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Clean Power Plan

James Fisher
Research Analyst
785-296-3181
James.Fisher@kld.ks.gov

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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 President Obama 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. On March 28, 2017, President Trump signed an Executive Order on Promoting Energy Independence and Economic Growth, which calls for the review of the CPP. On October 10, 2017, in response to the Executive Order, EPA Administrator Scott Pruitt, issued a notice of Proposed Rulemaking, proposing to repeal the CPP. Upon publication in the *Federal Register*, the public will have 60 days to submit comment.

The current iteration of 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 to ensure the power plants in the state meet the statewide goals.

The first interim compliance period for the CPP 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. On March 30, 2017, Administrator Pruitt sent a letter to governors stating, "It is the policy of the EPA that States have no obligation to spend resources to comply with a Rule that has been stayed by the Supreme Court of the United States."

Clean Power Plan—Kansas

For Kansas, the 2012 carbon dioxide rate is 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. It is not yet clear if these goals will be utilized in a revised version of the rule.

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 the 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 had 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, 18 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 6 local governments (New York City, Philadelphia, Chicago, Boulder [Colorado], South Miami, and Broward County [Florida]) have filed as intervenors in support of the CPP. In addition, a group of 5 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. On April 28,

2017, in response to the EPA's motion for an indefinite hold on CPP legal proceedings, the D.C. Circuit Court ordered a 60-day hold to allow the EPA time to review and revise the CPP. An additional 60-day hold was granted on August 8, 2017, to allow the EPA more time for review. The EPA's October 10, 2017, status report to the D.C. Circuit Court stated the EPA is proposing to repeal the CPP on the grounds the CPP exceeds the EPA's statutory authority under Section 111 of the Clean Air Act.

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 were due to the D.C. Circuit Court on October 3, 2016, and final briefs were due on February 6, 2017. On March 30, 2017, the D.C. Circuit Court issued an order removing the oral arguments scheduled for April 17, 2017, pending a motion for abeyance. On August 10, the D.C. Circuit Court ordered the proceedings be held until further order is issued.

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, and extends through December 31, 2017. 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 2017, cumulative auction proceeds were more than \$2.78 billion. While 25 percent of proceeds must be reinvested into consumer benefit programs such as energy efficiency, renewable energy, and direct bill assistance, 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 84.3 million short tons in 2017. The cap will decline 2.5 percent annually until 2020. On August 23, 2017, RGGI announced a proposed program change implementing a 30 percent emissions cap reduction from 2020 levels. This goal is projected to be achieved by 2030.

For more information, please contact:

James Fisher, Research Analyst
James.Fisher@klrd.ks.gov

Erica Haas, Principal Research Analyst
Erica.Haas@klrd.ks.gov

Heather O'Hara, Principal Research Analyst
Heather.OHara@klrd.ks.gov

Natalie Nelson, Principal Research Analyst
Natalie.Nelson@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181
Fax: (785) 296-3824