



Environmental ADVISORY ■

JUNE 3, 2014

EPA Releases Proposed Clean Power Rule for Existing Power Plants

On June 2, 2014, the U.S. Environmental Protection Agency (EPA) released its Clean Power Plan proposed rule to reduce greenhouse gas (GHG) emissions from existing fossil fuel-fired electric generating units (EGUs) under Section 111(d) of the Clean Air Act (CAA), 42 U.S.C. § 7411(d). An EGU is a boiler, integrated gasification combined cycle (IGCC) or combustion turbine that “(1) is capable of combusting at least 250 million Btu per hour; (2) combusts fossil fuel for more than 10 percent of its total annual heat input (stationary combustion turbines have an additional criteria that they combust over 90 percent natural gas); [and] (3) sells the greater of 219,000 MWh per year and one-third of its potential electrical output to a utility distribution system.”¹ All fossil fuel-fired EGUs that were in operation or had commenced construction as of January 8, 2014, are considered an “existing source” and therefore subject to the Clean Power Plan proposed rule. This proposed rule establishes rate-based carbon dioxide (CO₂) emission goals for the power sector for each state and provides guidelines for how states should develop plans to achieve their state-specific goals. If promulgated and successfully implemented, the proposed rule will reduce CO₂ emissions from the power sector to 30 percent below 2005 emissions levels by 2030.

Relying on the little known Section 111(d) of the CAA, the EPA proposal creates a state-federal partnership to reduce GHG emissions. EPA establishes regulations for controlling emissions for existing sources and states must create a plan that establishes standards of performances for those sources and that provides for the implementation and enforcement of those standards.² The standards of performance are based on the best system of emission reduction (BSER), i.e., they must “reflect the degree of emission limitation achievable through the application of the ‘best system of emission reduction’ that, taking into account the cost of achieving such reduction and any non-air quality health and environmental impacts and energy requirements, the Administrator determines has been adequately demonstrated (BSER).”³ EPA examined strategies states are

¹ PEPA, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 129, June 2, 2014, (prepublication version) [EPA-HQ-OAR-2013-0602], <http://www2.epa.gov/sites/production/files/2014-05/documents/20140602proposal-cleanpowerplan.pdf> (hereinafter “Clean Power Plan Proposed Rule”).

² 42 U.S.C. § 7411(d)(1).

³ Clean Power Plan Proposed Rule at 24-25.

already using to lower CO₂ emissions from the power sector and set BSER are based on four “building blocks”: 1) improved efficiency at EGUs, 2) increased use of lower-emitted EGUs, 3) use of other low-emitting and zero-emitting power sources, and 4) end-use/demand-side energy efficiency. To set the proposed state-specific goals under the Clean Power Plan, EPA calculated the CO₂ emission rate each state could achieve through the application of BSER. The goals for each state are listed in Table 8 of the proposed rule, in average pounds of CO₂ per net MWh.

Under the proposed Clean Power Plan, states will have flexibility in creating a plan to meet the goals and can also join with other states to develop a multistate plan. States are not required to apply all of the BSER measures, or apply a BSER measure to the extent that EPA determines is achievable at reasonable cost. Further, states can apply measures that are not BSER, so long as the state achieves reductions at EGUs necessary to meet the state-specific goal EPA set by applying BSER.

Once the final rule is promulgated in June 2015, states will have until June 30, 2016, to draft their plans. However, states that have difficulty finalizing their plans in one year may elect to follow a two-phased submission process. States can request a formal extension by the 2016 deadline, and if EPA grants an extension, they will have an additional year for individual state plans and an additional two years for multistate plans. Under the Clean Power Plan, states would be expected to make “meaningful progress” by 2020 and will be required to meet and sustain their goals by 2030. (Note, EPA is also requesting comment on a five-year compliance plan, which has less stringent CO₂ performance levels.) Beginning in 2022, states must report to EPA on progress made by affected EGUs.

Once final state-specific goals are promulgated in this rulemaking to adopt the Clean Power Plan, states cannot request that EPA adjust its CO₂ goals when developing their state implementation plans to meet those goals. Therefore, industry and states must take a deep dive now into EPA’s determination of BSER, the application to its state, and the data used in such computations, as they will be precluded from raising concerns in subsequent rulemakings for the adoption of state plans. Once the Clean Power Plan proposed rule is published in the Federal Register (which is expected shortly), interested parties have 120 days, i.e., until early October, to provide comments. The agency will also hold four public hearings on the rule during the week of July 28 in Atlanta, Denver, Pittsburgh, and Washington, D.C.

For any additional questions regarding this advisory, please contact **Maureen Gorsen**, **Bruce Pasfield** or **Elise Paeffgen**.

If you would like to receive future *Environmental Enforcement Advisories* electronically, please forward your contact information to **environmental.advisory@alston.com**. Be sure to put "**subscribe**" in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Doug Arnold
404.881.7637
doug.arnold@alston.com

Edward Casey
213.576.1005
ed.casey@alston.com

Mark Johnson
213.576.1089
mark.johnson@alston.com

Geoffrey Rathgeber
404.881.4974
geoff.rathgeber@alston.com

Sarah Babcock
404.881.7632
sarah.babcock@alston.com

Lee DeHihns
404.881.7151
lee.dehihns@alston.com

Clay Massey
404.881.4969
clay.massey@alston.com

Beverlee Silva
404.881.4625
beverlee.silva@alston.com

Ward Benschopf
213.576.1108
ward.benschopf@alston.com

Skip Fulton
404.881.7152
skip.fulton@alston.com

Peter Nyquist
213.576.1142
pete.nyquist@alston.com

Jocelyn Thompson
213.576.1104
jocelyn.thompson@alston.com

Meaghan Goodwin Boyd
404.881.7245
meaghan.boyd@alston.com

Maureen Gorsen
916.498.3305
maureen.gorsen@alston.com

Elise Paeffgen
202.239.3939
elise.paeffgen@alston.com

Andrea Warren
213.576.2518
andrea.warren@alston.com

Andrew Brady
213.576.2527
andrew.brady@alston.com

Ronnie Gosselin
404.881.7965
ronnie.gosselin@alston.com

Bruce Pasfield
202.239.3585
bruce.pasfield@alston.com

Jonathan Wells
404.881.7472
jonathan.wells@alston.com

Nicki Carlsen
213.576.1128
nicki.carlsen@alston.com

Maya Lopez Grasse
213.576.2526
maya.grasse@alston.com

Robert Pontelle
213.576.1130
robert.pontelle@alston.com

Diane Wizig
404.881.4954
diane.wizig@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2014

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333