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EPA Proposes Its Landmark Guidelines For Reducing Carbon Emissions from Existing Fossil Fuel-Fired Power Plants

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On June 2, 2014, the Environmental Protection Agency ("EPA") proposed guidelines for regulation of carbon dioxide ("CO_2") emissions from existing power plants. The guidelines, christened EPA's "Clean Power Plan," are projected to reduce CO_2 emissions from the power sector by 30 percent (%) from 2005 levels. Consistent with the principles of cooperative federalism embraced throughout the Clean Air Act—and, in particular, by Section 111(d)—a key feature of the Clean Power Plan is the flexibility it affords states in tailoring their own plans to meet the emission performance goals established by U.S. EPA. In furtherance of such flexibility, EPA proposes a "portfolio approach" to expand the types of measures that can be included in states' plans for meeting the goals for each individual state. In response to calls from many states and other stakeholders that the guidelines look more broadly at reductions that can be achieved throughout the integrated electric grid, EPA has set each state's individual goal—a set of rate-based performance levels, expressed in pounds of CO_2 per MW-hour generated—based, not only on efficiency improvements that can be achieved at the affected power plants themselves, but also on measures designed to reduce demand for generation from such plants, including increased generation by renewable or lower carbon generation sources (i.e., displacement of load to cleaning generating sources), and energy efficiency and other demand-side reductions (i.e., reductions in consumption of power). Further, in a nod to the two active carbon trading programs in the U.S. to date—the Regional Greenhouse Gas Initiative ("RGGI") and California's Cap-and-Trade Program—EPA has provided a clear roadmap in the proposed guidelines for states participating in such market-based programs to demonstrate that the reductions achieved through their implementation meet the participating states' performance goals.

Ambitious in scope, the Clean Power Plan would largely fulfill President Obama's commitment to take significant action to reduce greenhouse gas ("GHG") emissions and address climate change in the absence of Congressional action. While the final regulation is certain to be challenged in the D.C. Circuit and possibly by subsequent lawsuits in the various U.S. Circuit Courts of Appeal challenging EPA's approval of individual state plans (or publication of a plan for states that fail to submit one), assuming EPA should succeed in defending its actions, the Clean Power Plan is likely to hasten cleaner generation and energy conservation throughout the electric sector, particularly in those states that have not moved forward with the adoption of aggressive renewable generation and energy efficiency goals. It also is likely to result in reduced generation from the nation's coal fired generating fleet and

may lead to the retirement of even greater coal-fired capacity than is already slated for retirement due to secular changes in the energy market and other EPA rulemakings.

President Obama's Climate Action Plan

President Obama released his Climate Action Plan on June 25, 2013, which proposed a series of measures aimed at reducing U.S. GHG emissions.[1] Chief among these measures is reducing GHG emissions from fossil fuel-fired power plants, which are responsible for approximately 40% of all annual GHG emissions in the United States.[2] Accordingly, in a separate Presidential Memorandum, President Obama directed the EPA to propose performance standards to regulate CO_2 emissions from both new and existing fossil fuel-fired power plants.[3] To that end, on September 20, 2013, EPA issued proposed New Source Performance Standards ("NSPS") applicable to new fossil fuel-fired power plants pursuant to section 111(b) of the CAA.[4]

The Clean Power Plan's regulation of existing power plants is the second, and far more significant, piece of President Obama's directive to EPA to reduce GHG from the U.S. power sector. The EPA's authority to issue guidelines regulating CO_2 emissions from existing power plants is derived from CAA Section 111(d), which only applies to existing sources (1) of any pollutant that is neither a criteria pollutant nor a hazardous air pollutant ("HAP") and (2) to which an NSPS would apply, if the existing source were a new source.[5] Putting aside a potential legal issue associated with the failure to reconcile two versions of section 111(d) when the 1990 Amendments to the Clean Air Act became law,[6] EPA would appear to have authority to regulate the CO_2 emissions of existing power plants because (1) CO_2 is a pollutant that is neither a criteria pollutant nor a HAP and (2) existing power plants would need to comply with a CO_2 NSPS, if they were new sources (upon EPA finalizing the NSPS regulating GHG emissions from new power plants). The section 111(d) planning process begins with EPA's issuance of a guideline document (i.e., the Clean Power Plan) for states to use in developing their respective plans for regulating existing sources for the relevant source category ("State 111(d) Plans").[7] Specifically, such guidelines provide information for the development of State 111(d) Plans, including (1) an applicable standard of performance reflecting the application of the best system of emission reduction ("BSER") that has been adequately demonstrated for designated facilities,[8] and (2) the deadline for compliance with the standard of performance.

