CRC CAPITAL RESEARCH CENTER

Green Watch

Obama's Climate Trick

To implement its War on Coal and a Global Warming treaty, the administration tries an end-run around the Constitution

By Marlo Lewis

Summary: *In a rush to end the production of inexpensive electricity from coal—a policy that would hamstring the economy—the Obama administration is ignoring the constitutional requirements for international treaties. That's because it sees the latest international agreement on Global Warming as a way to help defend its sweeping new regulations on generating electricity, which are themselves unlawful under the Clean Air Act. The administration is daring Congress to stop its unilateral actions on treaties and its blatant disregard of existing law.*

Elites gathered from around the world for the climate conference in Lima, during which the environmental extremist group Greenpeace vandalized Peru's ancient Nazca lines.

The world is rushing headlong toward an international agreement (supposedly) to fight Global Warming, to be finalized in Paris at the end of this year. Even from the perspective of environmentalists, the deal won't do much to fight Warming. That's because, among other reasons, it's highly unlikely that there will be any way to enforce the agreement other than by "naming and shaming" violators.

But to the Obama administration, the upcoming deal represents a prime opportunity to do another end-run around the Constitution—to impose major restrictions on the American economy through an international agreement, while ignoring the requirement that treaties be ratified by the U.S. Senate.

That pesky Constitution and the Clean Air Act stand in the way of the administration's so-called Clean Power Plan, the key component in its War on Coal.

The UN Framework Convention & Kyoto

First, some background. The 1992 United Nations Framework Convention on Climate Change (UNFCCC), formalized at a conference in Rio de Janeiro, was in effect a treaty to create treaties, an effort to create an international regime that would supposedly deal with the threat of Global Warming.

After the UNFCCC agreement, also known as the Rio Treaty, was submitted to the U.S. Senate by the George H.W. Bush administration, Senators ratified it in October 1992 on a voice vote with no debate, just as they rushed to leave Washington before the November election. As the *Los Angeles Times* put it on October 8, 1992: "With the 102nd Congress driving for adjournment, the controversial treaty was cleared for President Bush's signature almost unnoticed." With Bush's signature, the U.S. became the first industrial nation to ratify the treaty.

Bush's EPA administrator, William K. Reilly, had been so confident of ratification that, earlier that week, he had sent out a press release praising the Senate's action, with an embargo delaying publication until ratification actually occurred.

UNFCCC set up a series of Conferences of the Parties, with the first ones held in Berlin, Germany in 1995, Geneva,

February 2015

Switzerland in 1996, and in 1997, Kyoto, Japan.

In July 1997, the Senate approved by 95 to zero a resolution sponsored by Robert Byrd (D-W.Va.), the Senate's senior Democrat and former Majority Leader, and Chuck Hagel (R-Neb.), who would later be President Obama's secretary of defense. The Byrd-Hagel resolution expressed "the sense of the Senate" regarding the upcoming Kyoto conference. My colleague Myron Ebell explained the action:

> Exercising its constitutional authority to advise the President on treaties, the Senate resolved that the U.S. should not sign any international agreement to set mandatory limits on greenhouse gas emissions that: (1) did not also set emissions limits on developing countries; and (2) that "would result in serious harm to the economy of the United States." Further, the Senate advised that any treaty sent to it for ratification "should be accompanied by a detailed explanation of any legislation or regulatory actions" that would be required to implement it, plus "an analysis of the detailed financial costs and other impacts on the economy" that would result from implementing it.

Despite the fact that the final agreement failed to meet those requirements, the Clinton administration (in the person of Vice President Al Gore) signed the Kyoto Protocol in December 1997. Of course, as set forth in the Constitution, a treaty is not binding on the U.S. government unless it is ratified by a two-thirds vote of the Senate. President Clinton never even submitted it to the Senate, and his successor, President George W. Bush, expressly opposed the Kyoto agreement, although he did not exercise his prerogative to withdraw the United States as a signatory. President Obama never submitted it to the Senate, either, not even early in his presidency when Democrats held 60 of 100 seats in the Senate.

The Kyoto treaty entered into force in 2005, committing parties to reducing "greenhouse gas" emissions, with legally-binding emission limitations placed upon countries that have more advanced economies ("developed" countries).

