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Clean Power Plan: EPA Trying to Ready Final Rule for Publication by August 10; EPA May Include more Flexibility for 2020 Targets, But State Department Concerned about US Ability to Deliver on Global Reduction Commitments

A Close Look at the CPP

Despite efforts to derail the Clean Power Plan (CPP), the EPA is targeting to publish its CPP rule by August 10th, before the President goes on vacation. If it does not complete the rule by then, Labor Day is the next likeliest deadline for publication. Sources suggested that the two likeliest changes to the plan are: (a) a relaxation of the interim emission reduction goals that states must meet by 2020, and (b) changes in final emission targets for certain states, probably without an aggregate impact on the bottom line emission target in the CPP. Changes to the emission targets for certain states could create winners and losers within the coal industry, as coal companies that operate in states with less aggressive emissions targets may be at a competitive advantage over those coal companies that operate in states with higher emission reduction targets.

For this article, we spoke with Robert Meyers, the former head of EPA's Office of Air and Radiation (OAR), which is responsible for administering the Clean Air Act; Kenneth Colburn, a principal at the Regulatory Assistance Project; Jim Tozzi, a former Assistant Director of the White House Office of Management and Budget (OMB), and former Deputy Administrator of the OMB Office of Information and Regulatory Affairs (OIRA); Carol Werner, the Executive Director of the Environmental and Energy Study Institute; Michael Burger, the Executive Director of the Sabin Center for Climate Change Law at Columbia Law School; James Goodwin, a policy analyst for the Center for Progressive Reform; and various other industry sources and policy experts.

Timing. The timing outlined above would be consistent with recent statements by current and former EPA personnel:

- In a telephone interview with *The Capitol Forum*, an EPA spokesperson stated that the EPA is waiting to hear back from the OMB about the final rule but that the EPA is still confident that the rule will be finalized by mid-summer.

- In a recent speech to the League of Conservation Voters, EPA Administrator Gina McCarthy stated, "we are going to finalize our Clean Power Plan to set the first ever carbon pollution standards for our power sector this summer"; and on July 7, 2015 in a discussion with the Christian Science Monitor, Administrator McCarthy stated The Supreme Court's recent ruling on mercury and air toxics standards would not delay the EPA's efforts to finalize the CPP this summer.

- Mr. Meyers stated to *The Capitol Forum* that the Obama administration and EPA would undoubtedly prefer to finalize the CPP as soon as possible so they would be able to participate in the inevitable legal challenges to the CPP before the administration changes in January 2017.

Changes to Final CPP: Relaxed 2020 Emissions "Cliff" and Bottom Line-Neutral, State-by-State Modifications to 2030 Emission Reduction Requirements

Political factors may result in relaxing of 2020 emission reduction targets. Although states would have until 2030 to reach the bottom-line CO2 emissions targets established by the current iteration of the CPP, the rule includes

interim emissions reduction targets requiring states to significantly reduce CO2 emissions by 2020 (sometimes referred to as the "cliff"). Critics of the rule have voiced concerns that the front-loaded emissions reduction schedule contemplated by the rule may not be feasible and have asked the EPA to relax the 2020 targets.

There are at least two important political forces that could lead the EPA to maintain the stricter 2020 targets. One source noted that the State Department wants President Obama to be able to tout the EPA's strong new requirements at December's Paris Climate Conference. And Mr. Meyers observed that White House's formal target to reduce emissions by 26-28% below 2005 levels by 2025, announced in China in 2014, could limit the EPA's flexibility to some extent. Notwithstanding these forces, however, experts and industry sources expect the EPA to relax the 2020 "cliff" to some extent. Ms. Werner noted that recent statements by Ms. McCarthy and Janet McCabe, the acting assistant administrator for OAR, implied that there would be at least some changes to the rule. And more specifically, Ms. McCabe indicated in June that the final rule would contain relaxed interim emissions targets.

Another source pointed to the EPA's desire to build congressional support for the CPP as another reason the EPA might relax the 2020 targets. Congressional support is important because Congress could take action to delay implementation of the rule until legal challenges are complete or use the Congressional Review Act (CRA) to enact a "resolution of disapproval" undoing the CPP. The EPA could use relaxed 2020 targets—either on a state-by-state basis or across the board—as a bargaining chip to gain support. States whose support is particularly crucial and who, in turn, may ultimately benefit from relaxed 2020 targets include: New Hampshire, Pennsylvania, Maine, Indiana, North Dakota, Missouri and Virginia.

