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Focusing On a Blind Spot In EPA's Clean Power Plan: Why Emissions From New Gas-Fired Power Plants Must Be Accounted For In State Plans

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A major component of President Obama's Climate Action Plan consists of two sets of rules proposed by the United States Environmental Protection Agency (the "EPA") that would, for the first time, establish limits on the emissions of carbon dioxide ("CO₂") from new fossil fuel-fired electric generating units ("EGUs") and require states to develop plans for how they will reduce CO₂ emissions from existing EGUs.

- The "new source performance standards," which are being developed pursuant to section 111(b) of the Clean Air Act (the "Act"), were sent to the White House's Office of Management and Budget for interagency review earlier this month.¹
- The guidelines for existing power plants—"Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" Proposed Rule, known as the "Clean Power Plan"—are being developed pursuant to section 111(d) of the Act and are expected to be finalized this summer. Projected to achieve a 30% reduction in CO₂ emissions from the U.S. electric generating sector by 2030, relative to 2005 levels, they would establish emissions performance goals for each state at the level that EPA found can be achieved through implementation of four so-called "building blocks": (1) efficiency improvements that can be achieved at coal-fired power plants; (2) re-dispatch from coal-fired to existing natural gas combined cycle ("NGCC") power plants; (3) increased generation by renewable resources; and (4) energy efficiency and other demand-side reduction measures.²

The proposed Clean Power Plan affords states an unprecedented degree of flexibility in how they can achieve their respective goals. It does not mandate that states actually implement *any* of the four building blocks, so long as emissions from their existing EGUs are reduced to the extent needed to meet the goals. As a consequence, EPA expects that implementation of the Clean Power Plan will also result in the construction of a significant number of new NGCC facilities. Yet, under the proposed Clean Power Plan, those new NGCCs would only be subject to the new source standards promulgated under section 111(b): EPA has not proposed to consider the reductions that can be achieved through the construction and operation of new NGCC facilities in calculating states' goals under section 111(d), nor has it proposed to require states to include any requirements for new NGCCs in their section 111(d) compliance plans.



Disparate treatment of new and existing NGCC facilities will create market distortions that could result in the construction of significantly more new NGCC capacity than is actually needed to meet demand and achieve the state's emission performance goals. This risk is particularly acute in states employing a market-based program or carbon fee that only applies to existing sources. Further, if electricity load from existing affected EGUs were simply shifted to new NGCC facilities without accounting for the emissions from those new facilities, then it is possible that a state could demonstrate illusory compliance with its emission performance goals, without actually achieving the reductions in power sector emissions required by the Clean Power Plan. While section 111 of the Act requires that new and existing sources be treated differently, it does not mandate that EPA simply ignore the risk that states may circumvent the Clean Power Plan's and the Act's overall emission reduction goals in this manner.

The memorandum from Paul Hastings LLP (linked [here](#) and [below](#)) examines the legal authority for EPA to require that, where new NGCC facilities will in fact be built and operated to reduce emissions from affected EGUs, the state must account for the emissions from such new NGCC facilities in its state plan. Importantly, by requiring states to account for new NGCC emissions in their section 111(d) plans, new NGCC facilities would *not* become "affected EGUs" under the Clean Power Plan or "existing sources" subject to section 111(d) of the Act. New NGCCs would continue to be subject to separate standards under section 111(b). States, however, would be prevented from demonstrating illusory compliance with their respective emission performance goals by simply shifting dispatch from affected EGUs to new NGCC facilities, without accounting for the impact that the emissions from such new NGCCs would have on system-wide CO₂ emissions.

Paul Hastings' memorandum regarding the treatment of new NGCCs under the Proposed Clean Power Plan is linked [here](#).



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¹ See "[U.S. EPA Proposes Separate CO₂ Emissions Standards for New Natural Gas-Fired and New Coal-Fired Power Plants](#)" for more background on the new unit standards.

² See "[EPA Proposes Its Landmark Guidelines For Reducing Carbon Emissions from Existing Fossil Fuel-Fired Power Plants](#)" for more background on the proposed Clean Power Plan.

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