"Greenhouse gases" are gases in the atmosphere that absorb and emit heat radiation; the most important such gases are water, carbon dioxide, methane, nitrous oxide, and ozone. These gases are present naturally—carbon dioxide, for example, is exhaled by humans and other animals when they breathe—and the warming effect of these gases makes it possible for the earth to support human life. Global Warming activists believe that the earth is threatened catastrophically by a human-caused build-up of GHGs, especially emissions of carbon dioxide, from human activities such as industry, transportation, and power generation.

The latest big international conference was held December 1-12, 2014, in Lima, Peru. For the UNFCCC, which the U.S. Senate ratified, it was the 20th session of the Conference of the Parties, or COP. For the follow-up Kyoto Protocol, which the Senate effectively rejected 95-0, it was the 10th meeting of the parties (the Conference of the Parties Serving as the Meeting of Parties to the Kyoto Protocol, called CMP).

(Sorry for all the bureaucratic gobbledygook. Such proceedings use language that seems deliberately designed to obscure what politicians, bureaucrats, and special interest groups are up to.)

The purpose of the Lima meeting was to lay the groundwork for the ultimate agreement to be cobbled together in Paris in December 2015. If all goes as planned, the Paris agreement will create a worldwide system, supposedly to fight "climate change" and restrict emissions of greenhouse gases, particularly carbon dioxide.

In the 2014-2015 climate treaty negotiations, the Obama administration advocates a "politically binding" agreement in which each country chooses its own emission-limitation targets based on its individual capabilities. Administration officials seek thereby to end the division between relatively poor countries, which have always rejected emission-limitation commitments, and the relatively wealthy, industrial countries, which alone had emission-reduction targets under the Kyoto Protocol.

We don't need no stinkin' ratification!

U.S. government officials take an oath to support and defend the Constitution. Perhaps, like many Americans, you believe it's critical that officials keep that promise. If so, there's a twist in this process that should send a chill down your spine.

Under the Constitution, a treaty enters into force only if ratified, and ratification requires the approval of "two-thirds of Senators present." Given that the Kyoto Protocol was opposed 95-0 in the Senate in 1997; that since then, the computer models making the case for catastrophic, manmade Global Warming turned out to be wrong; and that the U.S. Senate is now in the hands of Republicans, the prospects are dim for ratification of any Obama-backed Global Warming treaty. Yet President Obama has declared that his strategy for his final two years in office will be, "I've got a pen, and I've got a phone"—which, as critics interpret it, means simply ordering people to do his will without regard to what Congress says or does.

Still, the President usually claims some legal pretext for his actions, no matter how illegal those actions might be. For example, in June 2014, the Supreme Court

Editor: Steven J. Allen
Publisher: Terrence Scanlon
Address: 1513 16th Street, NW
Washington, DC 20036-1480
Phone: (202) 483-6900
E-mail: sallen@CapitalResearch.org
Website: CapitalResearch.org

Green Watch is published by Capital Research Center, a non-partisan education and research organization classified by the IRS as a 501(c)(3) public charity. Reprints are available for $2.50 prepaid to Capital Research Center.

shot down EPA's attempt to "tailor"—that is, amend—Clean Air Act permitting programs based on the idea of "enforcement discretion."

On what basis could the President commit the U.S. government to a massive international regulatory regime on Global Warming, overriding existing U.S. law, without Senate ratification? Here's how: Remember that United Nations Framework Convention on Climate Change, which the Senate ratified on a voice vote without debate in October 1992 while Senators were heading for the exits in order to campaign before the election? If one claims that the upcoming Paris agreement is just an outgrowth of the UNFCCC (the quarter-century-old Rio Treaty), well, there's no need to ratify the Paris agreement—because it's already been ratified.

Another matter that should greatly concern Americans is the prospect that the UNFCCC process will cement an alliance between the U.S. and Communist China. [See the Jan. 2015 *Green Watch*.] President Obama and Chinese President Xi Jinping declared that they had reached a bilateral agreement in which Obama pledged to reduce U.S. carbon dioxide (CO_2) emissions 26-28 percent below 2005 levels by 2025, and Xi pledged that China would obtain 20 percent of its electricity from non-CO_2-emitting sources by 2030.

As was widely noted, and accurately, Xi only pledged to do what the Chinese government plans to do anyway, whereas the Obama pledge to Communist China is credible only if the so-called Clean Power Plan is carried out. That plan currently exists only as a highly controversial regulation proposed by the EPA. It is also the centerpiece of the War on Coal being conducted by the Obama administration.

