

# EPA's Final Rule to Regulate Carbon Dioxide Emissions from Existing Fossil Fuel-Fired Power Plants

## Summary

On August 3, 2015, the Environmental Protection Agency (EPA) released its final rule to establish emission guidelines for carbon dioxide (CO<sub>2</sub>) emissions from fossil fuel-fired power plants. Called the Clean Power Plan (CPP) by EPA, the rule set state-specific, rate-based goals for CO<sub>2</sub> emissions from the power sector, subcategory-specific CO<sub>2</sub> emission performance rates, and state mass-based CO<sub>2</sub> goals that represent the equivalent of each state's rate-based goal. The rule also established guidelines for the states to follow in developing plans to achieve the state-specific goals. According to the agency, the rule would have reduced CO<sub>2</sub> emissions from the power sector by 32 percent by 2030 from CO<sub>2</sub> emission levels in 2005.

In March 2017, President Trump directed the Administrator of EPA to review the CPP and determine whether the agency should “suspend, revise, or rescind” the rule. Pursuant to that directive, EPA proposed a rule in October to rescind the CPP. The agency also issued an advanced notice of proposed rulemaking (ANPR) for a possible replacement rule. APPA is supportive of the agency repealing the CPP and replacing it with a new rule that conforms to the Clean Air Act (CAA).

## Background

On August 3, 2015, EPA released its final “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units” (called the Clean Power Plan or existing plant rule) as well as its final “Standards for Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Generating Units” (new plant rule)<sup>1</sup> and final Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Generating Units. In addition, EPA proposed its Federal Plan Requirements for Greenhouse Gas Emissions from Electric Generating Units; Model Trading Rules; Amendments

to Framework Regulations (Federal Plan and Model Trading Rules) on August 3 (this was done in an effort to assist states to develop implementation plans that rely on tradable compliance instruments). All three rules and the proposed Federal Plan and Model Trading Rules were published in the Federal Register on October 23, 2015.

The Clean Power Plan set final emission guidelines in the form of nationally uniform CO<sub>2</sub> emission performance rates for two kinds of fossil fuel-fired EGUs—steam generating units (1,305 pounds CO<sub>2</sub> per megawatt hour (lb CO<sub>2</sub>/MWh)) and combustion turbines (771 lb CO<sub>2</sub>/MWh). It also finalized state goals between 771 and 1,305 lb CO<sub>2</sub>/MWh based on the weighted average of existing fossil-fuel fired generation in the state and provided equivalent mass-based goals in short tons of CO<sub>2</sub>. This was a substantial change from the proposed rule, which did not establish performance rates that would directly apply to EGUs and only proposed mandatory state goals. These changes resulted in a range of state goals that were much narrower than in the proposed rule and would impose more stringent goals on states that are heavily reliant on coal-fired power.

Under Section 111(d) of the CAA, EPA may establish procedures for states to develop plans to establish performance standards for an air pollutant from existing sources. The state plans must “establish standards of performance that reflect the degree of emission limitation reduction achievable through the application of the ‘best system of emissions reduction’ [BSER] 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.”<sup>2</sup> In the final rule, EPA determined “that the BSER is the combination of emission rate improvements and limitations on overall emissions at affected EGUs that can be accomplished through” three building blocks:<sup>3</sup> (1) improving heat rates at affected coal-fired steam EGUs; (2)

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1. While APPA has concerns with EPA's final rule to regulate CO<sub>2</sub> emissions from new power plants, this issue brief focuses exclusively on the existing plant rule.

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2. See footnote 1 of the final rule located at p. 64664 of the Federal Register, Vol. 80, No. 205, 10/23/2015.

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3. P. 64707 of the Federal Register, Vol. 80, No. 205, 10/23/2015.

substituting increased generation from lower emitting existing natural gas combined cycle units for generation from higher-emitting affected steam generating units; and (3) substituting increased generation from new zero-emitting renewable energy generating capacity for generation from affected fossil fuel-fired generating units. The fourth building block on energy efficiency included in the proposed rule was dropped in the final rule. EPA then calculated the amount of emission reduction achievable through application of these three building blocks.

