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“The Impact of Federal Regulations: A Case Study of Recently Proposed Rules”

Committee on Homeland Security and Governmental Affairs
Testimony of Assistant Deputy Attorney General Delanie Breuer
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Good afternoon Chairman Johnson, Ranking Member Carper, and members of the committee. Thank you for the opportunity to provide testimony on behalf of Attorney General Brad Schimel and the state of Wisconsin.

The health of Wisconsin’s economy rests on the back of manufacturing, food processing, pulp and paper, and agriculture. Together, these industries make up the heart of our state and all of them are in danger due to the EPA’s effort to usurp state control over the natural resources that are necessary for Wisconsin’s continued growth.

Environmental stewardship is important to all of us, and everyone see the value of responsible use of natural resources. But in order to leave our future generations better off than ourselves, we must find the balance between protecting our environment and protecting our economy.

I’m here on behalf of Attorney General Brad Schimel to discuss the legality of two specific initiatives: the Waters of The United States rule and the EPA’s “Clean Power Plan.” But we cannot discuss these two overreaching rules without additional context.

Under President Obama, the EPA has hammered business and industry with regulations at a historical. There have been multiple National Ambient Air Quality revisions including particulate matter, ozone, NO₂ and SO₂, the Cross State Air Pollution Rule, rules regulating water intake at power generating facilities, rules further limiting mercury and other chemicals from those same facilities, rules regulating coal combustion residuals, and rules regulating effluent from generators. This was all well before the two regulations we are addressing today.

But these two regulations in particular are the broadest expansion of EPA authority we’ve seen to date. One gives EPA control over nearly ever stream and tributary in the state, and the other allows EPA to manipulate and control the entire country’s electric grid. The industries important to Wisconsin may not survive this onslaught.

Attorney General Schimel has promised to do all he can to protect Wisconsin’s economy by fighting this type of federal overreach. Since he took office in January, Wisconsin has

joined four separate law suits challenging the "Clean Power Plan," a law suit challenging the Waters of the United States rule, and is contemplating even more litigation to prevent the federal government from taking more control of our state resources through EPA regulation.

The Waters of the United States

The Waters of the United States rule, or WOTUS, is an attempt by EPA to control more bodies of water with federal regulation. The Clean Water Act requires anyone seeking to discharge materials into the "Waters of the United States" to obtain a permit from the EPA or Army Corps of Engineers. Discharge is not only traditional pollutants, but can also include rock, sand, and dredge material.

The rule that is currently being challenged overhauls the definition of the "Waters of the United States." It defines three categories of water: primary water, waters adjacent to primary waters, and waters with a significant nexus to primary waters. Primary waters are defined as any interstate waters and wetlands. The rule maintains jurisdiction over primary waters, which is unchanged from past practice. However, it also establishes per se jurisdiction over waters adjacent to primary waters.

One of the most troubling additions to the definition of Waters of the United States is that of "adjacent waters" or neighboring waters. This expands EPA authority to water within 100 feet of the ordinary high water mark of navigable waters, areas within the 100-year floodplain and within 1500 of the ordinary high water mark of navigable waters, and waters within 1500 of the ordinary high water mark regardless of whether they are actually connected in any way to the related navigable waters. EPA's expanded authority is even greater than the Wisconsin DNR's in that the DNR must show some connectivity to groundwater, surface water, or wetlands in order to regulate these types of waterways. Practically speaking, the types of waters subject to per se or potential EPA regulation include ditches, ponds, and streams that may only flow during or after heavy rains but are usually dry, and to the 100 year flood plain which is likely dry 99 out of 100 years. It also includes any ponds, natural or manmade, on any property, public or private, within those specified boundaries.

There are some practical problems with the rule's application as well. First, it leaves ambiguous the state's jurisdiction over water with a "significant nexus" to primary waters. "Significant nexus" is defined as water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affecting the chemical, physical, or biological integrity of a water." EPA has justified this rule by claiming that it will reduce the number of case-by-case evaluations, but in fact, this definition not only requires a case-by-case analysis of a body of water to determine if it has a significant nexus before the property owner can apply for permits, but it also broadens the definition to a point that will allow the EPA to regulate any water anywhere by determining it has a 'significant nexus' to a navigable water.

Notably, the new WOTUS rule impacts all property owners, public and private, as well as all Wisconsin industry, but particularly agriculture. The rule adds more red tape and barriers to practical land use by requiring more permits, and in many cases, duplicative state and federal permits. There is no question that all farmers will be spending more time working with engineers and less time farming under this rule. Worse, they will be spending more of their hard-earned dollars working with attorneys and compliance experts instead of reinvesting those profits in their land and buying equipment to increase productivity.

