

October 13, 2017

Energy Update

EPA Initiates Rulemaking to Repeal the Clean Power Plan

Overview

On October 10, Environmental Protection Agency (EPA) Administrator Scott Pruitt signed a [Notice of Proposed Rulemaking \(NPRM\)](#) titled “Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units”. The NPRM would rescind the Obama Administration’s Clean Power Plan (CPP), a rule that would reduce greenhouse gas (GHG) emissions from existing power generation sector sources, namely coal and natural gas power plants.

Clean Power Plan Background

On October 23, 2015, the EPA published the [final rule](#) establishing the Clean Power Plan, which would have given states the central role in reducing GHG emissions from existing power plants. The EPA would enforce implementation of the regulations, by issuing a Federal Implementation Plan (FIP) for any state that failed to meet the requirements. The Clean Power Plan directed states to take actions reducing GHG emissions from existing power plants by 32 percent below 2005 levels by 2030. The Obama Administration EPA, in promulgating the original rule, designated the Best System of Emission Reductions (BSER), the mechanism for limiting emissions from existing sources under the Clean Air Act, as “building blocks”. The NPRM released on October 10, described the building blocks: (1) “Improving heat rate at affected coal-fired steam generating units;” (2) “Substituting increased generation from lower-emitting existing natural gas combined cycle units for decreased generation from higher-emitting affected steam generating units; and”; (3) “Substituting increased generation from new zero-emitting renewable energy generating capacity for decreased generation from affected fossil fuel-fired generating units.” In the proposed rule, the Trump Administration EPA identifies building blocks 2 and 3 as going beyond the bounds of the Clean Air Act provisions establishing the BSER requirements.

The NPRM is the latest step in the Trump Administration’s effort to roll back Obama Administration regulations. On March 28, 2017, President Trump signed an Executive Order titled “Promoting Energy Independence and Economic Growth” ([E.O. 13783](#)), which directed the EPA to “review the [Clean Power Plan]...and, if appropriate...publish for notice and comment proposed rules suspending, revising, or rescinding” the final rule. On April 4, 2017, the EPA published a [notice](#) announcing that “it is reviewing the Clean Power Plan...including the accompanying Legal Memorandum, and, if appropriate, will as soon as practicable and consistent with law, initiate proceedings to suspend, revise or rescind this rule.”

On February 9, 2016, the Supreme Court issued a stay on enforcement of the Clean Power Plan while its merits were litigated. Oral arguments in the case, *West Virginia v. EPA*, were held before the U.S. Court of

Appeals for the D.C. Circuit on September 27, 2016. On August 8, 2017, the Court issued an order that the “consolidated cases remain in abeyance for 60 days from the date of this order.”

Repeal and Legal Basis

The NPRM would “repeal the CPP in its entirety”. In the NPRM, the EPA first proposes to revise its interpretation of the “phrase ‘best system of emission reduction’ in a way that is consistent with the Agency’s historical practice of determining BSEER by considering only measures that can be applied to or at the source.” The EPA then proposes to repeal the Clean Power Plan based on the determination that it “exceeds the bounds of” the Clean Air Act by directing “measures that departed from [the] traditional, source-specific approach to regulation and that were expressly designed to shift the balance of coal-, gas-, and renewable power at the grid-wide level...” The EPA concludes, therefore, that the “CPP is not within Congress’s grant of authority to the Agency under the governing statute.”

Potential Replacement Rule

The EPA states in the NPRM that it is considering “whether it should issue another [Clean Air Act] rule addressing GHG emissions from existing [electric generating units] and, if so, what would be the appropriate form and scope of that rule.” To that end, the EPA is developing an Advanced Notice of Proposed Rulemaking (ANPRM) that it will issue “in the near future to solicit information on systems of emission reduction that are in accord with the legal interpretation proposed in [the NPRM] (i.e., those that are applicable to and at an individual source), as well as information on compliance measures and state planning requirements.”

Next Steps

The NPRM will be subject to public comment for 60 days following publication in the *Federal Register*. Once the public comment period is complete the EPA will begin the process of drafting a final rule and the accompanying change in legal interpretation of the Clean Air Act. On a separate track, the EPA will publish an ANPRM, described above, as a step in determining whether to issue a new rule to “regulate...GHG...emissions from existing [power plants], and, if it [decides to] issue such a rule, when it will do so and what form that rule will take.”

Democratic state officials and environmental groups declared their intent to sue to block any rule repealing the Clean Power Plan. New York State Attorney General Eric Schneiderman issued a [press release](#) on October 9, stating that “[i]f and when the Trump Administration finalizes this repeal, I will sue to protect New Yorkers...”

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