An earlier blog post pointed to a logical gap in the current EPA's justification for repealing the Clean Power Plan (CPP), the Obama Administration effort to cut emissions from electrical power plants. He makes an argument that EPA can only base rules on actions that polluters can take within a facility, and jumps from there to the conclusion that Clean Power Plan is invalid. But the first point, even if true, doesn't justify the conclusion. Kirsten Engel from the Arizona law faculty and I have filed a formal comment with EPA expanding on that argument.

It's useful to begin with the Trump Administration's argument for repealing the CPP: Pruitt's EPA contends that it can only issue rules that dictate changes in technology or operations at a specific emissions source, that is, within a power plant's fenceline. The CPP, however, is based on substitution of electricity from cleaner energy sources such as renewable energy for generation by dirtier sources. But those cleaner sources are outside the "fenceline" of the carbon emitter (i.e., power plant) that is being regulated. In fact, because the cleaner sources, such as wind or solar, may be zero-emission, they may be outside EPA's jurisdiction over polluters entirely.

The premise that EPA can only regulate inside the fenceline of a specific source is highly questionable. These days, the grid is a much more integrated network. But even granting that premise, EPA's argument has a giant hole in it. All the carbon reductions that CPP would require, *do* take place within the fenceline of carbon emitters, because those emitters are simply utilized at lower levels. The increased use of zero-carbon or lower-carbon sources isn't itself a source of emissions reductions, but only a way of making decreased utilization of the dirtier sources more feasible. In other words, as the earlier post put it, "the off-switch is inside the fenceline."

Rather than go into more detail about this basic argument, I think it might be helpful to address a couple of points that weren't in the original blog post.

The first point is about the relationship between our argument and what's called the *Chenery* doctrine. The *Chenery* doctrine says that, if an agency's justification for its action is invalid, a court can't rely on a different justification to uphold its action. Instead, it has to send the case back to the agency, except in the rare case where this would be a waste of time because the agency could lawfully come to only one conclusion. So, if there's a logical gap in EPA's argument for repeal, as we think there is, a court won't be able to fill the gap on its behalf. Instead, EPA's repeal of the CPP will have to be sent back to the agency for further consideration.

Second, in the litigation over the CPP, which is now on hold in the courts, industry made an

argument that wasn't discussed in the earlier blog post. Industry argued that a different subsection of the statute prevents EPA from requiring reductions in plant operations and instead limits EPA to requiring technological fixes. This gets a bit technical, so feel free to skip the next paragraph, but the basic point is simply that industry is relying on the wrong section of the statute.

Industry contends that the definition of "standard of performance" in § 302(k) of the Clean Air Act precludes requirements that would entail limitations on plant utilization. The reason is that § 302(k) refers to "continuous emissions reduction," and changes in utilization allegedly don't qualify as continuous. It's not clear that this section rules out the kinds of sophisticated systems involved in the CPP. But the CPP is based on § 111, and § 111 has *its own* definition of "standard of performance." Section 111(a) explicitly states that this definition applies "for purposes of this section." As a result, § 302(k) is displaced to the extent that it differs from § 111(a)(1)'s broad definition of a standard of performance. And § 111(a)(1)'s does *not* contain the "continuous" reduction language. Its broader definition easily encompasses requirements that a source keep its emissions below a cap or purchase offsets to make up the difference, a requirement that applies day and night. So what § 302 has to say is pretty much irrelevant.

The Trump EPA really doesn't want to get into a complex policy analysis of the CPP, because that would take a long time. And if done with any kind of honesty, the analysis would favor the CPP or something very similar. Such an analysis would also require a lot of work by EPA's technical staff, a pretty disaffected group. That's why the White House and Scott Pruitt at EPA want to make a purely legal argument. That's especially easy to do because basically it just involves recycling arguments that Pruitt and others made against the CPP in litigation during the Obama Administration. If they want a legal argument that will succeed in court, however, they'll need to come up with something a lot better than what they've got at this point.