But as I will explain, the Clean Power Plan is unlawful in numerous ways, each such flaw being fatal to the regulation as a whole. U.S. negotiators are bargaining with chips they don't really have.

The Lima "climate" conference–the sticking points

Before I explain the problems in the Clean Power Plan, let's take a look at the Lima and Paris negotiations. Two issues in particular must be resolved before a new pact can be adopted in Paris. One issue is the level of responsibility of "developing" countries (countries where most people live in poverty)—whether those countries, like more economically advanced countries, will be required to limit their emissions.

The Kyoto Protocol required industrialized nations, but not LEDCs (less-economically-developed "developing" countries), to limit emissions. Yet over the course of the 21st Century, LEDCs will account for the overwhelming share of global emissions. China alone already emits twice as much CO_2 as the United States and about 2.8 times as much as the entire European Union.

It is the "developing" country exemption that made Kyoto a costly exercise in futility, even if its scientific underpinnings had been valid. According to one influential estimate by one of the most often cited climate scientists in the world, even if the Kyoto Protocol were entirely implemented by all industrialized nations—including the United States, which did not ratify that treaty—would avert only a negligible 0.15°C of Global Warming by 2100.

In Lima, the United States and the EU urged "developing" countries to join the club of the carbon-constrained. The governments of the industrial nations saw no point in negotiating another agreement that cannot work even on its own terms. They were also unwilling to continue giving China and other emerging industrial powerhouses a competitive economic advantage by exempting the latter from CO_2-control policies and the associated costs.

"Developing" countries (LEDCs) rightly view restrictions on energy use as more dangerous than Global Warming to the health and welfare of their peoples. To eradicate poverty and modernize their economies, LEDCs need greater access to cheap, reliable, scalable energy, most of which comes from carbon-based fuels. So those countries use "climate" negotiations not to help solve the alleged problem of Global Warming but to hustle Western nations for boodle. In return for billions of dollars in foreign aid ("climate assistance"), developing countries promise to ratify emissions reduction targets from which they are exempt.

Industrialized countries are supposed to transfer $100 billion a year to a Global Climate Fund that will supposedly be used to help poor countries mitigate the effects of Global Warming, which the industrialized nations supposedly caused, and to compensate the poor countries for loss and damage from Warming.

Foreign aid lends itself to massive corruption, of course. That's why foreign aid is sometimes defined as "taking money from poor people in rich countries and sending it to rich people in poor countries."

The other main issue debated in Lima was whether the new climate pact would specify legally binding emission limitations, as was the case with the Kyoto Protocol, or would simply require each country to choose its own emission limitation goals along with policies adequate to achieve them.

The EU pushed the former, arguing that a treaty without specified targets is meaningless. The Obama administration advocated the latter, arguing that all nations, including LEDCs, are more likely to make and keep "climate" policy commitments they have tailored to their respective capabilities. Critics have ridiculed the tailored approach, describing it as an "honor system" in which a country's obligations are vague and set by oneself, like a typical New Year's resolution.

Obama seeks to bypass the Senate

At first glance, the Obama approach might seem reasonable in light of the principle in the UNFCCC that developing and industrialized countries have "common but differentiated responsibilities and capabilities." But the President's approach is part of a design to forge an aggressive agreement without obtaining the Senate's consent.

It will be, you see, an agreement that is not exactly a treaty yet that is binding in

effect. As *New York Times* reporter Coral Davenport put it:

> To sidestep that [two-thirds of the Senate] requirement, President Obama's climate negotiators are devising what they call a "politically binding" deal that would "name and shame" countries into cutting their emissions. The deal is likely to face strong objections from Republicans on Capitol Hill and from poor countries around the world, but negotiators say it may be the only realistic path.

What Obama seeks is no mere "coalition of the willing" (an international coalition of limited purpose and duration). Even unratified by the Senate, the Paris agreement would include elements that would be enforceable as a matter of international law, in pursuit of the goals of the UNFCCC. Davenport continued:

> American negotiators are instead homing in on a hybrid agreement—a proposal to blend legally binding conditions from an existing 1992 treaty with new voluntary pledges. The mix would create a deal that would update the treaty, and thus, negotiators say, not require a new vote of ratification.
>
> Countries would be legally required to enact domestic climate change policies—but would voluntarily pledge to specific levels of emissions cuts and to channel money to poor countries to help them adapt to climate change. Countries might then be legally obligated to report their progress toward meeting those pledges at meetings held to identify those nations that did not meet their cuts.

