



Clean Power Plan Update – Carbon-Free Future or EPA Walk of Shame?

On August 3, 2015, the Administration issued the final rule of the Clean Power Plan (“Plan”) under the Clean Air Act (CAA). The Plan calls for an increased CO₂ emission reduction goal of 32% from 2005 levels by 2030, which is up from the 30% target in the original June 2014 proposal. The Plan will be effective 60 days after its publication by the Environmental Protection Agency (EPA) in the Federal Register. The states are still given “flexibility” with their implementing plans. Below are some of the key changes in the Plan from the original June 2014 proposal, followed by the legal challenges that are likely to be pursued.

Changes in the Clean Power Plan from the Original Proposal

Timelines for the States

The Plan allows the states until September 6, 2016, to submit initial plans for compliance or to ask for an extension. If an extension is granted, the state must submit a progress report by September 6, 2017, and a final plan by September 6, 2018. This is a year longer than the original plan. However, this is still an aggressive timeline for Louisiana. The Louisiana Department of Environmental Quality (LDEQ) is required to comply and currently only has authority over the individual electricity-generating unit (power plant) itself. LDEQ does not have any authority to mandate renewable energy usage or to mandate lower emitting natural gas combine-cycle systems (the only way to meet the goals set out by the plan). To develop a state plan acceptable

to EPA, LDEQ would need to consult with other state agencies, Regional Transmission Organizations (RTO)—the facilities authorized to operate power plants, and possibly other states. Furthermore, state legislation and regulations would likely be needed to give the LDEQ the authority to even submit a plan and ensure its compliance.

The Plan retains the state-specific goal structure but changes the baseline. For example, in the June 2014 EPA proposal, Louisiana's 2012 baseline emission rate was 1,466 pounds per megawatt hour (lb CO₂/MWh) and the final 2030 goal was 883 lb CO₂/MWh, representing a 40% reduction. The 2012 actual or baseline emission rate for Louisiana in the final plan is 1612 lb CO₂/MWh with a 2030 goal of 1,121 lb CO₂/MWh, which represents a 30.7% reduction. This reduction cannot be achieved at the power-plant level alone.

The Plan provides for an eight-year interim compliance periods from 2022 through 2029 with three steps (see charts below). This is two additional years in which the states must begin to show compliance over the June 2014 plan. However, this short timeline is aggressive, as the practicality for the energy industry to design, purchase, and install a system to achieve these reductions is challenging. That is because almost every state in the nation will be demanding the same services, technology, products, and manpower simultaneously.

Elimination of Energy Efficiency as a Step for a State Plan

EPA eliminated building block 4 in the Plan in applying the “best system of emission reduction” (BSER). Block 4 was the implementation of demand-side efficiencies that would reduce electricity demand. This step was likely outside the scope of the EPA and the states' CAA authority. However, the EPA is still using this energy-efficiency step as an example of ways in which the states can choose to achieve emission reductions (see below). To substitute the lost emission from energy efficiency, the use of renewable energy was increased by EPA in the

rule from 20% to 28% in building block 3 (discussed in detail below). This change prioritizes renewables over natural gas now.

New Building Blocks

The Plan defines the BSER for CO₂ emissions from existing sources using three building blocks: (1) heat-rate improvements (combustion efficiency) at coal-fired units; (2) increasing the utilization of natural gas combined-cycle technology by displacing electricity that would have been generated by coal or less efficient natural gas boilers; and (3) mandating that 28% of electricity generated by 2030 come from zero-carbon-emitting renewable sources such as wind, solar, or biomass.

The heat-rate improvements of block 1 were reduced from 6% in the original proposal to 2.1% for power plants in the Western regional electricity interconnection, 2.3% in the Electric Reliability Council of Texas, and 4.3% in the Eastern Interconnection. The utilization of natural gas combined-cycle in block 2 was changed from 70% based on nameplate capacity to 75% based on net summer capacity. Finally, in block 3, existing and under-construction nuclear were removed for capacity purposes, but they can be used to demonstrate compliance. Larger demand is made for renewables such as wind and solar, which has increased from 20% to 28% for states.

Development of State Goals

In the original June 2014 proposal, BSER was applied to the individual power plants within each state in EPA's development of the individual goals for those states. Now EPA applies BSER to national performance rates. EPA then applies these rates by the 2012 baseline for each category to develop the final rate goal. See the following Gulf State Goals Charts for power plants or electric generating units (EGU):

Rate-Based CO₂ Emission Performance Goals (Adjusted Output-Weighted-Average Pounds of CO₂ Per Net MWh from All Affected Fossil Fueled-Fired EGUs) Including 2012 Baseline, and % Reduction for the Following Gulf States

State	2012 Baseline	Interim Goal Step 1 (2022-2024)	Interim Goal Step 2 (2025-2027)	Interim Goal Step 3 (2028-2029)	Interim Goal	2030 Final Goal	% Reduction
Texas	1566	1279	1163	1086	1188	1042	33.4
Louisiana	1618	1398	1265	1175	1293	1121	30.7
Mississippi	1185	1136	1040	978	1061	945	20.2
Alabama	1518	1244	1133	1060	1157	1018	32.9
Florida	1247	1097	1006	949	1026	919	26.3

