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CLIENT ALERT:

Comment Period Open on the Proposed Federal Implementation Plan and Model Trading Rules

On October 23, 2015, the proposed federal implementation plan and model trading rules for existing power plants was published in the *Federal Register*, triggering the start of the 90-day comment period.¹

Under Section 111(d) of the Clean Air Act, EPA establishes emission performance levels based on its determination of the best system of emission reduction (“BSER”) for an existing air pollution source. These performance levels are finalized in the Clean Power Plan.² Now, states must apply the emission guidelines to their affected sources and develop a state implementation plan (“SIP” or “state plan”), which may include, among other compliance mechanisms, a trading program. The deadline to submit SIPs, or an initial submittal requesting an extension of time, is September 6, 2016.

If a state fails to submit a state plan or submits a non-compliant state plan, EPA plans to develop and implement (pursuant to 42 U.S.C. § 7411(d)(2)) a state-specific federal plan (“FIP”) that will be federally enforceable against the affected electric generating units (“EGUs”) in the state.

THE RULEMAKING

The current rulemaking proposes four main discrete actions: (1) a rate-based federal plan, (2) a mass-based federal plan, (3) a rate-based model trading rule, and (4) a mass-based model trading rule. EPA is proposing a “market-based trading program” design for the federal plan; thus, the regulatory text of each model rule is quite similar to that of the respective proposed federal plan.

EPA has indicated that it intends to finalize both model trading rules, but that it plans to issue the same type of federal plan (rate-based or mass-based) in each state that fails to submit an approvable state plan. EPA has invited comments on which methodology it should select for the federal plans.

¹ Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations, [80 Fed. Reg. 64,966](#) (proposed Oct. 23, 2015).

² Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, [80 Fed. Reg. 64,662](#) (Oct. 23, 2015) (“Clean Power Plan” or “CPP”).

States have the option of incorporating, in whole or in part, the proposed model rules and federal plan into their state plan. Moreover, states may choose to join the federal rate- or mass-based trading programs that EPA intends to set up and administer.³ Accordingly, EPA's proposed approaches have the potential to affect many states (and stakeholders), even if it is not likely that a federal plan will be issued for that state.

Mass-Based Model Trading Rule/Federal Plan

Under the mass-based program, EPA would create a state emissions budget that is equal to the total tons of CO₂ that each affected EGU is allowed to emit in the state based on that state's mass-based goal. EPA would then distribute an initial allocation of the state budget allowances; the allowances could be transferred, bought, sold on the open market, or banked for future use. At the end of each compliance period, each affected EGU would have to turn over a sufficient number of allowances to cover its emissions during that compliance period.

EPA proposes to withhold from that initial distribution three allowance set-asides,⁴ and requests comment on whether it should create an additional set-aside in order to make allowances available in the event of an emergency reliability situation.⁵

Rate-Based Model Trading Rule/Federal Plan

Under the rate-based program, each affected EGU would be required to meet an EPA-set emission standard (expressed in pounds of CO₂ per MWh) that EPA would derive from the state's rate-based goal. If an EGU emits above its assigned rate, then it must acquire a sufficient number of emission rate credits ("ERCs") to bring the emission rate into compliance. Each ERC represents a zero-emitting MWh; ERCs may be bought and sold or banked for future use and must be generated through an EPA-approved and administered process.

The model trading rules and the federal plan differ in the universe of entities that may qualify as an "ERC Resource." Under the federal plan, EPA has proposed to include only certain renewable energy resources (wind, solar, geothermal power, and hydropower), new nuclear units, and uprates at certain existing nuclear units.⁶ Under the model rate-based trading rule, any emission reduction measure would be eligible so long as it meets the CPP eligibility requirements, including that it complies with EPA's evaluation, measurement, and verification procedures.

³ A proposed state trading program that follows the final model trading rule will be presumptively approvable.

⁴ The set-asides are for the Clean Energy Incentive Program, renewable energy and measurement updates. States that incorporate EPA's model mass-based trading rules may replace the federal allowance allocation provisions with their own allocation provisions. See *also* Allowance Allocation Proposed Rule Technical Support Document, <http://www3.epa.gov/airquality/cpp/tsd-fp-allowance-allocations.pdf>

⁵ EPA has proposed to not incorporate the "reliability safety valve" into the federal plan, stating it believes reliability is supported sufficiently by the EGUs ability to "obtain allowances or credits if needed."

⁶ EPA seeks comment on whether it should also include other emission reduction measures in the federal plan such as demand-side energy efficiency programs.

Additional Changes: The Section 111(d) Process

In addition to the proposals for the federal plan and model trading rules, the rulemaking proposes revisions to EPA's Section 111(d) process, including adding authority for EPA to partially approve/disapprove of a plan where components of the plan are functionally severable and to conditionally approve of a plan. EPA plans to finalize these changes prior to finalizing the model rules.

Next Steps

EPA plans to hold public hearings to receive information from interested parties. These hearings will take place in Pittsburgh (Nov. 12-13), Denver (Nov. 16-17), Washington, D.C. (Nov. 18-19), and Atlanta (Nov. 19-20).⁷

Comments are due January 21, 2016, absent an extension of the comment period. EPA has established Docket No. EPA-HQ-OAR-2015-0199 for this rulemaking.⁸ EPA plans to finalize the model trading rules in summer 2016. EPA will promulgate a federal plan for a state within 12 months of a finding that the state failed to make an approvable initial submittal. There will be an opportunity to comment on any state plan submitted for approval. States in which EPA implements a federal plan will be able to transition to a state-implemented plan or work on the implementation of a FIP through delegation by EPA of certain administrative aspects of the FIP.

NEW SPIEGEL RESOURCE

Spiegel & McDiarmid encourages readers to follow its blog, *Considering the Grid*, focused on following developments at the intersection of energy and the environment, including issues related to EPA's carbon emission rules. You can find us and subscribe to receive post notifications at www.consideringthegrid.com.

FOR ADDITIONAL INFORMATION, PLEASE CONTACT THE FOLLOWING SPIEGEL ATTORNEYS:

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⁷ Information about registering to present at a hearing is available at <http://www2.epa.gov/cleanpowerplan/forms/public-hearings-proposed-federal-plan-clean-power-plan> and in the *Federal Register* notice, 80 Fed. Reg. 65,979 (Oct. 28, 2015).

⁸ See EPA's website, <http://www2.epa.gov/cleanpowerplan/how-comment-proposed-federal-plan-clean-power-plan>, for more information on how to submit comments.