

MJB&A Issue Brief ■ October 13, 2017

## Proposed Repeal of Clean Power Plan: Summary

On October 10, EPA released its proposed “Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” starting the repeal process for the Clean Power Plan (CPP). EPA based its repeal on a reinterpretation of Clean Air Act section 111(d), which it believes limits EPA’s authority to imposing a best system of emissions reductions (BSER) that requires only technological or operational measures that can be applied to or at a single source. Comments are due on December 15, 2017.

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### Key Takeaways: EPA Actions

- EPA is proposing to repeal the CPP in its entirety on the basis that the CPP extended beyond EPA’s authority to impose a BSER, which EPA now proposes to define as requiring technological or operational measures that can be applied to or at a single source.
- EPA has not determined the scope of any potential rule under section 111(d) to regulate GHG emissions from existing EGUs, or what form it would take. EPA intends to issue an Advance Notice of Proposed Rulemaking (ANPR) “in the near future.” The ANPR will solicit information on systems of emission reduction that are consistent with the legal interpretation outlined in the proposal.
- EPA is proposing to rescind additional documents relating to the in the CPP docket, titled “Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units” and “Legal Memorandum Accompanying Clean Power Plan for Certain Issues.”
- In conjunction with the Proposed Rule, EPA also released a Regulatory Impact Analysis (RIA) that made modifications to the cost and benefit analysis from the original CPP and provided additional analysis relating to the avoided compliance costs and foregone benefits resulting from CPP repeal.

### Background

Under the Obama Administration, EPA published the final Clean Power Plan (“Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (EGUs)”) on October 23, 2015. On March 28, 2017, President Trump issued Executive Order 13783, which among other things called for EPA to review the CPP. On April 4, 2017, EPA announced that it was initiating its review of the CPP and providing notice of forthcoming proposed rulemakings consistent with the Executive Order.<sup>1,2</sup>

In the Proposed Repeal, EPA notes that their review has “raised substantial concerns that the CPP is not consistent with the policy articulated in Section 1 of the Executive Order.”<sup>3</sup> Namely, EPA noted that the CPP, as finalized

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<sup>1</sup> 82 FR 16,329.

<sup>2</sup> The same day, EPA also withdrew the proposed federal implementation plan, model trading rules, proposed amendments to certain regulations under 40 CFR subpart B implementing CAA section 111(d), and proposed rule regarding the Clean Energy Incentive Plan. See 82 FR 16,144.

<sup>3</sup> Section 1 laid out the policy goals for promoting energy independence and economic growth, including promoting clean and safe development of national energy resources and “avoiding regulatory burdens that unnecessarily encumber energy

by the past administration, would “impose massive costs,” had “invaded traditional areas of state regulation,” and “did not adequately ensure the national interest in affordable, reliable electricity, including from coal generation.”

### Legal Basis for Proposed Repeal

EPA proposes to repeal the CPP due to a change in its legal interpretation of section 111(d) of the Clean Air Act (CAA). In promulgating the CPP, EPA relied on a definition of BSER that accounted for reductions in emissions from the covered sources that could be achieved if dispatch of coal-fired generation were shifted to gas-fired generation and if dispatch from all fossil generation were shifted to new renewable (wind and solar) generating resources. In this proposal, EPA describes the “generation shifting” required by the CPP’s BSER as essentially requiring emission reduction measures to be taken “on behalf of the source at another location.” EPA now proposes to define BSER as consisting of measures that can physically or operationally be applied to or at the source itself. EPA states that “such measures must be based on a physical or operational change to a building, structure, facility, or installation at that source.”