Since publication of the final rule in the Federal Register on October 23, 2015, more than 150 state and industry petitioners challenged the legality of the rule in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Many of those petitioners requested that the D.C. Circuit stay implementation of the rule during the litigation. In January 2016, the D.C. Circuit rejected the stay request, which was then made to the U.S. Supreme Court. On February 9, 2016, the U.S. Supreme Court granted an emergency stay of the Clean Power Plan that put implementation of the rule on hold while the courts heard legal challenges to it. The stay remains in place while the D.C. Circuit reviews the rule, as well as any future appeal to the U.S. Supreme Court. While the stay is in effect, neither EPA nor the states can enforce any of the deadlines or requirements in the final rule, nor will states be penalized for missing a deadline or requirement. Oral argument in the litigation occurred in September 2016.

### Administrative Action

On March 28, 2017, President Trump signed an Executive Order (EO) entitled, "Promoting Energy Independence and Economic Growth." Among other things, the EO directs the Administrator of EPA to review the CPP and determine whether the agency should "suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules." The rules to be examined include those for new, modified, and reconstructed power plants, as well as existing power plants and the proposed Federal Plan and Model Trading Rule. The EO also orders the Administrator to review and determine whether to "suspend, revise, or rescind, as appropriate with the law, the 'Legal Memorandum Accompanying the Clean Power Plan for Certain Issues.'"

Pursuant to the EO, EPA, through the Department of Justice, notified the D.C. Circuit of its intentions to review the new and existing plant rules. The agency requested the court hold the litigation in abeyance as it conducts its review. The court granted that request and is currently holding the case in abeyance. The D.C. Circuit also cancelled the oral argument that was scheduled to occur on the new plant rule.

On October 16, 2017, EPA published in the Federal Register a proposed rule to repeal the CPP. On December 28, 2017, EPA published the ANPR in the Federal Register. It seeks comment on what a replacement rule should include. APPA submitted comments to EPA on the ANPRM on February 26, 2018, expressing the Association's support for the agency to issue a new rule that is workable and comports with the language of Section 111(d). The Association also submitted comments on April 26, 2018, expressing support for the repeal of the CPP. EPA anticipates issuing a proposed Section 111(d) replacement rule this summer and plans to finalize a rule by the end of 2018.

### Congressional Activity

Given EPA is reexamining its rules to reduce emissions from new and existing fossil fuel-fired power plants, there will unlikely be any legislative activity related to the rules in the 115th Congress. The agency is expected to do what Congress sought, but was unable to do in the 114th Congress, overturn the rules.

### American Public Power Association Position

The Association believes the final rule went well beyond what is permissible under Section 111(d) of the CAA, and was strongly concerned about its potential impacts on some public power utilities and their customers. APPA believes the agency exceeded its authority under the CAA when it established standards of performance for any existing source in the fossil fuel-fired category that are not achieved in practice by an existing EGU through either technological or operational measures that limit the rate at which CO<sub>2</sub> is emitted by that source. The Association is not aware of any precedent under Section 111 whereby EPA has required the owner or operator of a source to take actions separate and apart from the source. Furthermore, the final rule sets standards that would result in the curtailment or closure of some affected facilities and the replacement of their generation by EPA-preferred sources such as wind and solar. EPA has the authority to require existing EGUs to make feasible improvements in their performance. Nothing in the CAA gives EPA the authority to tell EGU owners and operators to limit operation or shutdown their units and instead generate electricity from other types of sources. APPA is supportive of EPA's proposal to repeal the CPP. The Association believes EPA should replace the existing plant rule and complete its review of the new plant rule. These actions would provide the electric utility industry with regulatory certainty. While we do not believe the CAA is suited to regulating CO<sub>2</sub> or other GHG emissions, and that Congress should enact legislation to address climate change, the Association supports EPA replacing the existing source rules with common-sense standards that reduce CO<sub>2</sub> emissions and enable the continued use of fossil fuel-fired generation.

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The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.