

EPA Regulation of Greenhouse Gas Emissions from Existing Power Plants: Issues and Options

Kyle Danish, Stephen Fotis, Doug Smith, and Ilan Gutherz

In his June 25th speech on climate policy, President Obama announced that he will direct the Environmental Protection Agency (EPA) to use its existing authorities under the Clean Air Act to develop greenhouse gas (GHG) emission standards for power plants.

The President described this regulation as one plank in an overall plan to meet a commitment made by his administration in international climate negotiations: a reduction in U.S. GHG emissions of 17 percent from 2005 levels by 2020.

Given that existing power plants account for approximately a third of U.S. GHG emissions, it would be difficult to meet the Obama Administration's objective without addressing power sector emissions in some way. However, setting GHG emission standards for existing power plants under the Clean Air Act is far from straightforward. What follows is a review of some of the key issues and options for setting these regulations.

REGULATION OF POWER PLANTS UNDER SECTION 111 OF THE CLEAN AIR ACT

The EPA is expected to regulate power plant GHG emissions under section 111 of the Clean Air Act, which authorizes EPA and the States to set "standards of performance" for emissions from major emitting facilities. Indeed, EPA has already proposed GHG performance standards for *new* power plants under section 111(b). (See our March 2012 issue alert: <http://www.vnf.com/news-alerts-696.html>.) A Presidential Memorandum issued concurrently with the President's speech (see <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>) directs EPA to *revise* its proposed rule for new power plants in light of the comments received and to issue a new proposal by September 20, 2013.

The Presidential Memorandum further directs EPA to develop GHG emission standards for *existing* power plants, and for modified and reconstructed power plants, on a more extended schedule, with EPA issuance of proposed rules by June 1, 2014, and issuance of final rules by June 1, 2015.

Section 111(d) authorizes EPA to regulate existing sources of certain air pollutants that are not regulated under other sections of the Clean Air Act. Section 111(d) directs EPA to require States to develop plans that establish performance standards for such sources. The State plans are subject to approval by EPA.

Previously, EPA established a generic procedure to carry out this Federal-State regulatory process. Under this procedure, EPA develops an "emission guideline," which sets a benchmark for State performance standards. State plans generally must be "no less stringent" than the EPA-set emission guideline, but States have some



leeway to tailor their plans to in-State conditions.

The EPA procedure establishes a multi-year process under which the agency develops the emission guidelines, States develop and submit plans, EPA reviews and approves the plans, and regulated sources comply with approved State plans by certain deadlines. The President’s June 25th Memorandum calls for EPA to finalize the guidelines by June 1, 2015 and to require States to submit plans for implementing the federal guidelines by June 30, 2016. The Memorandum does not specify a deadline by which regulated power plants must comply with the standards.

ISSUES WITH SECTION 111 REGULATION OF EXISTING POWER PLANTS

Authority to Regulate. EPA faces a threshold issue: Can the agency even regulate existing power plants under section 111(d)?

During amendments to the Clean Air Act in 1990, the Senate and the House of Representatives passed different versions of amendments to section 111(d). In the rush to finalize the massive bill, the House-Senate conference did not reconcile the two versions, and – in an unusual outcome – both became part of the bill that was signed into law.

The Senate language alone would allow EPA to regulate GHGs from existing power plants. The House language, on the other hand, prohibits EPA from regulating a category of facilities that EPA already is regulating under section 112 of the statute, which addresses air toxic emissions. Because EPA has issued a final rule regulating toxic emissions from power plants – the Mercury and Air Toxics Standards Rule (*see our December 2011 issue alert: <http://www.vnf.com/news-alerts-661.html>*) – the House language, if read literally, would preclude section 111(d) regulation of power plants.

Lacking clear guidance from Congress, EPA has interpreted the House and Senate amendments to section 111(d) in a manner that allows EPA to regulate GHGs from existing power plants and other existing stationary sources. The extent to which a court would defer to this interpretation is a question the agency will face if it moves forward on regulation under section 111(d).

Setting the “Emission Guideline.” Assuming that EPA may regulate under section 111(d), it faces another set of questions in setting the “emission guideline” for State plans. EPA regulations provide for setting a guideline that “reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated” for sources within the regulated category.

EPA’s conventional approach to setting emission guidelines and performance standards under section 111 has been to look at systems of emission control technologies that can be implemented *at the facility*. However, that approach is complicated in the context of GHG emissions because direct control technology for GHG emissions (such as carbon capture and sequestration) is not now commercially viable. Some units may be able to reduce emissions with plant efficiency improvements, co-firing with natural gas or biomass, or fuel switching, but others may lack any



feasible at-the-plant options. Given these constraints, emission guidelines developed based solely on consideration of at-the-plant measures may produce limited emission reductions.