Under General Schimel, Wisconsin has joined the fight against this federal regulatory overreach. The Clean Water Act gives EPA the authority to regulate “navigable waters.” The average citizen might find this issue slightly ridiculous. He or she probably thinks that the common sense definition of “navigable water” is one down which you could drive or paddle a boat. Of course a seasonal stream that only runs during periods of heavy rain cannot be considered navigable under any reasonable construction of that term. And a small pond on private land with no connection to a major waterway is certainly not within the definition of “navigable waters” under a common-sense definition. The average citizen and his or her common sense approach is correct. Legally, the rule exceeds the bounds of the Commerce Clause by asserting per se or potential jurisdiction over water that has little or no connection to interstate navigable waters. This redefinition cannot be called anything other than a power grab by the federal government.

Worse still, the rule exempts “waters being used for established normal farming, ranching and silviculture activities” from per se regulation. At first, this seems like good news. It seems to say the EPA will not automatically regulate water used by our farmers. But what it really does is force farmers’ permits to be evaluated on a case-by-case basis, meaning uncertainty and likely harsher regulation of farm tributaries, impacting not just corporate farms, but small family farms that have existed in Wisconsin for decades, or even centuries.

This type of overreach with respect to the Clean Water Act has been attempted and rejected multiple times. Most notably, the Supreme Court rejected the Army Corps’ and EPA’s authority to regulate non-navigable, intrastate waters not significantly connected to navigable interstate waters. This seems like a clear holding that the agencies are ignoring by promulgating this new definition.

Currently, the WOTUS rule is stayed pending litigation due to several lawsuits that were filed after the rule was published by the EPA. However, there are ongoing litigations over the jurisdiction of the court issuing the stay. A reversal of the injunction would irreparably harm Wisconsin and many other states. Wisconsin will continue to support litigation efforts to protect our state.

The “Clean Power Plan”

The “Clean Power Plan” is the centerpiece of the Obama administration’s intended environmental legacy, but the repercussions will devastate Wisconsin’s economy for little or no benefit. At its core, the “Clean Power Plan” is a cap-and-trade plan in disguise.

At this point, the details of the rules are relatively well known by industry and utilities, as well as the legal world. There are three parts to the “Clean Power Plan”: 111(b) regulating carbon dioxide emissions from new coal- and gas-fired power plants, 111(b) regulating carbon dioxide emissions from modified or reconstructed plants, and 111(d) regulating carbon dioxide emissions from existing plants. All three versions were published on October 23rd of this year.

The Clean Air Act requires EPA to set standards for new sources in a given source category before it can set standards for existing sources in that same category. In other words, 111(b) is a necessary precursor to 111(d). For this reason, and to preserve the ability to rely on coal in the future as part of a balanced energy portfolio, Wisconsin has joined a law suit to challenge the 111(b) new source performance standard.

The rule sets limits for new natural gas generating facilities at 1000 lbs/MWh and for coal generating facilities at 1400 lbs/MWh. The limit for coal plants is most troubling. It requires approximately 20% of the carbon produced to be captured and permanently stored underground through carbon capture and sequestration, or CCS. There is no off-the-shelf, add-on technology that can eliminate carbon from an emissions stream like there are for other noxious pollutants. In fact, even the newest, most efficient ultra-supercritical technology cannot meet the standard without CCS. That cutting edge technology emits about 1700 lbs/MWh, 300 lbs over the limit. In simplest terms, the CPP is designed to end coal-fired power generation in the United States. The devastating impact of this cannot be overstated as it applied to Wisconsin’s manufacturing sector and to those who live on fixed incomes.

Wisconsin joined 23 other states to challenge this portion of the “Clean Power Plan” on November 3rd. While we may not have plans to build a new coal-fired generator in the near future, it’s important to keep coal on the table as a fuel option. The litigation is also important because success a successful challenge will also preclude the implementation of 111(d) for existing sources.

The legal argument against 111(b) for new sources is sound. The Clean Air Act requires a standard to reflect “the degree of emissions limitation achievable through the application of the best system of emissions reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”¹ The challenging states will argue that CCS has not been “adequately demonstrated.”

¹ 42 U.S. Code § 7411(a)(1).

CCS is not a common or a proven technology. There are just over a dozen CCS projects worldwide and only one (in Saskatchewan, Canada) is connected to an operating power plant. The plant that was intended to be the poster child for the technology in the U.S., Mississippi Power's Kemper County facility, has faced nothing but problems. The total cost of the plant to date is \$6.4 billion, almost 64% (or \$4 billion) over budget. It is also two years behind schedule.

Since CCS has not been "adequately demonstrated" and even the most technologically advanced coal-fired plants cannot meet the standard without CCS, the rule is more stringent than allowed by the Clean Air Act.