The Clean Power Plan And Its Building Blocks

On June 2, 2014, EPA Administrator Gina McCarthy proposed the highly anticipated GHG emissions guidelines for existing power plants.[9] Under the Clean Power Plan, EPA projects a 30% reduction in carbon emissions from the electric generating sector by 2030, relative to 2005 levels, which would amount to a reduction in CO_2 emissions from the sector of approximately 500 million metric tons. Building on an earlier proposal developed by the Natural Resources Defense Council ("NRDC"),[10] the Clean Power Plan produces two alternative formulations of the BSER from existing power plants: a more limited potential formulation on which the EPA solicits comment, and a proposed formulation which the EPA explicitly prefers. Both formulations consist of combinations of strategies that may be implemented by states to achieve the required GHG emissions reductions. These measures are grouped into four categories, which the EPA calls "building blocks":

1. Heat rate (i.e., efficiency) improvements at individual power plants;

2. Moving dispatch to units with lower carbon emissions (i.e., switching from coal to natural gas combined cycle ("NGCC") units), with a target NGCC utilization rate of 70%;

3. Replacing electricity generated by fossil fuel-fired power plants through expanded renewable energy capacity; and

4. Reducing emissions from fossil fuel-fired power plants by increasing demand-side energy efficiency that reduces the amount of generation required.[11]

The first two blocks represent changes that are achieved at individual fossil fuel generating units or among the fleet of fossil fuel generating units. The latter two blocks reach more broadly beyond the fenceline of individual plants or the existing fossil-fuel fired fleet. The first formulation of the BSER (the "potential" formulation upon which EPA is seeking comments) is comprised only of strategies from building blocks 1 and 2; the second formulation (EPA's "proposed" formulation) includes strategies from all four building blocks.[12] The guidelines compute both interim and final state-specific emission performance goals based on application of the proposed BSER to each state's particular mix of fossil fuel-fired generating sources and potential to achieve reductions in emissions from such sources through expansion of renewable energy capacity and demand-side energy efficiency.[13] The final goals, expressed in pounds of CO_2 per net MW-hour generated (lb/MWh), range from a low of 215 lb/MWh for Washington, to a high of 1,783 lb/MWh for North Dakota. This approach creates a seemingly odd result; in some cases, the final goal for particular states is lower than EPA's proposed performance standards for new sources. If any of the building blocks is found to be an invalid basis for the development of BSER, the goals will be adjusted to reflect the emission reductions possible from the remaining building blocks.[14]

State Plans And The Portfolio Approach

CAA section 111(d) gives states the primary responsibility for designing their own State 111(d) Plans for submission to EPA.[15] Accordingly, the Clean Power Plan refrains from prescribing how an individual state should meet its goal, instead allowing each state to design its program based on the combination of building blocks most relevant to their specific circumstances and policy preferences. In addition, each state can identify technologies or strategies that are not specific to the building blocks as part of their overall plans, such as market-based trading programs[16] or construction of new NGCC units. Although EPA has established rate-based CO_2 performance goals for each state, states are also permitted to adopt an equivalent mass-based goal, which would allow for market-based trading programs such as a cap-and-trade system to be implemented to meet the goal. Further, acknowledging the integrated nature of the electric grid and the fact that the implementation of measures such as energy efficiency in one state could result in reductions in emissions from affected fossil fuel generating units in another state, EPA is also allowing states to pursue multi-state approaches, so long as the state's plan "would achieve the equivalent in stringency, including compliance timing, to the state-specific rate-based goal set by EPA."[17]