Mass-Based Emission Performance Goals in Adjusted Output-Weighted-Average-Tons of CO₂ From All Affected Fossil Fuel-Fired EGUs

State	Interim Goal Step 1 (2022-2024)	Interim Goal Step 2 (2025-2027)	Interim Goal Step 3 (2028-2029)	Interim Goal	2030 Final Goal
Texas	221,613,296	203,728,060	194,351,330	208,090,841	189,588,842
Louisiana	42,035,202	38,461,163	36,496,707	39,310,314	35,427,023
Mississippi	28,940,675	26,790,683	25,756,215	27,338,313	25,304,337
Alabama	66,164,470	60,918,973	58,215,989	62,210,288	56,880,474
Florida	119,380,477	110,754,683	106,736,177	112,984,729	105,094,704

New Source Complements to Mass Goals (Existing Sources) in Short Tons

State	Interim Goal* Step 1 (2022-2024)	Interim Goal* Step 2 (2025-2027)	Interim Goal* Step 3 (2028-2029)	Interim Goal	2030 Final Goal
Texas	223,672,713	210,382,837	202,595,072	213,419,599	198,105,249
Louisiana	42,233,941	39,131,613	37,130,156	39,794,622	35,834,321
Mississippi	29,109,101	27,358,874	26,293,049	27,748,753	25,666,463
Alabama	66,515,949	62,104,698	59,336,277	63,066,812	57,636,174
Florida	120,099,944	113,181,823	109,029,369	114,738,005	106,641,595

*states can set their own interim milestones as long as they can demonstrate it will meet the interim and final goals.

Incentive for Early Investment

EPA is offering a Clean Energy Incentive Program to stimulate early state investments in wind and solar energy or reductions in end-use energy demand during 2020 and 2021. This plan will provide matching funds or Emission Rate Credits to states that participate up to 300 million short tons of CO₂ emissions with a larger match for low-income energy efficiency projects.

Proposed Federal Implementation Plan

In the event the state fails to submit an approvable plan, EPA is offering a federal plan that involves trading which is being published concurrently with the Plan. The federal plan is broken down in two approaches—rate-based trading and mass-based trading to meet the Plan’s goals. The rate-based trading programs would require the power plants to meet an emission, and if they are above that rate, they must acquire the requisite number of emission rate credits to comply with the emission standard. Each such credit must represent a zero emitting megawatt hour. In the mass-based approach, EPA would set up an emission budget for CO₂ emissions in each state and issue allowances that can be transferred, bought and sold in the open market, or

banked. EPA is accepting comments on the federal plan, which must be received on or before 90 days after their publication in the Federal Register.

Potential Legal Challenges

Plan is Still Beyond the Fence Line and Beyond the Authority of EPA

One central argument is that EPA has no authority from Congress to regulate beyond the fence line of a facility that pollutes. Although the EPA was careful to couch the performance standard as applying to the plant, the reality is that there is no way a state can comply without reaching beyond the fence. Although EPA has apparently removed block 4 (energy efficiency), block 2 (dispatch) and block 3 (renewables) are still arguably beyond the agency's legal control of the individual plants.

Section 111(d) of the CAA provides a procedure for the states to submit a plan to EPA that establishes a standard of performance for any existing source. The final EPA Plan, however, would require the states to submit an implementation plan that is based on activities beyond the control of the polluting source (plant). The plant alone does not have the ability to increase the use of natural gas combined-cycle or to increase the state's use of renewable power. The activities mandated by the Plan are more like a comprehensive energy program that does not fit within the four corners of the CAA. Further, this will be the first rulemaking under 111(d) where outside-the-fence activities are required.

Section 112 vs. 111

Section 111(d), as it is currently written in the U.S. Code, prohibits the EPA from regulating any air pollutant emitted from a source that EPA already regulates under Section 112 of the CAA. Currently power plants are regulated under the EPA Mercury Air Toxic Standards Rule under Section 112. Therefore, opponents of the Plan argue EPA cannot regulate greenhouse

gas from such plants under 111(d), because they are already regulated under 112 of the CAA. EPA counters that ambiguity exists in the history of 111(d), and it that may still reasonably construe its authority to authorize the regulation of greenhouse gases like CO₂ under 111(d).

Act 726 of the 2014 Regular Louisiana Legislative Session

Act 726 enacted La. R.S. 30:2060.1, known as the Louisiana Carbon Dioxide Emission Fossil Fueled-Fired Electrical Generating Units Control Act, which provides that if the LDEQ establishes standards of performance for coal-fired power plants, such standards shall be “based on measures that can be implemented by the owners or operators of existing fossil-fuel-fired electric generating units.” It is difficult to see how LDEQ can establish a standard of performance that EPA will accept based only on measures that can be achieved at the specific plant.

In summary, with the final version of the Plan, the EPA addressed some of the concerns brought up during the rule-making comment period and attempted to change the rule to avoid legal challenges. However, the Plan itself is likely still to be heavily litigated in the months and years to come.

For further information, please contact [Alex P. Prochaska](#) or [Stanley A. Millan](#).

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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