



THE COMMITTEE ON ENERGY AND COMMERCE

MEMORANDUM

September 5, 2014

TO: Members, Subcommittee on Energy and Power

FROM: Committee Staff

RE: Hearing on “State Perspectives: Questions Concerning EPA’s Proposed Clean Power Plan”

On Tuesday, September 9, 2014, at 10 a.m. in 2123 of the Rayburn House Office Building, the Subcommittee on Energy and Power will hold a hearing entitled “State Perspectives: Questions Concerning EPA’s Proposed Clean Power Plan.”¹

I. WITNESSES

The Honorable Kenneth W. Anderson, Jr.
Commissioner
Public Utility Commission of Texas

The Honorable Paul J. Roberti
Commissioner
Rhode Island Public Utility Commission

The Honorable Travis Kavulla
Commissioner
Montana Public Service Commission

The Honorable Kelly Speakes-Backman
Commissioner
Maryland Public Service Commission

The Honorable Henry R. Darwin
Director
Arizona Department of Environmental Quality

The Honorable David W. Danner
Chairman
Washington Utilities and Transportation
Commission

The Honorable Tom W. Easterly
Commissioner
Indiana Department of Environmental
Management

II. BACKGROUND

On June 2, 2014, the Environmental Protection Agency (EPA) announced a 645-page proposed rule for existing fossil fuel-fired power plants pursuant to section 111(d) of the Clean Air Act (CAA) entitled “[*Carbon Emission Guidelines for Existing Stationary Sources: Electric Generating Units*](#)” (“Clean Power Plan”).² The proposed rule is accompanied by hundreds of pages

¹ The Subcommittee previously held hearings on the proposed Clean Power Plan on [June 19, 2014](#) with EPA Acting Administrator Janet McCabe and on [July 29, 2014](#) with the Federal Energy Regulatory Commission.

² In 2010, EPA announced a [settlement](#) committing the agency to issue greenhouse gas emissions standards for fossil fuel-fired power plants pursuant to Section 111 of the CAA. On June 25, 2013, President Obama announced his [Climate](#)

of [fact sheets](#), [legal](#) and [other](#) memoranda, [technical support documents](#) and a [regulatory impact analysis](#). The proposal was [published](#) in the Federal Register on June 18, 2014, and comments are due October 16, 2014.

In its proposed rule, EPA interprets section 111(d), a rarely invoked provision of the CAA,³ to provide the agency with regulatory authority to require states to meet mandatory carbon dioxide (CO₂) targets set by the agency for the state's electricity system. In particular, EPA proposes to set unique "state-specific rate-based goals for carbon dioxide emissions from the power sector" which include for each state an "interim goal" required to be met beginning in 2020 and applying through 2029, and a "final goal" required to be met beginning in 2030 and beyond. EPA derives its mandatory CO₂ "goals" for States based on the consideration of four "building blocks," which include measures to:

- 1) "make fossil fuel power plants more efficient," which EPA projects would result in an average heat rate improvement of 6% for coal units;
- 2) "use low-emitting power sources more," which EPA projects could be achieved by dispatch to existing and under-construction natural gas combined cycle units up to a 70% capacity factor;
- 3) "use more zero- and low-emitting power sources," which EPA projects could be achieved through dispatch to new clean generation, including new nuclear generation under construction, deployment of new renewable generation, and continued use of existing nuclear generation; and
- 4) "use electricity more efficiently," for which EPA assumes would increase demand-side energy efficiency of 1.5% annually.⁴

A chart reflecting each state's proposed interim and final "goals"⁵ is attached as Appendix 1.

EPA is proposing that states adopt plans that incorporate a combination of "strategies," and has posted on its website a [map](#) which includes information for each state (except Vermont and the District of Columbia) and indicates that the state "may work alone or in cooperation with other states to comply with the proposed rule," and should identify "strategies" for their plans which may include:

[Action Plan](#) and issued a [Presidential Memorandum](#) directing EPA to complete these rulemakings. For additional background relating to EPA's proposed standards for new and existing power plants, see [Nov. 14, 2013 hearing memorandum](#); [June 19, 2014 hearing memorandum](#); and [July 29, 2014 hearing memorandum](#).