EPA provides five reasons for this interpretation:

1. It accords with the meaning and application of relevant terms and phrases in CAA section 111 as they are used in other, related sections of the CAA. This reasoning focuses on the fact that, statutorily, a best system of emissions reduction must be “applied.” EPA explains that an “application” is used in other CAA contexts to “signal a physical or operational change to a source.” EPA also notes that standards must be established “for” sources, not other sources or entities.
2. It aligns with the Congressional intent underlying CAA section 111 as informed by relevant legislative history. EPA explains that both House and Senate CAA 1970 Amendment bills were premised on physical or operational changes that would be applied to a source. EPA further notes that the 1977 Amendments did not alter this understanding, and while the 1990 Amendments removed the term “technological” from section 111, Congress did not indicate an intent to expand the phrase “system of emission reduction” beyond the source.
3. It aligns with the EPA’s prior understanding of CAA section 111 as reflected in the Agency’s prior regulatory actions. EPA notes EPA first interpreted the phrase system of emission reduction under 111(d) in 1975, in which it defined BSER as a “technology-based approach” that control emissions sources. EPA also states that the cap-and-trade program in the since-vacated Clean Air Mercury Rule was based on control technology for installation at an existing source, which EPA states was “fundamentally different from the CPP’s second and third ‘building blocks.’”
4. It is reinforced by the section’s broader statutory context. EPA notes that best available control technologies are applied per facility, not at a broader level. By comparison, EPA states that “best available control technology” (BACT) relies on section 111 standards as the floor but interpreting section 111 to extend beyond the source “could have the unintended consequence of imposing greater emission reductions” under section 111 than BACT. Further, EPA notes that BACT must be applied to the source itself and given its statutory link to BSER, BSER should also be interpreted to harmonize these provisions. EPA also explains that Congress in the CAA 1990 Amendments explicitly established a cap-and-trade program for the Acid Rain program, and did not do so for section 111.
5. It avoids a policy shift between the Federal government and states and avoids interference with the authority of other Federal agencies. EPA states that the CPP would have had “transformative

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production, constrain economic growth, and prevent job creation.” See <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1>.

economic, policy, and political significance” without the authority to take such action (citing legal precedent requiring a clear statement from Congress assigning that authority).

For the reasons above, EPA is proposing to repeal the Clean Power Plan in its entirety. It notes that those portions of the rule such as building block 1, which arguably do not exceed its authority, are not severable and separately implementable.

## Regulatory Impact Analysis Update

As part of this filing, EPA prepared an analysis of the avoided compliance costs and forgone benefits associated with CPP repeal.

### *Highlights from Proposed Rule Summary of RIA*

In the Proposed Rule, EPA highlighted some of the analysis methodology and results, including:

- recent changes in the electric sector have changed pollution projections, even without the CPP (i.e., emissions of criteria pollutants are now expected to be lower than what EPA originally projected in 2015), indicating uncertainty as to the applicability of the 2015 analysis of health benefits;
- the repeal of the CPP “does not affect the level of public health and environmental protection already being provided by existing [national ambient air quality standards] and other mechanisms in the CAA;”
- counting energy efficiency cost savings as a benefit rather than a cost reduction (which lowers the forgone benefits of the rule);
- the inclusion of only those benefits of reduced carbon pollution, reflected in the social cost of carbon, that occur within the United States (rather than globally); and
- a review of recent studies of the CPP’s projected costs and CO<sub>2</sub> emission reductions performed by non-governmental institutions to inform the RIA’s calculation of avoided compliance costs.

The Proposed Rule also notes that the RIA includes a discussion of additional factors, such as how the potential impacts of the CPP repeal will be distributed across the population (noting that repeal may result in lower household energy bills for low-income households) and impact of job loss on public health (“research has suggested that involuntary job loss may increase risks to health, of substance abuse, and even of mortality”).

### *Summary of RIA Methodology and Key Findings*

The RIA prepared by EPA in support of the repeal proposal has garnered significant stakeholder attention with several important changes to the methodology used to evaluate the rule. Rather than re-modeling the rule, EPA opted to reanalyze the prior IPM modeling that it had prepared in 2015 in support of the original Clean Power Plan.

