obama Administration's Clean Power Plan would require utilities to improve efficiency at coal-fired power plants and reduce the use of those plants in favor of generators using natural gas or renewables. Head of EPA Scott Pruitt claims EPA can only require CO₂ cuts that can be accomplished by utilities "inside the fenceline" of a power plant. Under his interpretation, EPA could require a utility to increase the efficiency of a coal-fired plant. But, he assumes, his interpretation would rule out requiring a utility to reduce use of the coal-powered plant and obtain power elsewhere. In other words, the efficiency improvements for coal-fired plants would still be required, but not the requirement to reduce use of coal-fired plants in favor of other sources of electricity, because obtaining electricity elsewhere is something that happens outside the fenceline. That's his justification for proposing to completely repeal Obama's entire Clean Power Plan, which was the Obama Administration's most important climate change initiative. In its favor, it's true that most pollution regulations do operate "inside the fenceline" in that they require changes to the specific polluting facility, like adding a scrubber to a power plant.

Pruitt's "fenceline" interpretation may not be right to begin with: Just because regulations are normally "inside the fenceline" doesn't necessarily mean they *always* have to be structured that way. But even if he's right that EPA can only impose mandates that apply within a polluting facility, this doesn't imply (as he assumes) that the Clean Power Plan is invalid. He's thinking of the Plan as an EPA mandate for companies to buy power from other sources. But there's another way of looking at it. Obama's Clean Power Plan does not actually mandate that polluting utilities get replacement power outside the fenceline. What it mandates, and what is important for cutting carbon, is that the utility make less use of coal-fired plants, even if their power is cheaper than cleaner alternatives. EPA is not directing utilities to get replacement power from less-polluting plants. The decision to get alternative power under the Obama regulation would not be mandated by EPA, it would be decided by the utilities themselves or their state regulators.

From this perspective, the only thing that the Clean Power Plan *does* require (reducing use of a coal-fired plant) is obviously something that can be accomplished purely inside the fenceline, by turning parts of the polluting plant off and on as needed. In fact, rather than obtain replacement power, the utility could just get its consumers to engage in energy conservation.

Here is some background. In issuing the Clean Power Rule, Obama's EPA relied on § 111(d) of the Clean Air Act. The key language requires "standards of performance for any existing source" of certain air pollutants. An earlier subsection (§ 111(a)) defines this term to mean "the best system of emission reduction . . . the Administrator determines has been adequately demonstrated." One system of emission reduction is simply to reduce use of a

polluting facility when you have feasible alternatives. Note that the statute doesn't say "best technological system," just "best system." So it clearly encompasses more than simply technological changes to increase efficiency and easily encompasses operational changes, such as turning off parts of a power plant as needed.

An analogous issue arose early in the history of the Clean Air Act. Section 111(d) explicitly cross-references another section of the Clean Air Act dealing with plans to achieve air quality standards. Within a few years after the passage of the statute, some sources claimed it was infeasible for them to achieve requirements using pollution control systems. Instead, they wanted to cut their use on days when air pollution was high. EPA allowed "intermittent use" as a way of cutting pollution only when there was no feasible alternative. This approach was upheld by the 9th Circuit Court of Appeals in the [Kennecott Copper](#) case. Congress later acted to limit the use of intermittent controls, but EPA [regulations](#) still grandfather certain plants.

Challengers of the Clean Power Plan [admit](#) that regulations under other parts of the Clean Air Act can require firms to reduce the use of a facility, reallocate use among different facilities, or participate in cap-and-trade schemes. (See this [CRS Report](#), p. 19). But they argue that § 111 is narrower, because a system of "performance" cannot include *reduced* performance or *nonperformance*. Their argument is at odds with ordinary English usage. Couldn't the military's "rules of engagement" include rules about when to break off or reduce engagement? Or consider two athletes having this discussion:

Athlete A: "My training system involves eight-hour workouts every day."

Athlete B: "My training system used to involve that, but my new system is to take a day off when I feel burned out and just take a long walk. That works a lot better."

If a system for training can involve reducing training; why can't a standard of performance involve reducing performance when appropriate?

In addition, "best standard of performance" clearly refers to best *emissions* performance, not to whether the plant or some of its units is performing in the sense of producing output. Achieving the best standard of emissions performance means cutting emissions as well as possible. If that weren't clear from the context, the statute makes it crystal-clear by defining standard of performance as based on the "best system for reducing emissions."

The best emissions performance might require shutting some units down from time to time. For instance, imagine that when run at the highest possible level, some type of factory

causes its pollution control devices to overheat. Why on earth couldn't EPA say that the best standard of performance involves running the factory below that level? Yet, if Pruitt is right, EPA would be barred from limiting the factory's level of operation even slightly.

At the very least, a perfectly reasonable "system of performance" for a utility is to reduce generation at its coal-fired plant, given that it has the option to increase generation at its natural gas plant. An equally good option is to start using wind or solar. The availability of these options helps show that curtailment of coal use is feasible, but EPA isn't actually mandating the use of these options.

In fairness to Pruitt, the argument I'm making here is different from the argument made by the Obama EPA. But in justifying his repeal of the rule, he needs to show that the rule isn't legally justified, not just that the Obama EPA picked the wrong argument.

There's something off about the "fenceline" argument to begin with. The attacks on the Clean Power Plan mostly involve contriving arbitrary restrictions on EPA's ability to find sensible ways to achieve its statutory mission of reducing emissions. Shouldn't EPA be more focused on whether a regulation makes sense, rather than trying to torture statutory language to block good policy?

Scott Pruitt no doubt thinks the Clean Power Plan is bad policy. Let him come clean and put forward a repeal regulation on that basis. He won't, because he doesn't have the evidence to prove it.