

U.S. EPA Finalizes the Clean Power Plan, Sets the Stage for Increased Role of Renewable Energy and Energy Efficiency in a Carbon Constricted Economy

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Practice Area: Environmental Law and Litigation

On August 3, 2015, the U.S. Environmental Protection Agency ("EPA") announced its final rule to regulate carbon dioxide ("CO₂") emissions from fossil-fuel fired power plants, known as the Clean Power Plan ("CPP"). Building on a mandate to regulate CO₂ emissions under the Clean Air Act ("CAA") that began with the U.S. Supreme Court's ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the EPA presented a draft of the CPP in June 2014. Over a year and 4 million public comments later, the EPA has now set the stage for the regulation of CO₂ emissions from existing power plants under the CPP.

Major Components

The CPP sets a national goal for reduction in CO₂ emissions from 2005 levels: 32% by 2030. From there, the CPP utilizes the "cooperative federalism" approach of CAA section 111(d) and sets individual CO₂ emissions reduction goals for each state with a coal- or natural gas-fired electric generating unit ("EGU")¹ based on uniform national carbon pollution rates for similar types of EGUs (natural gas v. coal).² The CPP sets a 41% emissions-reduction goal for Wisconsin by 2030. Comparatively, Wisconsin has one of the most aggressive reduction goals because of its heavy reliance on coal-fired power plants.

Each state is now tasked with formulating an implementation plan (known as a "State Implementation Plan" or "SIP") to meet the goal set by EPA. SIPs are due September 6, 2016, though a state may submit an interim SIP by that date and request an extension through September 6, 2018. Compliance requirements begin in 2022, with interim targets phased in for the eight following years through 2030.

Compliance Options

Along with establishing CO₂ emissions reduction goals, the CPP sets out several methods by which states can meet them. Among the compliance options are:

- Running more efficient power plants more often
- Switching to cleaner fuels (natural gas v. coal)
- Using more renewable energy (solar and wind)
- Utilizing emissions-allowance trading mechanisms³
 - Including through a multi-state approach
- Implementing demand-side energy efficiency

Compared to the 2014 draft rule, the finalized CPP places greater emphasis on renewable energy. EPA has also offered a Clean Energy Incentive Program ("CEIP") aimed at rewarding early efforts to develop renewable energy and energy efficiency projects (for low-income communities) prior to the CPP compliance period beginning. Under the CEIP, EPA will offer matching CO₂ emissions allowances for renewable energy projects started, and energy efficiency in low-income communities projects commissioned after, a state submits its final SIP to EPA (either in 2016 or 2018), and that either produce clean energy or reduce energy consumption in either 2020 or 2021. States must signal their intention to participate in the CEIP in their SIPs submitted either in 2016 or 2018. The EPA has 300 million short tons of CO₂ emissions allowances to award to participating states, which will be awarded on a first-come, first-served basis.

In the event a state chooses not to develop and submit a compliant SIP, the EPA has the ability to regulate the EGUs within a state directly. To prepare for this possibility, the EPA is developing a Federal Implementation Plan ("FIP") that is capable of meeting an individual state's goals, and providing regulated parties with options to participate in mechanisms such as emissions-allowance trading.

As emphasized by the EPA, State regulators will have significant latitude in the approaches they take to CPP compliance through their SIPs. Some options may emphasize the role of natural gas over coal EGUs, while others may focus on deploying more renewable energy and trading emissions allowances. States have the opportunity to either continue, or adopt, incentives and other regulatory mechanisms that have proven effective at building clean energy economies—and the substantial numbers of jobs that are part of them. Businesses and other interested parties will have a voice with state regulators. In Wisconsin, stakeholders should contact the Wisconsin Department of Natural Resources.

The (Current) Takeaway for Businesses

The CPP requirements target utility-owned fossil-fuel fired EGUs. How these EGUs are ultimately regulated depends in large part whether the state in which they are located adopts a SIP and what compliance options the state selects. The availability of interstate cooperation mechanisms within SIPs could lead to even more regionalization of power markets, and emissions trading could emerge as a revenue stream for utilities with leaner power fleets as well as an efficient compliance mechanism for other utilities. We will continue to monitor the evolution of the power and emissions-trading markets in the Midwest.

The CPP's effect on businesses and other electricity consumers will be substantial by way of increased electricity rates, with increases projected to be as high as 17-30%. Businesses currently have several options to mitigate this risk, and should seriously consider their own on-site renewable energy projects and energy efficiency retrofits. In many cases, a business can lower its utility bill by a greater amount than they will pay for the renewable energy or energy efficiency project. Additionally, it may be possible to monetize the emissions credits attributable to these projects as emissions-trading markets continue to develop. Of course, businesses that offer renewable energy and energy efficiency products and services should expect to see a growing market for their businesses. Any party (private or public) that is contracting for renewable energy or energy efficiency work should be familiar with "Renewable Energy Credits" or "RECs", energy performance guarantees, the "Investment Tax Credit" and "Property Assessed Clean Energy" or "PACE", among other key industry incentives, programs and contracting techniques.

While many questions regarding the CPP, and the specifics of state implementation will determine the compliance options in any given state, commentators seem to agree on one point: the reality of a carbon-constrained economy has arrived.

1 The CPP affects EGUs that sell energy into a utility distribution system only.

2 In a complement rule issued under CAA § 111(b), EPA also set emissions targets for new and modified sources. This complement rule is not addressed in this Update.

3 Emissions allowances are based upon the national carbon pollution rates for each type of EGU. In effect, a coal-fired EGU could meet its emissions rate by purchasing allowances or credits from clean sources like solar and wind.

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