Is such a "hybrid" feasible? The UNFCCC is often described as "voluntary" because, unlike the Kyoto Protocol which updated it, the Rio Treaty did not impose specific emission reduction targets. However, "shall"—the legal term of mandatory obligation—occurs repeatedly throughout the text.

For example, per Article 4.2(a), each industrialized country "shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." In the current round of climate negotiations, the United States proposes to reduce its CO_2 emissions 26%-28% below 2005 levels by 2025. That commitment merely "updates" what we "shall" do pursuant to the UNFCCC, the administration argues.

As Competitive Enterprise Institute legal scholar Christopher Horner points out, the Senate ratified the UNFCCC based on its "shared understanding" with the first Bush administration that the treaty would not authorize the executive branch to make binding commitments, absent additional advice from and consent by the Senate. The Senate Foreign Relations Committee reported at the time that

> decisions by the parties to adopt targets and timetables for limiting emissions would have [to be] submitted to the Senate for advice and consent. [Further,] a decision by the executive branch to reinterpret the Convention to apply legally binding targets and timetables for reducing emissions of greenhouse gases to the United States would alter the ''shared understanding'' of the Convention between the Senate and the executive branch and would therefore require the Senate's advice and consent.

Therefore, as the Foreign Relations Committee noted, the President may not "update" commitments to specify U.S. emission-reduction targets without the Senate's okay.

A loophole?

However, the Obama administration could argue that the Foreign Relations Committee's reservation against the UNFCCC does not apply because the emission reductions the President is pledging will occur anyway under the EPA's so-called Clean Power Plan regulations, which derive from the agency's claimed authority under the Clean Air Act, not the UNFCCC.

Fortunately, that Clean Power Plan, the centerpiece of Obama's climate policy agenda, is a mess from a legal perspective; I believe it will almost certainly be overturned in court.

The President is using the administration's domestic climate policies to extract comparable commitments from other countries, and he will undoubtedly try to use the resulting agreement to lock in his domestic climate agenda.In this game plan, future Congresses and future presidents won't be able to overturn EPA's Clean Power Plan without violating our updated UNFCCC pledges to the international community.

It's a neat trick. To see how it might work, let's take a look at that U.S.-China deal.

U.S./China: Who snookered whom?

Historically, China has been the leader of the "developing" country bloc in climate negotiations and the chief obstacle to achieving what enthusiasts call a "truly global" emission-reduction agreement. Because of China's history on this score, Global Warming activists hailed it as a significant breakthrough when, on November 11, Obama and Chinese President Xi Jinping announced their Joint Agreement on Climate and Clean Energy Cooperation. The White House said the agreement would "inject momentum into the global climate negotiations on the road to reaching a successful new climate agreement next year in Paris."

In the past, China rejected any climate treaty proposal containing any LEDC emission limitation, and insisted that industrialized nations pony up billions of dollars (as much as 1.5 percent of their combined GDP) to help "developing" countries adapt to the climate change they are supposed to have caused.

Without formally repudiating those negotiating positions, Xi pledged that China's CO_2 emissions would peak by 2030, and he did not condition that commitment on foreign aid for developing countries. However, during the first week of climate negotiations in Lima, China's chief negotiator said that Western nations' pledges of almost $10 billion in climate assistance (out of the demanded $100 billion per year) were "far from adequate."

As noted, the Joint Agreement commits the United States to cut its CO_2 emissions 26-28 percent below 2005 levels by 2025. That goes beyond the President's 2009 Copenhagen treaty proposal to reduce U.S. CO_2 emissions 17 percent below 2005 levels by 2020.

Some critics conclude that Xi outfoxed Obama, because under the Joint Agreement, U.S. emissions must begin to decline immediately whereas China's emissions don't have to plateau until 14 years after Obama leaves office—a change that, it was projected, was going to happen anyway.

A White House briefing memo emphasized the gigantic scale of China's commitment:

> China's target to expand total energy consumption coming from zero-emission sources to around 20 percent by 2030 is notable. It will require China to deploy an additional 800-1,000 gigawatts of nuclear, wind, solar and other zero emission generation capacity by 2030 – more than all the coal-fired power plants that exist in China today and close to total current electricity generation capacity in the United States.