EPA's proposed "portfolio approach," which would allow other enforceable measures such as renewable energy (RE) and demand-side energy efficiency (EE) measures that result in reduced utilization of (and therefore reduced CO_2 emission from) fossil fuel-fired power plants to be included in State 111(d) Plans,[18] could be either "utility driven" or "state driven" depending on the utility regulatory structure in a particular state. Under a utility-driven approach, a state plan could include "measures that directly apply to affected power plants (e.g., repowering or retirement of one or more electric

generating units) as well as RE and demand-side EE measures that avoid power plant CO_2 emissions."[19] Under a state-driven approach, in addition to standards that affect power plants, the measures could include "requirements that apply directly to entities other than affected power plants, for example, renewable portfolio standards (RPS) or end-use energy efficiency resource standards (EERS), both of which often apply to electric distribution utilities."[20] Importantly, these measures would impose legal responsibilities to achieve the necessary emission reductions on entities *other than* the power plants themselves.

Likely Challenges To Broad Scope Of Plan

Prior to Monday's announcement, many stakeholders and commentators questioned whether a State 111(d) Plan proposing a system of emissions reductions measures falling "outside-the-fenceline" of individual power plants was legally permissible under Section 111(d). This chorus is only likely to get louder given that the Clean Power Plan anticipates such measures as a part of its latter two "building blocks" and essentially forces fuel switching from coal- to gas-fired power plants as its second building block. Historically, EPA has issued only 13 emissions guideline documents under Section 111(d), most of which contain traditional unit-based emissions limits achievable through installation of a technology control device. A notable exception to this pattern was the Clean Air Mercury Rule ("CAMR"), which would have established a cap-and-trade program for mercury emissions from coal- and oil-fired power plants, but the D.C. Circuit in *New Jersey v. EPA* struck down the rule on unrelated grounds.[21] Thus, there is fairly limited precedent on what constitutes BSER for existing plants and how broadly EPA may look beyond the individual affected unit's fenceline in establishing the "best system of emission reduction."

EPA acknowledges that the terms of section 111(d)(1) do not explicitly address whether entities other than affected power plants may be subject to requirements that contribute to reducing power plant emissions or whether state plans may include other measures for achieving the emission performance level. However, building on the momentum from recent decisions upholding important rulemakings affecting the power sector by both the U.S. Supreme Court in *EPA v. EME Homer City Generation* and the D.C. Circuit in *White Stallion Energy Center, LLC v. EPA*, EPA cites to the U.S. Supreme Court's decision in *Chevron U.S.A. Inc. v. NRDC*[22] as providing the agency with the discretion to fashion a broad and flexible interpretation of the statute.[23] EPA's conclusion is based, in part, on the requirement under section 111(d) that states set performance standards "for" affected sources. According to EPA, standards, such as RE and EE standards, can reasonably be considered standards "for" affected sources, because they would "caus[e] reductions in affected power plants' CO_2 emissions by decreasing the amount of generation needed from affected power plants."[24] In other words, regardless that such standards would not apply directly to the affected fossil fuel generating units, their implementation will necessarily result in a reduction of emissions from such units.

Further, EPA concludes that, even if measures in the portfolio approach do not themselves constitute "standards of performance" for the affected sources, states may include measures that "implement" or "enforce" a standard of performance in their plans.[25] For example, if a State 111(d) Plan achieves the emission performance level "through rate-based emission limits applicable to the affected sources, coupled with a crediting mechanism for RE and demand-side EE measures," EPA proposes that such measures be included in the plan as "implementing measures" because they "facilitate the sources' compliance with their standards of performance."[26]

EPA also interprets section 111(d)(1) to allow State 111(d) Plans to include measures that would reduce emissions from affected sources, "even if those measures are neither 'standards of

performance for existing sources' nor measures 'for the implementation and enforcement of such standards of performance.'"[27] EPA notes that "there is no specific language in CAA section 111(d) or elsewhere in the Act that prohibits states from including additional measures in State 111(d) Plans, provided that they reduce emissions from affected power plants."[28] According to EPA, its interpretation of 111(d) in this respect is consistent in the principles of cooperative federalism, "which is one of the foundational principles of the Clean Air Act and which supports providing flexibility to states to meet environmental goals (provided minimum CAA statutory requirements are met)."[29] As noted throughout the Preamble to the Clean Power Plan, EPA is proposing to give states broad discretion to develop plans that best suit their circumstances and policy objectives particularly with respect to the range of measures that a state could include in its plan. EPA recognizes that its interpretation and approach in this regard could result in enforceable state plan obligations accruing to a diverse range of affected entities beyond affected power plants, and that there may be challenges to practically enforcing against some such entities in the event of noncompliance.