The overall reduction target of 30% by 2030 is unlikely to change, but individual state targets may be adjusted, in a way that creates winners and losers in the coal industry. Mr. Colburn indicated that he expected dramatic changes in the bottom-line emission reduction targets for certain states but did not anticipate a change in the CPP's overall emission targets. Rather, Mr. Colburn expected that the EPA would endeavor to maintain a similar level of overall reductions and that any reductions in one state's emissions numbers would result in an increase in another state's numbers. Mr. Colburn also anticipates other changes to the rule will include some form of safety valve to address reliability concerns and clarification of the use of renewable generation and energy efficiency as compliance options.

Ms. Werner also expected some changes to the emission reduction targets for some states. Specifically, Ms. Werner cited issues surrounding the EPA's treatment of under-construction nuclear reactors in setting emission reduction goals for Georgia, South Carolina and Tennessee. For purposes of the draft rule, the EPA treated the under-construction reactors as operating at 90% capacity although the reactors are still under construction and not generating electricity. The EPA solicited comments on whether it was appropriate to reflect completion of the under-construction nuclear units in the state goals and on alternative ways of considering the under-construction units when setting state goals. Critics opposed the inclusion of under-construction plants in the rate-setting formula, arguing that when those plants are operating, their output should be counted towards compliance, but their inclusion in the rate-setting formula "unfairly and severely penalize[d] states that are leading the expansion of nuclear energy in America."

Because our sources view any easing of one state's emission reduction target as zero-sum in that it will result in an increase in another state's emission reduction target, the EPA's treatment of under-construction nuclear plants could have a significant impact. If the EPA decides to alter the targets for South Carolina, Georgia and Tennessee where nuclear plants are under construction, it could result in more stringent emission targets for other states. Depending on the emission reduction targets for each state in the final rule, the CPP has the ability to shift the balance of power

within the coal industry, providing those companies operating in states with lower emission targets with a competitive advantage over companies operating in states with higher emission targets.

OIRA review is unlikely to water down rule, and delay tactics by outside parties are unlikely to be successful. On June 1, 2015, the EPA delivered the final draft CPP to OMB for interagency review, which will include review by OIRA. As part of its review process, OIRA holds meetings with interested parties and listens to their comments and concerns about the proposed rule. OIRA has released information about meetings with interested parties about the CPP, most of which were with industry groups seeking exemptions or changes that would weaken the rule. In addition to lobbying to water down a rule, parties can schedule meetings in an attempt to delay implementation of a rule. According to Mr. Goodwin, OIRA has previously ignored the 90-day limit on OIRA review imposed by Executive Order 12866, subjecting some rules to review for years, and parties in interest who seek to delay or push implementation of the rule to the next administration could employ delay tactics by scheduling additional meetings with OIRA.

But according to our sources, OIRA review is unlikely to result in any meaningful watering-down of the rule beyond any changes made by the EPA itself, and delay tactics are unlikely to be successful. According to a source, the final version of the CPP will not turn on OIRA review. Rather, given the significance of the CPP, key individuals in the White House, State Department and EPA will make a decision about the final version of the CPP. And because OIRA is unlikely to have much involvement in finalizing the rule, delay tactics employed by outside parties will likely be unsuccessful.

Further, in a telephone interview with *The Capitol Forum*, Mr. Tozzi suggested that little would change between the draft final rule and the final rule as a result of comments by outside groups. Mr. Tozzi downplayed the significance of the meetings, commenting that by the time the rule reaches OMB, OMB knows the issues and knows what changes it is likely to suggest. Unless parties opposed to the rule say something new, Mr. Tozzi indicated that the meeting was unlikely to result in significant changes to the draft final rule. And Mr. Tozzi noted that the administration could pressure OIRA to cut off meetings if it felt that the meetings were being used as a tactic to delay implementation of a final rule.

Mr. Burger echoed Mr. Tozzi's sentiments, further commenting that, given that the EPA and Obama administration's interests are aligned with respect to the CPP, there were unlikely to be significant changes to the rule. Mr. Goodwin stated that, in this particular case, the OMB meetings had a "Kabuki quality" in that most of the meetings thus far have involved industry groups seemingly reading their public comments to OMB officials who are perfectly capable of reading those comments themselves. These meetings, according to Mr. Goodwin, would not provide OIRA with any basis to suggest revisions to the rule.