Bloomberg News similarly concluded that China will need "1,000 nuclear reactors to fulfill its climate pledge," explaining that the Joint Agreement

> requires a radical environmental and economic makeover. Xi's commitment to cap carbon emissions by 2030 and turn to renewable [actually, non-CO_2-emitting] sources for 20 percent of the country's energy comes with a price tag of $2 trillion. . . .
>
> For China to succeed, it will have to install the clean energy equivalent of Spain's entire generating capacity each year until 2030, according to Bloomberg New Energy Finance data. It has achieved that only once—last year.

Although meeting the 20 percent target is "anything but assured," the Bloomberg story suggested that Xi's pledge is sincere because China's "emerging middle class [is] increasingly outspoken about living in sooty cities reminiscent of Europe's industrial revolution, [and] China is looking at radical changes in how its economy operates."

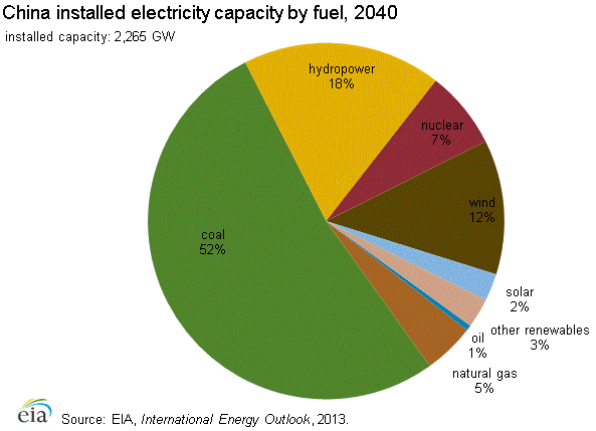
But Bloomberg acknowledged that, despite talk of radical changes, China is expected to increase its carbon-based fuel generation capacity between now and 2040:

> Electricity demand will rise 46 percent by 2020 and double by 2030, according to the International Energy Agency. China currently depends on coal for two-thirds of its energy, more than any other Group of 20 country [i.e., major economic power] except South Africa. . . .
>
> In all, China will spend $4.6 trillion upgrading its power industry by 2040. Nuclear and [so-called] renewables alone will garner $1.77 trillion in new investment, taking 79 percent of all the funding for power plants built in China, the IEA said in its *World Energy Outlook* on Nov. 12. [Carbon-based] fuels get the remaining share.

The final paragraph implies that China will spend $470 billion on new coal power plants. Presumably, coal would also get most of the $2.36 trillion spent to upgrade existing capacity.

The same general picture emerges from the U.S. Energy Information Administration's 2013 *International Energy Outlook*. At the end of 2012, 71 percent of China's electricity came from carbon-based fuels (coal, 66 percent; natural gas, three percent; and oil, two percent). Non-CO_2-emitting and carbon-neutral sources accounted for 28.2 percent (hydro, 22 percent; nuclear, one percent; wind, five percent; solar, 0.2 percent; and biomass, one percent). It is important to note that China already obtains more than 20 percent of its electricity from non-CO_2-emitting sources.

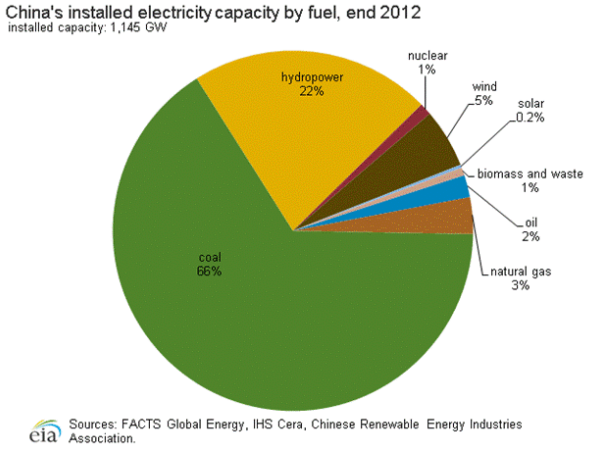
Here's the U.S. Energy Information Administration's projection for China's electricity fuel mix in 2040:



In 2040, 58 percent of China's electricity is projected to come from carbon-based fuels (coal, 52 percent; natural gas, five percent; oil, one percent), and 42 percent from non-CO_2-emitting and carbon-neutral sources (hydro, 18 percent; nuclear, seven percent; wind, 12 percent; solar, two percent; and other so-called renewables, three percent).

The critics are right. Although China's 20 percent commitment in the Obama-Xi agreement requires a staggering level of investment in nuclear and so-called renewables, it is well within the scope of what China plans to do anyway—and the scope of what China has already done!