³ Section 111(d) authorizes the EPA Administrator to prescribe regulations establishing a procedure under which states submit to the Administrator a plan establishing standards of performance (a/k/a "Existing Source Performance Standards") for certain existing sources and certain air pollutants. See [42 U.S.C. § 7411\(d\)](#). EPA has applied section 111(d) to regulate five source categories: fertilizer plants (1977), sulfuric acid mist (1977), Kraft pulp mills (1979), primary aluminum plants (1980), and municipal solid waste landfills (1996). See [Proposed Clean Power Plan](#), 79 Fed. Reg. 34,830, 34,844, n. 43 (June 18, 2014). EPA has also regulated sewage sludge incinerators under section 111(d) in conjunction with CAA section 129. *Id.* at 34845, n. 44.

⁴ See, e.g. ["Fact Sheet: Clean Power Plan Framework"](#). For further discussion of the "building blocks" see [Proposed Clean Power Plan](#), 79 Fed. Reg. 34830, 34855 -34875 (June 18, 2014).

⁵ In the proposed rule, EPA states that "[o]nce the final goals have been promulgated, a state would no longer have an opportunity to request that the EPA adjust its CO₂ goal." *Id.* at 34835.

- Demand-side energy efficiency programs
- Renewable energy standards
- Efficiency improvements at plants
- Dispatch changes
- Co-firing or switching to natural gas
- Construction of new natural gas combined-cycle plants
- Transmission efficiency improvements
- Energy storage technology
- Retirements
- Expanding renewables like wind and solar
- Expanding nuclear
- Market-based trading programs
- Energy conservation programs⁶

Under the Clean Power Plan, states would be required to develop, adopt, and submit their plans to EPA for approval not later than June 30, 2016, with a possible one year extension for individual state plans and two year extension for plans that include a multi-state approach. [Proposed Clean Power Plan](#), 79 Fed. Reg. at 34844. Once EPA approves the plan, the provisions in the plan would become “federally enforceable against the entity responsible for noncompliance.” *Id.* In the event that a state fails to submit a plan, or EPA finds a state’s plan unsatisfactory, EPA would impose a federal implementation plan. *Id.* The agency has not yet developed a model federal plan.⁷

Although EPA’s proposed Clean Power Plan currently is still being reviewed and the comment period is open,⁸ numerous questions have already been raised relating to EPA’s proposal. Questions range from legal issues relating to whether EPA has authority to regulate power plants at all under section 111(d), to whether EPA has authority to pursue an “outside the fence” approach (assuming the agency has authority to regulate existing power plants under section 111(d) of the CAA), or whether EPA has authority to impose what is effectively a state-by-state cap-and-trade CO₂ emissions policy, among other legal issues.⁹ Questions also concern the workability and feasibility of the rule, ranging from how EPA’s proposed mandatory state CO₂ emissions targets were calculated and whether there was interagency and state coordination in development of the rule, to the

⁶ See [“Clean Power Plan-States”](#); see also [“Clean Power Plan Toolbox for States.”](#)

⁷ On June 19, 2014, EPA Acting Assistant Administrator McCabe [testified](#) that the agency has “not come anywhere near to proposing a Federal implementation plan,” and that in terms of what a federal implementation plan would look like “[w]e haven’t thought that through, and any proposed federal plan, we would go through a public process to get people’s view on that.”

⁸ At least 17 states have requested extensions of the comment period. See, e.g., [Aug. 25, 2014 Letter to EPA from the Attorneys General of West Virginia, Nebraska, Oklahoma, Alabama, Indiana, Kansas, Louisiana, Montana, North Dakota, Ohio, South Carolina, South Dakota, and Wyoming](#); [Aug. 25, 2014 Letter to EPA from Kentucky Attorney General](#); [August 28, 2014 Letter from Alaska Department of Environmental Conservation](#); [Aug. 12, 2014 Letter from North Carolina Department of Environment and Natural Resources](#); [Aug. 21, 2014 Letter from Kansas Department of Health & Environment](#); [August 19, 2014 letter from Mississippi Department of Environmental Quality](#).