If finalized as proposed, EPA's Clean Power Plan is likely to face challenges to EPA's authority to establish numerical goals for individual states in the first instance and to base each state's goal on the level of reductions that can be achieved by both displacing generation from high-emitting coal-fired power plants towards lower- and no-carbon generation options and reducing energy consumption. To be sure, a rate-based performance standard has seldom, if ever, reached so broadly in identifying the level of reductions that can be achieved from affected sources. Although the flexibility to credit reductions throughout the power system was sought by many states (in particular, those with well-developed renewable energy and energy efficiency programs), EPA's proposal is likely to be criticized by other states as amounting to an intrusion into their energy policy, notwithstanding the unprecedented level of flexibility afforded to the states in crafting their individual plans.

The Clean Power Plan lends credibility to the efforts of individual states that have sought to achieve significant reductions in carbon pollution in the absence of any coordinated federal action. While the question has often been asked as to why a state like California would seek to reduce its own contribution to a global problem, when the reductions achieved are likely eclipsed by increases in China and elsewhere, the Clean Power Plan resoundingly answers the question: By moving first and establishing a framework for achieving dramatic reductions in power sector emissions, states like California have established a template that could then be drawn upon by EPA in determining what constitutes the "best system of emission reduction" for even those states that are lacking the initiative or political will to do so.

Whether or not the Clean Power Plan will motivate other states to join with California or RGGI in implementing market-based programs or to develop their own similar programs is unclear. By merely allowing states to rely upon such market-based programs in their individual or multi-state plans, EPA is not forcing states to put a price on carbon emissions, as Congress declined to do several years ago. In terms of practicality, setting up a cap-and-trade program would require participating states to reverse engineer the rate-based goals set forth by the Clean Power Plan and convert them into mass-based goals. However, the certainty the cap would provide in assuring both that the required reductions are achieved and that the obligation to achieve them ultimately rests upon the affected generating units could motivate states to nevertheless place such programs at the centerpiece of their plans. Multi-state trading plans would also automatically account for the fact that implementation of building blocks 3 and 4 (RE and EE) in one state may result in cognizable reductions in emissions in another state. Thus, it is not unreasonable to think that states which have thus far declined to participate in RGGI or stalled in their efforts to participate in the Western Climate Initiative might

revisit those decisions and see either program as offering a plug-and-play solution to an otherwise daunting task.

IMPLEMENTATION TIMELINE

According to the President's Climate Action Plan, EPA is required to finalize the rulemaking by June 1, 2015 and the states are then required to submit their Section 111(d) plans to EPA by no later than June 30, 2016. In its Clean Power Plan, EPA provides an opportunity for states to seek an extension for an additional year for a state plan or an additional two years for a multi-state plan, in light of the additional level of coordination that may be required to develop and submit multi-state plans.

After what EPA describes as an unprecedented level of public outreach in advance of unveiling its Clean Power Plan, EPA is holding a series of four public hearings across the nation and an extended, 120-day public comment period (from the date of the proposed rule's publication in the Federal Register), in part in response to the requests of members of Congress.

CONCLUSION

Broad in its scope and ambitious in its ultimate goals, EPA's Clean Power Plan reflects the extent to which President Obama is willing to make significant action to address climate change a centerpiece of his administration. EPA is relying on a seldom used provision of the Clean Air Act to undertake a program that could catalyze significant changes throughout the U.S. power sector, from changes in the units which generate electricity to the way in which it is consumed. While many of these changes are already largely being driven by market forces (in particular, the increased reliance on existing and proposed NGCC plants, as opposed to coal-fired units, to provide baseload power), EPA is acting boldly to require deep cuts in emissions of CO_2 from the nation's existing coal-fired generating fleet and, in so doing, will undoubtedly face opposition from states that rely heavily on coal-fired power and their Congressional delegations.