Moreover, the U.S. Energy Information Administration "projects that [China's] installed capacity will double to 2,265 [gigawatts] by 2040, propelled by a combination of coal- and natural gas-fired capacity and [so-called] renewable



sources." To break it down by the numbers, compared to 2012, China's coal plants in 2040 will supply 52 percent of the country's electricity instead of 66 percent. Of course, 52 percent of 2,265 gigawatts (China's future installed capacity) is substantially larger than 66 percent of 1,145 gigawatts (the current figure).

I know that's a lot of numbers. Here's the bottom line: Even as the Chinese reduce the share of their total power generation that comes from coal, the total amount of coal-fired power generation will increase (just not as fast as the amount of power from other sources).

How big is that increase in power from coal? In 2012, China's coal capacity was approximately 756 gigawatts; in 2040, it will be approximately 1,178 gigawatts. Thus, in the Energy Information Administration's projection, during the period between 2012 and 2040, China's coal capacity will grow by 422 gigawatts.

That increase in China's coal capacity—just the *increase*—is substantially more than America's *entire* existing coal-fired capacity.

In other words, **the U.S. could completely eliminate its power generation from coal, and that change would be more than canceled out by the increase in coal-fired power in China.** (And then there's India…)

In stark contrast to China's increasing use of coal for power, EPA's Carbon Pollution Standards Rule effectively prohibits the construction of new coal power plants in the United States, and the agency's Clean Power Plan will prematurely retire about 45 gigawatts of existing coal-fired capacity.

So did Xi pull a fast one on Obama? No. Obama got exactly what he wanted. He needs China's support for an agreement under which the United States is *politically bound* by pledges to the international community to implement his domestic climate agenda. Obama seeks thereby to shield EPA's climate regulations—his legacy—from potential repeal by future presidents and future Congresses. It is audaciously clever. Yet I believe it won't work.

Clean Power Plan—linchpin and weak link

The EPA's Clean Power Plan is so legally defective and outrages so many powerful constituencies (state policymakers, electric utilities, congressional leaders) that it will face a multitude of challenges. The attorneys general of 17 states, led by Scott Pruitt of Oklahoma, recently submitted official comments to EPA arguing that the Plan "has numerous legal defects, each of which provides an independent basis to invalidate the rule in its entirety."

The Plan requires states to adopt rules for carbon dioxide emissions from electrical plants that are already operating. By law, any such rules should require power plants to use the "best system of emission reduction" that has been "adequately demonstrated" taking "cost" into account.

CPP standards, calibrated in pounds CO_2 per megawatt hour, effectively set statewide CO_2 emission caps for the states' electric power plants. Each state except Vermont has its own EPA-imposed cap. On average, states are currently required to reduce their electric-sector CO_2 emissions 30 percent below 2005 levels by 2030.

In this new Plan to de-carbonize state power sectors, the EPA claims to be operating under the authority of the Clean Air Act, section111(d), and the CPP is called EPA's "111(d) rule." The provision requires EPA to require the states to adopt standards for *existing* facilities, if EPA has established standards for *new* facilities of the same type.

That distinction—between *existing* facilities and *new* facilities—is very important, and I'll return to it in a moment.

In September 2013, EPA proposed a new Carbon Pollution Standards rule that would create CO_2 standards for *new* power plants that use either coal or natural gas. EPA missed a deadline for finalizing this rule but now plans to finalize it next summer. The 111(d) rule—the Clean Power Plan—that will cover *existing* sources is expected to be finalized next summer as well.

The Clean Air Act, along with EPA's 1975 implementing regulation and all five previous 111(d) rules, make clear that an "existing source" is a "designated facility"—an individual physical structure. In addition, the legal requirement to use the "best system of emission reduction" means that designated facilities (in the present case, power plants) must use technology that has been "adequately demonstrated" to reduce emissions from facilities of that type.

In stark contrast to all those previous rules and regulations, the EPA's new Clean Power Plan treats each state's entire electric power sector as if it were a single existing source, and it also redefines "best system" to mean a mix of policies designed to restructure electricity markets as a whole, rather than a facility-specific technology.