⁹ See e.g., [Amicus Brief of the States of West Virginia, Alabama, Alaska, Kentucky, Nebraska, Ohio, Oklahoma, South Carolina and Wyoming filed June 25, 2014](#); [Petition for Review filed by States of West Virginia, Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio Oklahoma, South Carolina, South Dakota and Wyoming filed July 31, 2014](#); [Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources under § 111\(d\) of the Clean Air Act \(September 11, 2013\)](#); [“The Oklahoma Attorney General’s Plan: The Clean Air Act Section 111\(d\) Framework that Preserves States’ Rights” \(April 2014\)](#); [“North Carolina § 111\(d\) Principles” \(Jan. 27, 2014\)](#); [“N.C. Department of Environment & Natural Resources Comments on EPA’s Proposed Rules for Controlling Greenhouse Gas Emissions under the Clean Air Act, Section 111\(d\)” \(June 30, 2014\)](#).

impacts on electricity markets, electricity reliability, and fuel diversity; the implications of increased reliance on natural gas, renewables and energy efficiency; costs associated with stranded assets, compliance costs associated with building necessary new transmission infrastructure, and costs to consumers and businesses; and impacts on future economic impacts, including for states' energy intensive and trade exposed industries.¹⁰

There are also questions which may vary widely by state relating to the amount of state resources that would be required to comply with the Clean Power Plan, coordination among state regulatory agencies (including public utility commissions, environmental, economic development and other state agencies), necessary state approvals, the need for state and/or federal implementing legislation, the actions that would need to be taken by state legislatures to implement the proposed rule, whether and the extent to which special state legislative sessions may be necessary, and the consistency of the Clean Power Plan's "outside the fence" approach with state laws or pending legislation.¹¹ With respect to potential conflicting state legislation, there are at least five states that have passed laws that provide that any CO₂ performance standards established by the state for existing power plants be based on "inside the fence" measures, and there are at least thirteen additional states that have passed similar resolutions in either their House or Senate or both. *See* Appendix 2.

III. ISSUES

The following issues relating to EPA's proposed Clean Power Plan are expected to be examined at the hearing:

- Legal issues associated with EPA's proposal;
- Practical issues associated with EPA's proposal;
- Impacts on electricity rates for consumers and businesses;
- Impacts on fuel diversity and electric reliability; and
- Impacts on future economic growth and jobs.

IV. STAFF CONTACT

If you have any questions regarding the hearing, please contact Tom Hassenboehler, Mary Neumayr or Patrick Currier of the Committee staff at (202) 225-2927.

¹⁰ *See, e.g.* [June 19, 2014 List of Questions for EPA](#); *see also* [Questions](#) and [June 29, 2014 Hearing](#) (See witnesses and individual responses to preliminary hearing questions); [State Implementation of CO₂ Rules, Institutional and Practical Issues with State and Multi-State Implementation and Enforcement](#), A White Paper, Release 1.0-July 2014, Raymond L. Gifford et al.; [August 4, 2014 Letter from Arkansas Attorney General to EPA Re: Clean Air Act 111\(d\) Rule-The Clean Power Plan](#);

¹¹ *See*, footnote 10 above; *see also e.g.* [EPA's Co₂ Rule and 18 States' Resolutions and Legislation, EPA's Proposed CO₂ Rule Collides with Flexibility Asserted By States](#), Raymond L. Gifford et al. (August 2014).

APPENDIX 1 – STATE TARGETS

PROPOSED STATE GOALS FOR EXISTING POWER PLANTS

(Adjusted Output-Weighted-Average Pounds of CO₂ Per Net MWh From All Affected Fossil Fuel-Fired EGUs)

State	2012 Emissions	Interim Goal	Final Goal
Alabama	1,444	1,147	1,059
Alaska	1,351	1,097	1,003
Arizona *	1,453	735	702
Arkansas	1,640	968	910
California	698	556	537
Colorado	1,714	1,159	1,108
Connecticut	765	597	540
Delaware	1,234	913	841
Florida	1,200	794	740
Georgia	1,500	891	834
Hawaii	1,540	1,378	1,306
Idaho	339	244	228
Illinois	1,895	1,366	1,271
Indiana	1,923	1,607	1,531
Iowa	1,552	1,341	1,301
Kansas	1,940	1,578	1,499
Kentucky	2,158	1,844	1,763
Louisiana	1,466	948	883
Maine	437	393	378
Maryland	1,870	1,347	1,187
Massachusetts	925	655	576
Michigan	1,696	1,227	1,161
Minnesota	1,470	911	873
Mississippi	1,130	732	692
Missouri	1,963	1,621	1,544
Montana	2,245	1,882	1,771
Nebraska	2,009	1,596	1,479
Nevada	988	697	647
New Hampshire	905	546	486
New Jersey	932	647	531
New Mexico *	1,586	1,107	1,048
New York	983	635	549
North Carolina	1,646	1,077	992
North Dakota	1,994	1,817	1,783
Ohio	1,850	1,452	1,338
Oklahoma	1,387	931	895
Oregon	717	407	372
Pennsylvania	1,540	1,179	1,052
Rhode Island	907	822	782
South Carolina	1,587	840	772
South Dakota	1,135	800	741
Tennessee	1,903	1,254	1,163
Texas	1,298	853	791
Utah *	1,813	1,378	1,322
Virginia	1,297	884	810
Washington	1,763	264	215
West Virginia	2,019	1,748	1,620
Wisconsin	1,827	1,281	1,203
Wyoming	2,115	1,808	1,714

