On August 3, 2015 EPA Issued

- NSPS 111(b) standards for new, modified and reconstructed electric utility units
- NSPS 111(d) for existing electric generating units (approximately 4.3 million comments)
- A proposed Federal Plan for 111(d) implementation
- A proposed Clean Energy Incentive Program
Section 111(d)

- Seldom used Section of the CAA New Source Performance Standards for Existing Sources
- They are “Guidelines” for the States to develop plans for EPA approval
- If States do not prepare a plan a Federal Plan will be developed
- Seeking 32% reduction in CO2 emissions from 2005 levels from the electric utility industry group
Final vs Proposal

- Compliance time frame moved from 2020 to 2022
- Changes to the Building Blocks that must be part of State Plans
- State “Target” Goals have changed
- Deadline for state plans in Sept. 2016 with option for 2-year extension
- “Trading ready” approaches
- Clean Energy Incentive Program provides incentives for early action
Goal Computation

• EPA divided the country into three regional interconnects and applied the best system of emission reduction (BSER) to each

• The goal rates are as follows and those can be translated to mass-based. States choose between Rate or Mass.

<table>
<thead>
<tr>
<th>EGU Type</th>
<th>2030 Rate (lbs CO₂/MWh)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fossil Steam</td>
<td>1,305</td>
</tr>
<tr>
<td>NGCC</td>
<td>771</td>
</tr>
</tbody>
</table>
Mid-U.S. 2030 CPP Rate Goals Final v. Proposed

- Mid-U.S. Range (ND and TX)
- Final Rule Range: (1,042 – 1,305)
- Note: All goals are listed in units of lbs CO2/MWh
Building Blocks

• Heat rate improvements – Change from 6% to 4.3%
• Re-dispatch to gas-fired units from proposed 70% to final 75% of net summer capacity
• Increase RE in place of coal - No nuclear
• Demand side energy efficiency removed
• But the States can include other measures in SIPs if they want
LESS

MORE
Proposed Federal Plan & CEIP

- **Federal Plan** - Two Trading Programs – (1) a rate-based program or (2) a mass-based program
- May be used as a model rule for States to use but States are not required to use
- **CEIP** – Voluntary program that would award States CEIP allowance/ERCs for eligible projects and EPA matches
- Only Solar and Wind/EE in low-income communities
- For additional generation in 2020-2021
Race to the Courthouse

- 27 States lead by WV and TX file suit to Challenge the CPP (over 150 parties total)
- This includes Kansas, Missouri and Nebraska
- 18 States file in support of CPP lead by NC and CA
- Generally falls along party lines
- Suits filed even before the rule was published
- All lawsuits consolidated at the D.C. Circuit
State Legal Challenges

[Map showing the legal challenges across the United States, with states color-coded to indicate whether they are suing, not suing, exempt, supporting, or exempt & supporting.]
Key Legal Challenges

Utilities are already regulated under §112.

• EPA cannot regulate sources under § 111(d) if they are subject to regulation under § 112 (Hazardous Air Pollutant Program)

• Electric utilities are subject to regulation under §112 for emissions of mercury (the “MATS” rule)

• EPA argues that two versions were enacted and as such a version that DOES NOT appear in 111(d) should create ambiguity and Chevron deference

• EPA argues that the CAA allows regulation under §111(d) of a different air pollutant as opposed to the broader “source category”
EPA’s Building Blocks are not BSER

- CAA only allows imposition of “Best System of Emission Reduction” (BSER) at a source
- The proposal is inconsistent with the CAA because it includes more than technological and operational measures to reduce emissions at an affected facility
- EPA’s “outside the fence” and beyond the source category measures are unprecedented and are not permissable
- The recent Supreme Court case in UARG indicates that without clear statutory authorization EPA’s transformative expansion of how it proposes to regulate sources under § 111(d) will not be upheld.
Federalism Issues

• Unlike 111(b), EPA is required by the terms of 111(d) to allow States two develop BSER and only if they do not, can EPA regulate

• EPA cannot side step this mandate by calling the State percentage reduction goals “guidelines”

• EPA clearly states in the proposal that these are mandates that the States cannot change

• If finalized, EPA will usurp the ability of States to consider “remaining useful life” and other source-specific factors contemplated by 111(d)
Other Legal Challenges

• Drastic changes from proposed to final rule requires notice and comment
• 111(d) is more stringent than 111(b)
• Can be subject to 111(b) and (d) – CAA does not allow
• Can be subject to 111(d) and NSR
• Stepping into FERC Jurisdiction
• The Standards are not attainable and are therefore arbitrary and capricious and contrary to law
Supreme Court Issues a Stay

• Elements that petitioner must establish:
  ▫ Irreparable and imminent harm
  ▫ Likely to succeed on the merits
  ▫ The public interest favors granting a stay

• The D.C. Circuit declines to issue a stay

• In an unprecedented move the Supreme Court in a 5-4 decision issued a stay of the rule

• No analysis of the elements
What Does the Stay Mean

• EPA cannot enforce the CPP or approve State plans until the case is heard and decided on the merits

• It does not mean that the petitioners will succeed on the merits

• It does not mean that the deadlines will be changed if upheld

• EPA will still work with States that plan to proceed

• EPA will still finalize the Federal Plan and CEIP
**And Another Development**

- Just four days after the Supreme Court Issues the Stay Justice Scalia Dies – He voted for the Stay
- Possibility that the Court could split 4-4 on the merits
- If so, all action could be at the D.C. Circuit
- Opening Briefs filed last Friday and Oral argument scheduled in early June (June 2\textsuperscript{nd})
- Panel of three judges – two Democrat Appointees and one Republican
- One of the judges is rumored to be a potential Supreme Court nominee
What is a State to Do?

• States have two choices:
  • Continue as if the stay did not occur
  • Put planning on hold
• 18 States have suspended planning work (including Kansas and Nebraska)
• 9 are assessing (including Missouri and Iowa)
• Two bills have been introduced in MO that would restrict MDNR
• 20 States are continuing the planning process
State Responses

Supreme Court Stay Response

- Continuing Planning: 20 states
- Assessing Planning: 9 states
- Suspending Planning: 18 states
- Exempt: 4 states
Court Schedule

• D.C. Circuit CPP Schedule is on a fast track
• Opening Briefs filed last Friday
• Oral argument scheduled for June 2\textsuperscript{nd}
• Decision late summer/early fall
• Supreme Court decision in 2017
What if the Rule is Vacated?

• If the Court agrees with the Section 112 argument the rule would be vacated
• BUT – The Massachusetts case requires EPA to regulate GHGs
• What other CAA programs could be used?
• NAAQS, Section 112, Section 115 – Others?
• Modify the CAA?
Any Questions?

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