States will have to impose significant changes to meet their federal Clean Power Plan targets. Some states that now lack so-called "renewable energy" mandates will have to adopt them; some with a "renewable" energy quota or related tax incentives will have to increase them. In many states, grid operators will have to stop allocating electrical power on the basis of the best price and instead give priority to plants with the lowest emissions, no matter how costly. In many states, policymakers will have to adopt new or more aggressive programs to reduce the demand for electricity, such as rebates for programmable thermostats. EPA helpfully observes that cap-and-trade programs, especially if administered through multi-state compacts, can assist compliance.

When did Congress authorize the EPA to transform state electricity markets and create new caps on CO_2 emissions?

Never.

Here are my top reasons the Clean Power Plan is unlawful and, thus, cannot be part of any *bona fide* pledge that U.S. diplomats make in Global Warming treaty negotiations:

►**The Plan violates the separation of powers.** The Plan stretches the relevant law, the Clean Air Act section111(d), beyond all recognition. This obscure, seldom-used provision does not authorize EPA to restructure state electricity markets, revise state electricity policies, or establish statewide caps for CO_2. As the Supreme Court has cautioned EPA, "Congress does not hide elephants in mouse holes." EPA is making law, not implementing it.

►**EPA's Carbon Pollution Standard rule—the legal prerequisite for the Plan—is itself unlawful.** Under the Clean Air Act, a "new source" performance standard must be "adequately demonstrated," taking "cost" into account. The Carbon Pollution Rule establishes a new source performance standard for coal power plants that can be met only through a system of emission reduction known as carbon capture and storage. In that system, carbon dioxide is grabbed and put away so that it doesn't go into the air. Here's the problem: that new system is not " adequately demonstrated." Only one utility-scale power plant with such a system is operating, and it—like the handful of such plants under construction—requires costly subsidies. Technologies unaffordable without subsidy are not commercially viable and, thus, not "adequately demonstrated."

►**A "best system of emission reduction" for CO_2 emissions from existing power plants does not exist.** Commercial technology to capture or filter CO_2 emissions from existing power plants has not yet been developed, as even EPA admits. Hence there is no "best system" that EPA or states could use to set CO_2 performance standards for existing power plants.

►**A "best system of emission reduction" is a technology or set of technologies "adequately demonstrated" for "designated facilities," not a wish-list of market-restructuring energy policies.** Section 111(d) does not authorize EPA to control state policies regarding renewable energy, electricity dispatch, or demand management. Even though the Clean Air Act says nothing about electricity markets, EPA lays claim to greater authority over retail electricity markets than Congress delegated to the Federal Energy Regulatory Commission under the Federal Power Act.

►**Curbing production is not a "best system of emission reduction."** The Plan sets performance standards for power plants that are calibrated in pounds per megawatt-hour, which clearly implies that a power plant should try to reduce emissions per unit of output. The Plan's core strategy, however, is to reduce emissions by decreasing coal power plants' *output* (electric generation), period. But decreasing output does not improve a source's performance and thus is not a "best system of emission reduction."

►**Section 111(d) prohibits EPA from requiring such standards for existing power plants if those sources are already subject to "maximum achievable control technology" regulations under a different section of the Clean Air Act**, section 112. EPA has been regulating power plants under that section since December 2011. Congress intended to preclude double regulation of sources under both provisions of the Clean Air Act, so the Plan disregards that explicit limitation on EPA's power.

►**A state's electric-power sector is not a "source" that can be required to meet a performance standard.** The Clean Air Act section 111(a)(3) defines "stationary source" (whether new or existing) as "any building, structure, facility, or installation which emits or may emit any air pollutant." Obviously, a state's entire power sector is not any such individual physical object.

►**A rule for existing power plants ("sources") cannot be more stringent than the corresponding rule for new sources, nor can it regulate entities not covered by the new rule.** The Plan requires many states to adopt CO_2 standards for their power sectors that are more stringent than EPA's proposed standards for new coal and natural gas power plants. The CPP also requires states to regulate power plants (nuclear, "renewable") that are not emission sources, as well as households and firms that don't produce power. This defies the logic and intent of the Clear Air Act's section 111(d), which is to use the experience gained from regulating new sources to develop performance standards appropriate for existing sources.

Conclusion

We should perhaps be thankful to President Obama for attempting to negotiate an unconstitutional climate treaty by means of an unlawful EPA climate regulation. The President's disregard for the separation of powers is now too conspicuous to be concealed or ignored. His war on affordable energy, especially coal-based power, is alarming. But I believe that he has overplayed his hand and that the audacity of his power grab will be its undoing.

Marlo Lewis, Ph.D., is a senior fellow in energy and environmental policy at the Competitive Enterprise Institute in Washington, D.C.