* Excludes EGUs located in Indian country within the state

APPENDIX 2 – STATE LEGISLATION AND RESOLUTIONS

- Alabama** Resolution passed Senate and House ([SJR 57](#))
<http://alisondb.legislature.state.al.us/acas/searchableinstruments/2014RS/Printfiles/SJR57-enr.pdf>
- Arizona** Resolution passed Senate and House ([SCR 1022](#))
http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/51leg/2r/laws/scr1022.htm&Session_ID=112
- Arkansas** Resolution passed Senate during special session ([SR 2](#))
<http://www.arkleg.state.ar.us/assembly/2013/2014S2/Bills/SR2.pdf>
- Florida** Memorial (Resolution) passed Senate and House ([SM 1174](#))
<http://www.flsenate.gov/Session/Bill/2014/1174/BillText/er/PDF>
- Georgia** Resolution passed Senate and House ([HR 1158](#))
<http://www.legis.ga.gov/Legislation/20132014/138326.pdf>
- Illinois** Resolution passed the House ([HR 0782](#))
<http://www.ilga.gov/legislation/98/HR/PDF/09800HR0782lv.pdf>
- Indiana** Resolution passed the House ([HR 11](#))
<http://iga.in.gov/documents/a4a30ad7>
- Kansas** Legislation signed into law ([HB 2636](#))
http://www.kslegislature.org/li/b2013_14/measures/documents/hb2636_enrolled.pdf
- Kentucky** Legislation signed into law ([HB 388](#))
<http://www.lrc.ky.gov/record/14RS/hb388.htm>
- Louisiana** Legislation signed into law ([Act 726](#))
<https://www.legis.la.gov/legis/ViewDocument.aspx?d=915671&n=SB650%20Act%20726>
- Missouri** Legislation signed into law ([HB 1631](#))
<http://www.house.mo.gov/billtracking/bills141/billpdf/truly/HB1631T.PDF>
- Nebraska** Resolution passed Senate (unicameral) ([LR 482](#))
<http://nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LR482.pdf>
- Ohio** Legislation passed the House ([HB No. 506](#))
http://www.legislature.state.oh.us/bills.cfm?ID=130_HB_506
- Oklahoma** Resolution passed Senate and House ([SCR 39](#))
<https://www.sos.ok.gov/documents/legislation/54th/2014/2R/SC/39.pdf>
- Pennsylvania** Resolution passed the House ([HR No. 815](#))
<http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2013&sessInd=0&billBody=H&billType=R&billNbr=0815&pn=3445>
- South Dakota** Resolution passed Senate and House ([HCR 1022](#))
<http://legis.sd.gov/docs/legsession/2014/Bills/HCR1022ENR.pdf>
- Tennessee** Resolution passed the House ([HJR 663](#))
<http://www.capitol.tn.gov/Bills/108/Bill/HJR0663.pdf>
- West Virginia** Legislation signed into law ([HB 4346](#))
http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=hb4346%20ENR.htm&yr=2014&sesstype=RS&billtype=B&houseorig=H&i=4346
- Resolution passed by House ([HR 13](#))
http://www.legis.state.wv.us/Bill_Status/resolution_history.cfm?year=2014&sessiontype=RS&input4=13&billtype=R&houseorig=H
- Wyoming** Resolution has passed House and Senate ([SJ 0001](#))
<http://legisweb.state.wy.us/2014/Enroll/SJ0001.pdf>