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Utilities and Energy

L-1 Clean Power Plan

On August 3, 2015, President Obama and the U.S. Environmental Protection Agency (EPA) announced the Clean Power Plan (CPP), a federal rule that regulates reductions in carbon pollution from power plants in order to address climate change issues the President and the EPA believe are caused by carbon pollution. The ultimate goal of the CPP is to reduce U.S. carbon dioxide emissions by 32 percent from 2005 levels by 2030.

The CPP consists of establishing state-specific emission goals for states to follow in developing plans to reduce greenhouse gas emissions from existing fossil fuel-fired electric generating units. The goals are expressed two ways, rate-based and mass-based, either of which a state can use in its plan. Depending on which way a state chooses to measure its goal, states can then develop and implement customized plans that ensure the power plants in the state meet the statewide goals. Emission trading is allowed under the federal rule.

The first interim compliance period for the rule begins in 2022, by which time the states should have a plan in place. Each state's plan was required to be submitted in 2016, but the EPA can approve a two-year extension. The final goals for each state under the CPP should be met by 2030. The EPA has determined the "starting point" for each state, and included in the CPP are the rate or mass of carbon dioxide emissions for each state in 2012, as calculated by the EPA using its own mathematical formulas. However, the U.S. Supreme Court issued a stay on February 9, 2016, regarding the implementation of the CPP. It is not known how the stay might affect the compliance periods for the rule.

Clean Power Plan—Kansas

For Kansas, the 2012 carbon dioxide rate has been calculated to be 2,319 lbs/Net MWh. If Kansas chooses a rate-based goal, the goal for the interim period between the years of 2022 and 2029 would be 1,519 lbs/Net MWh, with a final goal in 2030 of 1,293 lbs/Net MWh. If Kansas chooses a mass-based goal, the 2012 amount is measured to be 34,353,105 short tons of carbon dioxide emissions. The state would need to meet a goal of either 24,859,333 or 25,120,015 short tons (depending on which mass-based goal measurement is chosen) during the interim period, with a final goal of 21,990,826 or 22,220,822 short tons in 2030.

The 2016 Legislature passed SB 318, which among other things, suspended all state agency activities, studies, and investigations that are in furtherance of the preparation of an initial submittal or the evaluation of any options for the submission of a state plan pursuant to the CPP. The bill does not preclude agencies from communicating and providing information to each other in furtherance of any other statutory obligation.

Clean Power Plan—Litigation

Several petitions have been filed challenging the legality of the CPP, which sets new emission limits for existing power plants under section 111(d) of the Clean Air Act. West Virginia, in conjunction with 23 other states (Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Texas, Utah, Wisconsin, and Wyoming), filed a petition for review arguing the final rule is in excess of the EPA's statutory authority; goes beyond the bounds set by the *U.S. Constitution*; and otherwise is arbitrary, capricious, and an abuse of discretion and not in accordance with law.

The 24-state group also filed a motion for a stay, which was granted by the U.S. Supreme Court on February 9, 2016, halting the rule from going into effect until litigation in the D.C. Circuit Court of Appeals has concluded.

Challenges to the "new source rule" also have been made. The new source rule mandates new and modified sources of carbon emissions must be regulated before or at the same time as existing sources through the CPP. North Dakota was the first state to challenge this rule. As of September 30, 2016, West Virginia, along with 23 other states (Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming), also filed a petition asking the D.C. Circuit Court of Appeals to strike down the "new source rule."

A number of utilities and members of the power industry also have filed challenges to the CPP under sections 111(d) and 111(b) of the Clean Air Act, including a coalition of 15 trade associations led by the U.S. Chamber of Commerce; a coalition of 3 coal industry groups; and a coalition of 38 power companies, utility industries, and labor groups.

On the other side of the litigation, the EPA has found several allies. Eighteen states (California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington), the District of Columbia, and six local governments (New York City, Philadelphia, Chicago, Boulder [Colorado], South Miami, and Broward County [Florida]) have filed as intervenors in support of the EPA in the CPP litigation. In addition, a group of five power companies have filed a motion to intervene, as well as a separate motion by NextEra Energy.

The D.C. Circuit Court has consolidated all of the various filings for challenges under 111(d) into one proceeding, *West Virginia v. EPA*, D.C. Cir., No. 15-1363. Oral arguments on the petition for review were presented to the D.C. Circuit Court of Appeals on September 27, 2016. The final decision on the petition is expected in 2017.

Additionally, the D.C. Circuit Court has consolidated all the various filings for challenges under section 111(b), the "new source rule," into one proceeding, *North Dakota v. EPA*, D.C. Cir., No 15-1381. First briefs are due to the D.C. Circuit Court on October 3, 2016, and final briefs are due on February 6, 2017.

Regional Greenhouse Gas Initiative

The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among nine Northeastern and mid-Atlantic states to reduce carbon dioxide emissions through a coordinated cap and trade program. RGGI is administered and implemented by a non-profit corporation, RGGI, Inc. The nine states currently participating are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. RGGI officially organized in 2003, but the first compliance period did not begin until January 1, 2009. RGGI participants adopted a Model Rule to guide their actions, namely, to set limits on in-state emissions, issue carbon allowances, and establish state participation for regional carbon allowance auctions. The program uses three-year compliance periods and establishes overall emissions budgets for each period; the third compliance period began January 1, 2015. RGGI distributes state allowances through quarterly auctions where bidders may submit multiple confidential bids for a specific quantity of allowances at a specific price. Proceeds from the auctions are then distributed among the states by RGGI, Inc. As of September 2016, cumulative auction proceeds were more than $2.5 billion. Twenty-five percent of proceeds must be reinvested into consumer benefit programs such as energy efficiency, renewable energy, and direct bill assistance, but in practice, states reinvest virtually all of their proceeds. Power sector carbon emissions in participating states have declined 45 percent since 2005. Emissions were capped at 86.5 million short tons in 2016. The cap will decline 2.5 percent annually until 2020.

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