Even more troubling is the 111(d) standard for existing natural gas- and coal-fired generating facilities. While 111(b) sets a standard for each type of plant regardless of location, 111(d) sets a standard for a state, basically treating an entire state as a source. The states' goals are based on current generation mix and emission rates, and a convoluted formula of renewable potential, retirements, natural gas capacity, and generic estimates of efficiency upgrades.

Wisconsin is in the crosshairs of this rule in a way unlike any other state because of our manufacturing-based economy, our low renewable potential, and our current reliance on clean, reliable coal plants. Since 2000, we have invested \$11.6 billion in reducing carbon in our utility industry, but we are still expected to make one of the largest reductions of any state under the final rule.

The states fighting this portion of the "Clean Power Plan" have not held back. There have been three separate attempts to stop what is clearly illegal and prevent the states and utilities from spending valuable resources to begin compliance planning. Currently, Wisconsin has joined 25 other states to challenge the final, published rule.

Wisconsin has played a significant role in the litigation since January. We continue to provide technical support both informally and through our regulators' declarations. We believe the EPA is legally prohibited from promulgating this rule under the language of the Clean Air Act because the EPA already regulates these same plants under a different section of the Act. We also believe that the EPA is exceeding its authority because the rule effectively sets state energy policy by regulating the entire grid rather than a specific source of emissions. In a nutshell, the EPA is telling the states that the best way to reduce emissions from fossil fuel plants is to simply stop using it. We refuse to accept that this is what Congress intended with the clean air act – to force the shutdown of clean, reliable facilities that have not reached the end of their useful life.

Moreover, the rule is tailored to encourage a cap and trade program, the same type of program rejected by congress but promised during President Obama's campaign. While the EPA claims to give states flexibility to comply, it is virtually impossible for states like Wisconsin to reach their goal without depending on credits from other states. Our manufacturers, and ultimately our consumers, will pay for that.

Currently, the parties are briefing a motion for stay made by the states challenging the rule. Absent a stay, we have no choice but to begin compliance planning. Our fear, of course, is that we will begin down an irreversible path with the decision we make while waiting for final adjudication. Of course, much like the recently litigated MATS rule, the EPA will be content with forcing states to make unnecessary investments while litigation is pending even if the rule is ultimately deemed illegal.

The great irony of this rule is that its impact will, at best, be minimal, and at worse, be the opposite of what EPA claims to want. By its own calculation, the impact of this rule over the next several decades is so minimal it is practically insignificant. But if we consider the very real consequences of price spikes, it is more than likely that global carbon emissions will increase as a result of the rule. Energy price spikes will reduce manufacturers' margins to a point that they will be forced to relocate. And when they do so, it's not to a neighboring state but to a different country – a country like China, or India, or Mexico, where cheap, reliable coal is plentiful, and where toxic emissions like SO₂ and mercury are not controlled at all. To the extent that the demand for manufactured products is maintained after the US economy is permanently altered by this regulation, the countries to which these manufacturers will continue increasing their carbon emissions as well as their economies, while we suffer. Those decisions to move overseas are not easily reversed, but if the rule is not stayed during litigation, those decisions will be imminent.

Conclusion

The legal and constitutional analyses of these rules are important. But more important is the impact on the citizens of our state. Many citizens do not understand the impact of these rules. More burdensome water regulation means farming becomes more expensive and so do the products that those farmers produce. Higher costs make it more difficult to compete with importers, and reduce the already small profits of most farmers. It makes manufacturers less competitive and increases the costs of their products for the end use consumer, as well.

Higher energy prices add another layer of burden, which may ultimately force Wisconsin companies to leave. Wisconsin utilities are regulated entities, and large energy users such as the paper mills and food processors pay for a disproportionately high amount of the infrastructure that brings energy to your home as well as their facilities. As they leave, the same costs must be collected, but from fewer customers, which accelerates the rate at which residential electric bills will increase. By the time residential customers see these double digit increases in their electric bills and food prices, we will be too far down the path to reverse course. Those consumers will not blame EPA for the rate hikes. They will blame manufacturers, utilities, farmers, and administration in office at that time.

Much of Wisconsin's industry feels pressure from consumers to be 'green' and take measures to protect the environment, and no one is arguing that the environment is not

important. However, the result of these two rules is not cleaner air or water, but less control over our state's natural resources. The air and water in Wisconsin is cleaner than it has ever been, and that was accomplished without illegal intervention from the federal government.

There has been a lot of rhetoric thrown around about these two EPA regulations, but the impact of the rules on our economy is not being exaggerated – it will be detrimental and it will be irreversible. These two regulations, along with the others promulgated over the last seven years, result in a regulatory power grab by the federal government like we've never seen. We must educate the citizens of our state on these consequences so they can make informed decisions.