Legal challenges to rule after implementation are inevitable; Preemptive legislative challenges before implementation will continue to fail so long as President Obama is in office. Legal challenges to the final rule are inevitable, as stakeholders have already indicated that they will sue to prevent implementation of the rule. Parties in interest and stakeholders should consider the following in assessing the prospects for success in litigation challenging the final rule:

- The recent decision by the D.C. Circuit denying a preemptive legal challenge to the rule based on the court's inability to review proposed agency rules may not have been a total loss. Commentators note that the rules of judicial economy suggest that the same three-judge panel—Kavanaugh, Griffith and Henderson, all of whom are Republican appointees—could hear subsequent legal challenges to the CPP. One commentator

notes that the probability of such a random assignment of three Republican appointed judges where nine of the 17 total judges were appointed by a Democratic president is about 8%. The fact that these three judges are Republican appointees—some of whom have already expressed skepticism over the scope of the EPA's rulemaking authority in previous cases—could bode well for the plaintiffs in their renewed challenges to the final rule.

- Mr. Burger, on the other hand, expressed some skepticism as to whether the same panel would remain in place, commenting that granting a motion to keep the same panel in subsequent legal challenges "would set a terrible precedent that would run directly *counter* to the principle of judicial efficiency and would encourage panel shopping." According to Mr. Burger, if the plaintiffs could retain the same panel, it would create a situation in which any opponent to any rule could file a motion for a writ of prohibition prior to the rule becoming final, and hope that they get a favorable panel. Then, according to Mr. Burger, when the case was ripe, the plaintiffs would be able to keep the panel (assuming they liked it), and if not, they would not file a motion requesting to keep the same panel.

- The recent Supreme Court decision in *Michigan v. EPA* is unlikely to help the plaintiffs in challenging the final rule. In *Michigan v. EPA*, The Supreme Court held that the EPA should have considered costs earlier in the rulemaking process when deciding to regulate mercury and air toxics produced by power plants. According to Mr. Burger, the Supreme Court's decision was very narrow and is unlikely to have any impact on the CPP. Mr. Burger noted that the *Michigan* decision was ultimately one of statutory interpretation that interpreted the words "appropriate and necessary" in the context of Section 112 of the Clean Air Act. Given the narrow ruling, and because the words "appropriate and necessary" do not appear in Section 111(d) of the Clean Air Act, which is the section the EPA has relied on in promulgating the CPP, Mr. Burger believes that the *Michigan* decision should not have any effect on the CPP. And the EPA remains undeterred by the Supreme Court's decision. In a recent blog post, Ms. McCabe commented that the "ruling will have no bearing on the effort to reduce carbon pollution from the largest sources of emissions."

Various sources indicated that they did not believe that legislative challenges had any chance of success while Obama was in the White House given his directive to the EPA to regulate carbon emissions. Recently, the House passed the Ratepayer Protection Act, which allows states to delay compliance with the CPP until after judicial review has been completed. It is not yet clear whether the measure has the votes to pass the Senate, but even if it does, President Obama has indicated that he will veto any measure that seeks to derail the CPP—which has become a legacy issue—and Republicans lack votes to override a Presidential veto.

Background

The CPP is part of President Obama's broader Climate Action Plan and is designed to reduce carbon emissions from existing power plants by 30% of 2005 levels by 2030. The EPA is also expected to finalize a rule regulating carbon emissions from new power plants shortly. The CPP contains what has been referred to as a "cliff" that requires states to meet interim goals beginning as early as 2020 with proposed interim goals applying over a "2020-2029 phase-in period." The EPA is acting under Section 111(d) of the Clean Air Act, which requires the EPA to identify the best system of emission reduction that has been adequately demonstrated.

Although the CPP is flexible in that the EPA allows states the ability to use whatever measures they deem appropriate in meeting the CPP's emission reduction goals for that particular state, the EPA also identified four "building blocks" used by many states today to provide states with ideas for mechanisms they can use for reducing

carbon emissions within that particular state. To the extent states fail to submit an approvable compliance plan to the EPA, the EPA may release a federal implementation plan for those states, which will be made public when the final CPP is announced. Any federal implementation plan will undoubtedly give states less flexibility in developing tools to reduce emissions, and the threat of a "top down" implementation plan being imposed on the states should encourage states to adopt their own implementation plans.

Under the timeline in the proposed rule, which assumed the EPA would finalize the rule by June 1, 2015, states were required to submit compliance plans to the EPA by June 30, 2016. The EPA recognized that certain states might need more time to submit a compliance plan. Under the proposed rule, the EPA would permit states in such circumstances to submit a plan that contains certain "required components," and if that state were able to document a need for an extension, the state could be granted an extension to June 30, 2017 or June 30, 2018 to submit a complete plan. If a state developed a plan that included a multi-state approach, it would have until June 30, 2018 to submit a complete plan.