EPA Finalizes Clean Power Plan: Now What?

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President Obama unveiled on August 3 what has been billed as the Administration's biggest initiative yet to regulate carbon emissions. Although the final regulations that form the Clean Power Plan are ostensibly aimed at reducing emissions from existing fossil fuel-fired power plants, the reality is that they go much further and require a portfolio of measures that will affect other aspects of the economy. The basic requirement of the Plan is that states are to put in place programs designed to reduce overall nationwide carbon emissions from existing power plants by 32% by 2030 compared to 2005 levels. (Power plants produce approximately one-third of the CO_2 emissions in the United States.) Each state has been assigned individual interim and final CO_2 reduction goals and can choose among the programs and plans it will use to achieve them.

The proposed rule had four "building blocks" states could use to design their programs:

- Displacing coal fired and coal/oil fired generating capacity with more combined-cycle natural gas generating units;
- Increasing the use of renewables, completing nuclear units under construction, and avoiding retirement of some nuclear units;
- Expanding programs to increase more efficient use of energy by consumers; and
- Improving the average heat rate of coal-fired generating units by 6%.

The final rule dialed things back. It (i) eliminates the consumer energy efficiency building block, (ii) places more emphasis on renewables than originally proposed, (iii) eliminates the credit that states could get by prolonging the life of nuclear units, and (iv) reduces the credit states can get for heat rate improvements at power plants. It also increases the overall 2030 goal from 30% to 32%. One bright spot in the final rule is the "safety value" provision. It allows plants to run harder for up to 90 days during emergencies, including extreme weather conditions, and not have their increased emissions count toward the state's goals.

Virginia, North Carolina and South Carolina came away better than expected under the final rule. Both their final and interim emission goals are less stringent than proposed. The final 2030 goal for all states ranges from 771 lbs. of CO_2 per megawatt hour in states that have only natural gas plants to 1,305 lbs. per megawatt hour in states that have only coal/oil-fired plants. Virginia's 2030 goal is 934 lbs., North Carolina's goal is 1,136 lbs., and South Carolina's goal is 1,156 lbs. All three states have – in EPA's words – "moderate goals."

Now what? States are required to submit their plans to EPA by September, 2016, but may request up to two more years if they need it. They must begin implementation by 2022. In the meantime, get ready for the tidal wave of litigation.

Will the Clean Power Plan survive? It's hard to say, but the odds are it will not. The Administration had no chance of getting Congress to pass legislation regulating greenhouse gas emissions, so it opted to proceed by issuing regulations based on existing authority. EPA says section 111(d) of the Clean Air Act gives it that authority, but this argument really "pushes the envelope." Section 111(d) requires states to develop "standards of performance" for existing stationary sources and an implementation plan to achieve those standards. EPA contends section 111(d) authorizes it to adopt a "systems-based" approach to regulating greenhouse gas emissions from these plants, but there is a strong argument that section 111(d) authorizes EPA to regulate emissions only from the plants themselves. If that's not the case, then section 111(d) gives EPA broad authority to regulate vast swaths of the economy far outside the fenceline of the emission sources themselves.

This is just the beginning of a long road to the Supreme Court. Rest assured the road will be rocky.

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- Channing J. Martin – 804.420.6422 – cmartin@williamsmullen.com

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