GW

GreenNotes

The **Obama administration** announced that 2014 was "the hottest year on record" by a margin of 0.04 degrees (four one-hundredths of a degree) compared to 2005, a fake fact that was repeated in hundreds of "news" media, virtually none of whom, it appears, bothered to check out the claim. (Typically, ***Wired*** magazine called it "2014's Record-Smashing Heat.") A simple check would have revealed the problem with the administration's assertion—that, as every scientist should know, the supposed increase, which is the basis for the claim of a "record" temperature, is *too small for science to measure*. It would be as if government experts announced that the average height of ten-year-old boys in America had increased in the past nine years from 55 inches to 55.00765 inches. How could you possibly measure such a thing so precisely? The answer is, you couldn't.

How insignificant is 0.04 degrees? Regarding the worldwide temperature in 2014, the difference between the official estimates made by **NASA** vs. the **National Oceanographic and Atmospheric Administration**—two parts of the Obama administration—is two-and-a-half times as big as the amount of the supposed 2005-2014 increase. If the ***New York Times*** reported the score for a **Super Bowl** as **Seahawks** 36/**Broncos** 32 and the ***Washington Post*** reported it as Seahawks 46/Broncos 42, and the **NFL** declared that it wasn't sure about the score but it didn't matter because the Seahawks won by four points either way, the NFL would be a laughingstock.

By the way, even a 0.04 degree increase, the Obama administration's latest fake fact, doesn't serve their case very well. That's because a 0.04 degree increase in the past nine years would mean that that warned-about two-degree increase, now projected to take place by the year 2050, would take *450 years* to occur. The Global Warmers' climate predictions—literally, the only scientific standard by which to determine whether the Warmers are correct—have been proven wrong once again, *even based on the figures they provide*.

As one might expect, the White House used the "hottest on record" report to justify the **EPA**'s so-called **Clean Power Plan**, part of its **War on Coal**. But the backlash against the Plan is growing. **Lawrence Tribe**, a strong supporter of the President (and one of Mr. Obama's professors at **Harvard Law School**) wrote in the ***Wall Street Journal*** that the Plan is unconstitutional and the EPA does not have the authority to re-engineer the nation's electric generating system and power grid. "Frustration with congressional inaction cannot justify throwing the **Constitution** overboard to rescue this lawless EPA proposal—especially when the EPA itself . . . has touted its proposal as 'an investment opportunity' that isn't really 'about pollution control' at all."

The new Senate Majority Leader, **Mitch McConnell** (R-Ky.), pledged to do all he could to stop the regulations, declaring that a White House "crusade" had devastated his state's economy. **Murray Energy**, the nation's largest privately held coal-mining company, asked a federal court to block the rules as a violation of the Clean Air Act, and 12 state governments filed a similar lawsuit. At least 26 state governments have urged EPA to withdraw the rules. The **American Legislative Exchange Council**, which represents conservative/mainstream state legislators, has drafted model resolutions and legislation to be used by lawmakers to fight the EPA plan.

Rep. **Kevin Cramer** (R-N.D.), a former utility regulator, said the Plan would raise electricity prices and threaten the power grid. "EPA personnel are environmental regulators, not electrical engineers, and have no experience in or knowledge of the construction and operation of power grids," he wrote, and the agency "failed to heed the advice" of people with such experience.

While campaigning for President, Barack Obama declared that, under his energy plan, electricity prices would "necessarily skyrocket." Sure enough, the **U.S. Energy Information Administration** projects that coal plant closures, driven by the Plan, could drive natural gas prices up 150 percent by 2040, causing electricity prices to climb 22 percent.

The Plan is part of a pattern of ultra-regulation. Between January 20, 2009, when the President took office, and December 23, 2014, the EPA issued 3,120 new final regulations filling 27,854 pages—almost 28 million words, 43 times as long as the **Bible**. Just before Thanksgiving, across the various federal agencies, the administration announced plans for 3,415 regulations, including 189 costing more than $100 million each.

Ideologically, government environmental regulators appear to be closely aligned with the President. Shortly before the election, the **Center for Responsive Politics** analyzed contributions by federal employees to candidate and political campaigns. Unsurprisingly, 91 percent of EPA employees who made contributions made those contributions to **Democrats**. Employees of the **Departments of Energy** and **the Interior**, which deal with environmental issues, also contributed to Democrats at a rate of more than 90 percent.