In the context of the Proposed Rule, the avoided compliance costs of the rule reflect the benefits of the Proposed Rule, while the forgone benefits represent the costs of the Proposed Rule. EPA treated energy efficiency savings as a benefit, making the estimated costs of the rule significantly higher (i.e., cost estimates of the rule now include the cost of the additional generation that “would have been needed” absent assumed demand reductions from energy efficiency programs). EPA also presents the direct and in-direct benefits of the rule, separately. The in-direct benefits result from the projected NO<sub>x</sub> and SO<sub>2</sub> emissions reductions under the Clean Power Plan. EPA also recalculates the benefits of the Clean Power Plan absent any significant co-benefits. Finally, EPA relies on an “interim domestic” social cost of carbon (rather than utilizing a global cost of carbon), which dramatically reduces the estimated benefits from reducing carbon emissions.

The net result of these changes is that the reported annual compliance costs of the rule are now between \$24.5 billion and \$33.3 billion in 2030—excluding the costs savings associated with energy efficiency. In the 2015 RIA associated with the Clean Power Plan Final Rule, the annual compliance costs were reported at between \$5.1 billion and \$8.4 billion in 2030 (across rate and mass scenarios). The estimated net benefits of the Proposed Rule for repeal depend on the methodology used to calculate the indirect benefits. Combining benefit-per-ton estimates from the initial Clean Power Plan analysis with new estimates of avoided compliance costs, EPA now estimates net benefits of the Proposed Rule ranging from \$1.1 billion to -\$28.3 billion in 2030 (with a negative value implying a net loss in benefits).<sup>4</sup> In other words, under these assumptions, the repeal of the Clean Power Plan is projected to result in somewhere between a significant net cost to a small incremental net benefit. Using EPA’s most conservative co-benefit assumption (i.e., PM benefits fall to zero in areas below the annual PM<sub>2.5</sub> NAAQS in 2025), the net benefits in 2030 range between \$12.7 billion and -\$2.1 billion in 2030. The RIA indicates that this alternative approach to estimating co-benefits is not intended to imply a specific lower bound estimate of the co-benefits; rather it was intended to increase transparency. Given the range of values presented, the analysis does highlight the importance of the co-benefits assumptions to the final net benefits calculation, particularly when the direct benefits of reducing carbon emissions are assumed to be so low.

### *RIA Next Steps*

EPA notes that it plans to conduct a more robust analysis before any final action is taken by the agency and provide an opportunity for the public to comment on the re-analysis. EPA also includes a note indicating that it plans to utilize this general approach for an RIA, which “underscores the uncertainty associated with any agency action of this magnitude, especially in actions where discretion is afforded to State governments,” regarding future EPA actions.

### **Comment Process**

EPA is requesting comments by December 15, 2017. EPA specifically requests comment on the following issues:

- the legal interpretation of EPA authority under 111(d);
- the general policy implications of the legal interpretation proposed in the repeal;
- whether the repeal “avoid[s] potentially transformative economic, policy, and political significance in the absence of a clear Congressional statement of intent to confer such authority on the Agency;”
- whether the CPP exceeded the EPA’s proper role and authority in superseding or limiting “long-recognized regulatory authority for the FERC over electric utilities engaged in interstate commerce, including wholesale sales, transmission of electric energy in interstate commerce, and reliability;” and
- components of the RIA methodology, including the avoided compliance costs, forgone benefits, modeling assumptions, uncertainties, “the extent that the EPA should rely on consideration of the benefits due to reductions in the target pollutant relative to the costs in the decision-making process,” and other relevant matters related to the development of the RIA for this rulemaking.

EPA explicitly notes that it does not solicit comment on an additional set of issues:

- EPA’s assessment of the impacts of greenhouse gases and the substance of the 2009 Endangerment Finding;
- the systems of emission reduction that are in accord with the legal interpretation proposed by EPA in this notice (i.e., those that are applicable to and at an individual source), as well as information on compliance

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<sup>4</sup> This range reflects the differences between the rate and mass scenarios as well as the discount rate applied. For the mass-based scenarios, the net benefits range between \$0.2 billion and -25.7 billion.

measures and state-planning requirements (EPA notes these issues will be open for comment in the ANPR); and

- on-site efficiency measures (i.e., those that would have been captured under building block 1).

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