Some environmental groups are advocating that the EPA take a different and more ambitious approach to setting the emission guideline for existing plants. Under this alternative approach, the benchmark would be based on a “system of emission reduction” that not only considers measures that can be implemented at an individual plants, but also considers offsite measures that can be implemented *across the entire power sector*. These other measures could include, for instance, additions of renewable or possibly nuclear generation resources, as well as programs that promote more efficient use of energy in homes, buildings, and manufacturing.

By assuming the availability of a much broader range of “beyond the fence” measures, some environmental groups have urged the adoption of stringent GHG emission guidelines that fossil-fueled plants may not be able to achieve through improved efficiency or other on-site measures alone. For example, the Natural Resources Defense Council (NRDC) has published one such proposal (*see <http://www.nrdc.org/air/pollution-standards/files/pollution-standards-report.pdf>*).

Means of Compliance. In addition to establishing GHG emission guidelines, EPA will likely need to provide guidance on the range of measures States may allow power plants to use in order to demonstrate compliance. For instance, could a State permit use of “beyond the fence” measures to establish compliance even if such measures were not the basis for the EPA-set emission guideline? Could a State provide for market-based compliance mechanisms such as inter-unit averaging, trading, and banking? Could a State with a pre-existing GHG regulatory program for power plants rely on that program for compliance, provided it is “no less stringent” than the EPA-set guideline?

The June 25th Presidential Memorandum does not identify a clear preference for one policy approach or another. The Memorandum does direct EPA to “develop approaches that allow the use of market-based instruments, performance standards, and other regulatory flexibilities” and “ensure that the rules enable continued reliance on a range of energy sources and technologies.” However, the Memorandum does not make clear whether EPA should consider the availability of market-based measures in determining the stringency of the emission guideline (potentially resulting in a much more stringent guideline) or should simply consider allowing States the flexibility to adopt such approaches in meeting a guideline otherwise based on systems of emission reductions that can be implemented directly at the plant (implying a relatively less stringent guideline).

Virtually any program EPA adopts will be subject to legal uncertainty. There is little or no instructive judicial precedent on implementation of section 111(d). The extent to which a court would defer to EPA on its interpretations of the key statutory terms is unclear.

The various regulatory approaches also raise a host of design questions. For example, how can energy efficiency program activities be translated into GHG emission reductions for purposes of supporting a Clean Air Act



compliance determination? Many end-use energy efficiency programs are in operation throughout the country, but adapting these program structures to be part of an enforceable GHG regulatory regime could involve significant work.

Regulation of Modified and Reconstructed Plants. GHG emissions from existing power plants that are modified or reconstructed would be regulated by EPA under section 111(b), not section 111(d). The standards of performance adopted for modified or reconstructed plants may be different from those promulgated for either new or existing units. The schedule of rulemakings for addressing modified sources is the same as that for the rulemakings on existing sources – with a proposed rule by June 2014, and a final rule by June 2015.

The performance standards to be established for modified and reconstructed power plants will become applicable to those existing plants that undertake major construction projects after the date that the EPA issues its proposal to establish those standards (which could be as early as June 2014). It may be necessary for companies undertaking major projects at existing power plants after June 2014 to document that those projects do not result in a GHG emissions increase that would trigger the application of new GHG performance standards for those plants.

CONCLUSION

Because GHG emissions from power plants represent a major portion of U.S. emissions, pursuing regulation of the electric power sector is likely to be a significant part of the President's new climate policy. However, EPA will have to resolve a number of legal and policy design issues as it moves forward with GHG performance standards for existing power plants. The Presidential Memorandum directs EPA to conduct a rigorous process to engage with States, the power sector, labor and other stakeholders in designing these policies.

FOR MORE INFORMATION

For more information on the issue of GHG standards for power plants or for assistance in engaging in these forthcoming regulatory processes, please contact [Kyle Danish](#), [Stephen Fotis](#) or any member of the firm's [Environment](#) or [Climate Change](#) practices at (202) 298-1800. Van Ness Feldman is active on the range of Federal and State activities relating to climate change, air quality, and energy policy. Van Ness Feldman has been recognized by *Chambers USA*, *Chambers Global*, *Legal 500*, and *U.S. News / Best Lawyers* for its Energy, Environment, Government Relations, and other related practice areas. The firm's Climate Change practice has received *Chambers USA's* Band One recognition, one of only five firms in the country to receive this honor.

In February 2012, Van Ness Feldman expanded its capabilities by combining practices with the Seattle law firm of GordonDerr LLP, a preeminent real estate, land use, water law, and civil litigation firm in the Pacific Northwest. Learn more at www.vnf.com.

© 2013 Van Ness Feldman, LLP. All Rights Reserved.

This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.