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[1] Executive Office of the President, The President's Climate Action Plan, at 6 (June 2013), *available at*: http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf (stating that "[i]n 2009, President Obama made a commitment to reduce U.S. greenhouse gas emissions in the range of 17 percent below 2005 levels by 2020…this document outlines additional steps the Administration will take –President's 2020 goal.").

[2] The Plan does not indicate the precise extent to which President Obama relies on power sector GHG emissions reductions for attaining a goal of reducing total U.S. GHG emissions in the range of 17% below 2005 levels by 2020. However, the Plan lists "Cutting Carbon Pollution from Power Plants" as the first policy, among many, for achieving that goal.

[3] Under *Mass. v. EPA*, 549 U.S. 497 (2007), GHGs are considered air pollutants. As a result, the Clean Air Act requires that the EPA regulate greenhouse gases under Section 111 of the Act. This element of President Obama's Climate Action Plan is therefore required by law. Note that CO_2 is only one of four significant categories of GHGs that are emitted into the atmosphere; however, it constitutes more than 80% of GHG emissions in the United States (as of 2012). Table ES-2 "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2012", Report EPA 430-R-14-003, U.S. Env'tl Protection Agency, Apr. 15, 2014.

[4] The NSPS set two limits on fossil fuel fired utility boilers and integrated gasification combined cycle units: 1,100 lb of carbon dioxide per megawatt-hour ("lb CO_2/MWh") over a 12 month operating period, or 1,000-1,050 lb. CO_2/MWh over a 7 year period, requiring such plants to partially implement carbon capture and storage to reduce emissions. The proposed standards also set a limit of 1,000 lb CO_2/MWh for large natural gas-fired stationary combustion units, and 1,100 lb CO_2/MWh for smaller natural gas-fired stationary combustion units, based on the performance of natural gas combined cycle units. 79 Fed. Reg. 1429-1519.

[5] 42 U.S.C. § 7411(d)(1)(A).

[6] There are two versions of section 111(d) that were not reconciled when the 1990 Amendments to the CAA became law. The Senate version prohibits regulation under section 111(d) for any HAP that is listed in section 112(b) [i.e., the list of 188 HAPs], regardless of whether the source categories that emit such HAP are actually regulated under section 112. See Library of Congress, A Legislative History of the Clean Air Act Amendments of 1990, at 4534 (1998) (indicating the "conforming amendment" in Senate Bill 1630 § 305(a) that amended section 111(d)).

The House of Representatives version, which is codified in the U.S. Code, prohibits regulation under section 111(d) for any ''air pollutant''—presumably including both HAP and non-HAP—that is emitted from a particular source category regulated under section 112. 42 U.S.C. § 7411(d)(1)(A)(i). EPA has previously recognized that no canon of construction addresses which version of section 111(d) should govern. In order to give some effect to both versions, EPA has previously stated that it interprets section 111(d) to provide that, "[w]here a source category is being regulated under section 112, a section 111(d) standard of performance cannot be established to address any HAP listed under section 112(b) that may be emitted from that particular source category." EPA, Final Rule, Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List, 70 Fed. Reg. 15994, 16031 (Mar. 29, 2005); *see also Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 872 (D.C. Cir. 1979) (deferring to EPA's attempt to "devise a middle course between inconsistent statutes [i.e., other CAA provisions] so as to give maximum possible effect to both").

Likewise, in the Preamble to the Clean Power Plan, EPA similarly concludes that, in the face of this ambiguity, "the EPA may reasonably construe the provision to authorize the regulation of GHGs under CAA section 111(d)." Clean Power Plan at 126. EPA also notes the U.S. Supreme Court decision in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537-38 (2011), wherein the Supreme Court found that federal common law was displaced by EPA's authority to regulate CO_2 emissions from fossil fuel-fired power plant emissions under Section 111, which EPA contends included its authority to do so under Section 111(d). See Clean Power Plan at 126.

