

ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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EPA Releases Final Clean Power Plan Rulemaking

On August 3, 2015, the United States Environmental Protection Agency (EPA) released its highly anticipated final Clean Power Plan regulating carbon dioxide emissions from existing power plants. The Clean Power Plan makes several changes to EPA's initial proposal that was published in June 2014. Implementation of the Clean Power Plan will significantly alter the landscape of power generation in the United States, and could seriously affect power plants and the energy industry.

The Clean Power Plan is based on Section 111(d) of the Clean Air Act (CAA), which authorizes EPA to require states to submit plans establishing performance standards "for any existing source for any air pollutant...which is not...emitted from a source category which is regulated under section [112] but to which a standard of performance under this section would apply if such existing source were a new source." Pursuant to Section 111(a), a "standard of performance" must be reflective of the "degree of emission limitation achievable through the application of the best system of emission reduction...that [EPA] determines has been adequately demonstrated."

Under the Clean Power Plan, EPA calculated rate-based (amount of carbon dioxide emitted per megawatt hour generated) and mass-based (total amount of carbon dioxide emitted per year) targets for each state ("state goals") through application of three "building blocks" that were deemed to constitute the "best system of emission reduction...adequately demonstrated" (BSER). These "building blocks" include: (1) improvements to heat rates (a measure of heat input to power output efficiency) achieved at individual power generation facilities; (2) shifting power generation to natural gas-fired or combined cycle (NGCC) facilities; and (3) increased power generation from renewable and zero-emitting sources. Implementation of demand-side energy efficiency measures as part of the BSER, a fourth "building block" considered in the EPA's proposal, was dropped from the final rule.

Each state's goals were created by EPA by applying two categorical baseline emissions rates to each fossil fuel-fired electric steam generating unit and stationary combustion turbine unit within the state. A given state's goals were, therefore, largely based on the current makeup of a state's fleet of generation facilities.

Each state is required to submit a plan to achieve its emissions targets. In creating a plan, each state must decide whether to pursue achievement of mass-based or rate-based emissions goals, whether to impose federally-enforceable emissions standards on individual affected sources, whether to adopt "state-measures" to impose standards on entities other than power plants, and whether to create an emissions trading system or participate in a multi-state trading system. A state plan must demonstrate that it will achieve the applicable state goal.

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The final version of the Clean Power Plan contains several revisions from the proposed rule. The final rule allows for states to request a two-year extension from the initial September 2016 deadline to submit its final state plan. However, states pursuing the extension must provide an initial submittal by September 2016 and a progress report on development of its state plan in 2017. In addition, the final rule slightly delays the compliance timetable for states, requiring interim reductions between 2022 and 2029, and achievement of final state goals by 2030. The final Clean Power Plan also includes a “Reliability Safety Valve,” that potentially allows for temporary exemptions or variances from carbon dioxide emissions standards during certain emergency situations that threaten grid reliability.

As a controversial rulemaking garnering over four million public comments, implementation of the Clean Power Plan may be complicated by the unwillingness of some states to submit state plans. However, as provided in the final rule and authorized by CAA Section 111(d)(2), EPA may implement a federal implementation plan (FIP) in non-participating states. On the same day it unveiled the Clean Power Plan, EPA released a proposed FIP that is open for public comment.

The Clean Power Plan is also likely to face significant legal challenges brought by industry and states. In particular, many have questioned whether shifting power generation from one type of power plant to another under the second and third “building blocks” lawfully constitutes a BSER. In addition, EPA's interpretation of Section 111(d) to allow for simultaneous regulation of power plants under Sections 111(d) and 112 (through the Mercury and Air Toxics Standards (MATS) rule) is likely to come under attack.

If you have questions regarding the Clean Power Plan or climate change-related regulations in general, please contact David E. Northrop at (412) 394-6590 or dnorthrop@babstcalland.com, Michael H. Winek at (412) 394-6538 or mwinek@babstcalland.com, or Varun Shekhar at (412) 394-5679 or vshekhar@babstcalland.com.