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EPA Publishes Clean Power Plan And Initiates Concerted Attempt to Reduce GHG Emissions from Fossil Fuel Fired Power Plants

On October 23, 2015, the U.S. Environmental Protection Agency ("EPA") published its final Clean Power Plan, seeking to reduce greenhouse gas ("GHG") emissions from fossil fuel fired power plants throughout the country. The 300+ page final rule can be [accessed here](#). 80 Fed. Reg. 64662. The final rule becomes effective December 22, 2015, although challengers to the rule have requested an immediate stay.

The Clean Power Plan is one of the most intensely scrutinized and debated rules in EPA's history. The proposed rule, published in June of 2014, generated 4.3 million individual comments. The final rule was immediately challenged in 15 separate appeals, including by 26 states in various coalitions and a number of industry parties. Numerous state, municipal and industry parties have also petitioned to intervene on behalf of EPA, including, a coalition of 18 states and several cities which includes all of the states that currently maintain GHG emission trading programs and/or have state-imposed GHG emissions reduction mandates. All of the petitions for review have been consolidated into a single case.

The Clean Power Plan is promulgated under Section 111(d) of the federal Clean Air Act ("CAA"). Pursuant to the CAA, EPA may establish emission standards for certain existing emission sources reflecting the degree of emission limitation achievable through the application of the "best system of emission reduction" taking into account cost and non-air quality health and environmental impacts and energy requirements ("BSER"). Each state is then allowed to develop its own procedure for implementing and enforcing the EPA BSER standards and must submit that procedure for EPA approval into the state implementation plan. If a state does not submit a plan that EPA finds approvable within the allotted timeframe, EPA is authorized to impose its own requirements in that state in the form of a federal implementation plan.

The Clean Power Plan establishes interim and final carbon dioxide (CO₂) emission performance rates for two subcategories of fossil fuel-fired electric generating units (EGUs):

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- Fossil fuel-fired electric steam generating units (generally, coal- and oil-fired power plants); and
- Natural gas-fired combined cycle generating units.

In the final rule, EPA determined that BSER consists of three 'building blocks' as follows:

- Reducing the carbon intensity of electricity generation by improving the heat rate of existing coal-fired power plants;
- Substituting increased electricity generation from lower-emitting existing natural gas plants for reduced generation from higher-emitting coal-fired power plants; and
- Substituting increased electricity generation from new zero-emitting renewable energy sources (like wind and solar) for reduced generation from existing coal-fired power plants.

To develop state-specific CO₂ reduction goals, EPA calculated national assumptions for the extent of possible emissions reductions that could be achieved from each building block, and then applied those assumptions to each state's baseline emissions. EPA's analysis was conducted at the "interconnection" level, meaning that EPA aggregated individual states' baseline emissions according to the country's three established regional electricity interconnections – the Western, Eastern and Texas interconnections. For example, EPA determined that coal-fired EGUs could improve their heat rate by 2.1 – 4.3%, depending on which interconnection the EGU was located in. EPA applied that heat rate reduction to the baseline emissions in each interconnection to calculate the emissions reductions that could be expected in that particular interconnection from the heat rate improvement building block. EPA did the same for the other two building blocks. After calculating the expected emissions reductions on a per-EGU basis for each interconnection, EPA then selected the interconnection with the least stringent emissions reductions expectation, and applied that level of emissions reduction to each state's unique energy mix in order to develop the state-specific goals.

The Clean Power Plan requires each state to adopt its own individualized plan to achieve compliance with interim and then final CO₂ emission performance rates. Interim rates must be achieved between 2022 – 2029, and final rates must be achieved by 2030.

States may opt to use an emission standards plan, with source-specific requirements, or a state measures plan, with a mix of state measures such as renewable energy standards and programs to improve residential energy efficiency. Any state using the 'state measures' approach must include in its plan a backstop of federally enforceable standards on affected power plants that would be triggered if the state measures fail to achieve the required emissions reductions on schedule. EPA actively recommends that states consider market-based emissions trading programs to achieve their individual state goals, citing to its experience with similar existing EPA programs in the utility power sector to address acid precipitation, interstate transport of ozone and particulate matter. In EPA's view, such programs - including the Regional Greenhouse Gas Initiative in the Northeast and Mid-Atlantic states ("RGGI") and the trading program implemented by the state of California– "maximize compliance flexibility for affected (facilities) and enable the state to meet its mass goal in the most economically efficient manner possible." 80 Fed. Reg. at 64834 and 64839. Also, as currently configured, any federal implementation plan imposed by EPA would require states that failed to submit approvable plans to participate in a trading program.

The Clean Power Plan establishes a schedule with interim milestones for achieving the 2030 final CO₂ emission reductions. By September 6, 2016, states are required to submit a final plan, or an initial submittal with an extension request. For states that receive an extension, the final deadline for submitting a plan is September 6, 2018. If a state fails to submit an approvable plan, EPA will require it to participate in the federal implementation plan. Regardless of their plan type, states must start achieving their targets in 2022, with periodic reporting and demonstrations of progress towards the 2030 deadline to meet the final targets.

As noted above, immediately following issuance of the final rule, numerous parties filed petitions for review, including a coalition of southern and coal producing states. All cases have been consolidated before the U.S. Court of Appeals for the District of Columbia Circuit. Several petitioners, including Peabody Energy Corp. and Basin Electric Power Cooperative, have requested a stay, arguing that immediate implementation of the final rule will cause them irreparable harm, and that their challenges are likely to succeed on the merits.

Several of the petitioning parties previously challenged EPA's efforts to finalize the Clean Power Plan, but the D.C. Circuit Court of Appeals dismissed that case, concluding that the agency's actions were not ripe for review prior to final rule issuance.

The pending challenges to the final rule will raise a host of issues, including: whether the rule exceeds EPA's statutory authority by regulating the operation of the national electricity generation and distribution framework; whether the rule impermissibly attempts to regulate a category of emission source that is already regulated under Section 112 of the Clean Air Act; whether BSER is adequately demonstrated or reasonable; and whether the rule is otherwise arbitrary, capricious, an abuse of discretion and not in accordance with law. Peabody Energy, with assistance from Harvard law professor Lawrence Tribe, also makes the arguments that the Clean Power Plan usurps the power of Congress, thereby violating the Tenth Amendment to the Constitution, and forces coal companies to bear a burden that ought to be shared by all members of society, thereby violating the Fifth Amendment. Petitioners will also likely argue that the court should afford no deference to EPA's interpretation of the Clean Air Act under the *Chevron* standard, *Chevron USA v. NRDC*, 467 U.S. 837 (1984), an issue that is increasingly under scrutiny in challenges to EPA's rulemaking authority.

Intervenors seeking to defend the rule include several power generation companies that have made significant investments in natural gas and renewable energy facilities, such as NextEra (Florida Power and Light), Calpine, Pacific Gas & Electric and National Grid. These companies argue that the final rule establishes a reasonable program for reducing GHG emissions, and in support of the flexibility provided to states. They make the point that they have already made a financial bet on low-carbon emitting assets and that the Clean Power Plan offers an orderly transition for remaining assets to lower carbon emitting power production over a predictable time schedule.

For further information about the Clean Power Plan, please contact the authors.