[7] 40 CFR § 60.22(a).

[8] Designated facilities are existing facilities to which section 111(d) applies. *Id.* § 60.21(b).

[9] Sources covered by EPA's proposed guideline are any fossil fuel fired power plant that was in operation or had commenced construction as of January 8, 2014 (when the NSPS for fossil fuel fired power plants was proposed), and is therefore an existing source for purposes of CAA section 111, and that in all other respects would meet the applicability criteria for coverage under the proposed GHG standards for new fossil fuel-fired power plants. The proposed GHG standards for new fossil fuel-fired power plants define covered power plants as any boiler, IGCC, or combustion turbine that (1) is capable of combusting at least 250 million Btu per hour; (2) combusts fossil fuel for more than 10 percent of its total annual heat input, (3) sells the greater of 219,000 MWh per year and one-third of its potential electrical output to a utility distribution system; and (4) was not in operation or under construction as of January 8, 2014. Clean Power Plan, p. 129.

[10] NRDC Report, "Closing the Power Plant Carbon Pollution Loophole", at 10-11 (Mar. 2013), *available at*: http://www.nrdc.org/air/pollution-standards/files/pollution-standards-report.pdf. NRDC's proposal recommended (1) the establishment of state-specific emissions rate standards based on fleet average emissions rates, (2) allowing Averaging, Banking and Trading ("ABT") of emissions reduction credits across individual regulated sources, and, most significantly, (3) crediting energy efficiency and renewable energy improvements towards meeting performance standards.

[11] Clean Power Plan, Preamble, 153.

[12] *Id*. at 252.

[13] These state goals (in average lb CO_2/net MWh from all covered fossil-fuel fired power plants) are summarized in Table 8 of the Clean Power Plan. Clean Power Plan, Preamble, Table 8, p. 346.

[14] *Id*. at 345.

[15] CAA section 111(d) state plans differ from a state implementation plan ("SIP") for a criteria air pollutant national ambient air quality standard ("NAAQS") in several important respects. A CAA section 110 SIP must be designed to meet the NAAQS for a criteria air pollutant for a particular area (not for a source category), and the NAAQS itself is based on scientific evidence and does not reflect consideration of cost. By contrast, a CAA section 111(d) state plan must be designed to achieve a specific emission performance level for a particular source category. Unlike the NAAQS, the emission levels for the source category reflect a determination of BSER (i.e., the building blocks), which consider cost, technical feasibility and other factors.

[16] The Clean Power Plan does not explicitly endorse the market based emissions allowance trading program California has implemented under AB 32 as satisfying the requirements for a State 111(d) Plan. However, the guidelines repeatedly emphasize that they are designed to allow states to meet their emissions goals via programs such as those implemented by California under AB 32 (including a market based emissions allowance trading system). See Clean Power Plan at p. 22, 24, 267-69. The guidelines also acknowledge California's projections that programs implemented under AB 32 will reduce power sector GHG emissions to less than 80 million metric tons of CO_2 equivalent by 2025, a 25% reduction from 2005 power sector emissions levels. Clean Power Plan, p. 99 (citing Mary Nichols' Letter to the EPA Administrator, "States' Roadmap on Reducing Carbon Pollution," December 16, 2013).

[17] Clean Power Plan, Preamble, 43.

[18] *Id*. at 154.

[19] *Id*. at 383.

[20] *Id*.

[21] 517 F.3d 574 (D.C. Cir. 2008).

[22] 486 U.S. 837 (1984).

[23] Under *Chevron*, where Congress has not spoken directly to the precise question at issue (*Chevron* "Step 1"), a court must simply decide whether an agency's action is based on a reasonable construction of the statute (*Chevron* "Step 2"). *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In EPA's view, because Congress has not directly spoken as to the permissibility of different options for regulating pollutants under section 111(d) (i.e., the term "standard of performance" is broad), it should be afforded discretion in devising a strategy for doing so.

[24] Clean Power Plan, Preamble, pp. 390-91.

[25] *Id*. at 391

[26] *Id*. at 391-392

[27] *Id*. at 392.

[28] *Id*.

[29] *Id*. at 392-393.