

President Trump Takes First Step on Long Road to Roll Back Climate Rules

Recent executive order seeks broad repeal of Obama administration climate policies, including actions directed at the electric power sector.

On March 28, 2017, President Donald Trump signed a “Presidential Executive Order on Promoting Energy Independence and Economic Growth,” directing executive departments and agencies to review regulations that potentially burden the development or use of domestically produced energy resources. The Executive Order (EO)¹ sets the stage for what could become a series of sweeping reversals of the Obama administration’s greenhouse gas (GHG) reduction and climate change policies. Among the EO’s many policy directives to executive departments and agencies² are several provisions directing the US Environmental Protection Agency (EPA) to reevaluate and potentially roll back its landmark rules addressing GHG emissions from power plants:

- The EO directs EPA to review for consistency with the broadly defined policy goals of the EO: the Clean Power Plan (CPP) regulations promulgated under Clean Air Act (CAA) section 111(d) to reduce CO₂ emissions from existing coal-fired and natural gas-fired electric generating units (EGUs);³ and CO₂ new source performance standards (NSPS) promulgated under CAA section 111(b) for new, modified and reconstructed power plants.⁴
- “[I]f appropriate,” based on this review, the EO directs EPA to “as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules.”⁵
- The EO further directs EPA to review the proposed federal plan requirements and model trading rule⁶ for the CPP and “determine whether to revise or withdraw” those proposals.
- The EO directs EPA to inform the Department of Justice (DOJ) of its actions, so DOJ can notify the D.C. Circuit and, at the Attorney General’s discretion, DOJ can seek to stay or delay litigation or otherwise seek appropriate relief in the challenges to the CPP⁷ and NSPS⁸ pending before the court. DOJ immediately filed motions in both cases, seeking an abeyance of litigation, pending EPA’s review of the rules.
- The EO rescinds or repeals a series of Obama-era climate memoranda and reports addressing electric power sector emissions, including President Obama’s June 2013 Climate Action Plan and Presidential Memorandum of June 25, 2013 on Power Sector Carbon Pollution Standards.⁹

An EO cannot repeal regulations promulgated through notice and comment rulemaking, which have the force of law. Rather, the EO kicks off what will likely be a long and complex process for EPA to review the CPP and NSPS, draft and publish proposals to suspend, revise or rescind the rules, accept notice and comment on the proposals, address comments on the proposals, and then issue final rules. On March 28, EPA Administrator Scott Pruitt signed notices for publication in the Federal Register, announcing the initiation of EPA's review of these rules.¹⁰ And on April 3, 2017, Administrator Pruitt published a notice, withdrawing the proposed federal plan requirements and model trading rule pending review.¹¹

Regardless of whether EPA proposes to suspend, revise or rescind the rules, legal challenges are sure to follow. And critical to how any revision or rescission might fare in the federal courts is whether the D.C. Circuit grants DOJ's motions to hold in abeyance the pending challenges to the CPP and NSPS.

The new administration's actions in the next few years are likely to shape the fate of GHG regulations governing the electric power sector in important ways. Some states and regulated entities will undoubtedly view potential revision or rescission of the CPP and NSPS as a welcome reprieve from the standards that these rules impose. Other states and regulated entities will fight attempts to weaken the CPP and NSPS, which they supported as a framework for achieving emission reductions and for setting the stage for more uniform regional or nationwide GHG regulations and markets.

This *Client Alert* provides an overview of the regulatory policies of relevance to the electric power sector that are targeted in the EO, describes the administrative law implications of the EO on those policies, outlines potential approaches EPA may take on the CPP and NSPS, and discusses implications of EPA's actions on both the power sector and the international climate change framework.

Background on Regulatory Policies in the Crosshairs

The CPP was promulgated pursuant to section 111(d) of the CAA,¹² a rarely used provision that directs EPA to establish procedures for states to develop plans for implementing and enforcing performance standards for existing sources of an air pollutant, once EPA has established a standard of performance for new sources of that pollutant. The CAA requires EPA to base its performance standards on what it determines is the "best system of emissions reduction [BSER] which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."¹³

The CPP established CO₂ emission performance rate standards for two types of existing electric generating units (EGUs) — fossil fuel-fired steam boilers and natural gas combined cycle units¹⁴—and set statewide emission reduction goals by applying the EGU emission performance rates to each state's mix of affected EGUs (*i.e.*, coal-fired and gas-fired). In determining what constituted BSER for existing sources, EPA looked to what many called "outside the fence" measures — the implementation of which depends on electric power system-wide actions beyond the fenceline of any individual EGU. These BSER measures, divided into three "Building Blocks,"¹⁵ included:

- Improving heat rates at coal-fired steam plants (Building Block 1)
- Substituting generation from lower-emitting existing natural gas combined-cycle plants (gas plants) for generation from higher-emitting steam plants, which are primarily coal-fired (Building Block 2)
- Substituting generation from new zero-emitting renewable-energy generating capacity for generation from existing fossil-fuel-fired plants, which are primarily coal- or gas-fired (Building Block 3)¹⁶

EPA determined in the CPP that EGUs could implement these measures collectively to achieve substantial CO₂ reductions cost-effectively, and without adverse energy reliability impacts.¹⁷ The CPP does not require that states use all of the Building Blocks or that they apply any one of the Building Blocks to the same extent that EPA determines is achievable at reasonable cost. Instead, the CPP allowed the states to select their preferred compliance approach as long as the measures were sufficient to achieve the state's CO₂ emission reduction goals under the CPP. The CPP was immediately challenged in the D.C. Circuit by a number of states and industry groups.¹⁸ That challenge has already been fully briefed and argued before the D.C. Circuit, *en banc*.¹⁹ Petitioners also persuaded the Supreme Court to take the extraordinary action of staying implementation of the CPP, pending judicial review of the rule.²⁰

The final CPP was accompanied by proposed rules outlining federal plan requirements and model emissions trading platforms for states to adopt market-based mechanisms to meet the CPP standards. Moreover, concurrent to finalizing the CPP, EPA, in a separate but related rulemaking, finalized NSPS for new, modified and reconstructed fossil fuel-fired EGUs under CAA section 111(b). For those sources covered by section 111(b), EPA established a BSER and a corresponding numeric emission limit that new, modified or reconstructed sources must meet.²¹ Importantly, the NSPS limits for new coal-fired units would require the application of carbon capture and sequestration technology to a portion of such plants' emissions. Although the CPP and the NSPS final rules were signed concurrently, it is important to note that EPA's promulgation of these NSPS for new sources under 111(b) was the legal predicate for EPA's promulgation of guidelines for existing sources under 111(d).²² Litigation challenging the NSPS is also pending before the D.C. Circuit.²³ Briefing has been completed, but oral argument has not yet occurred.²⁴

The March 28, 2017 EO also revokes the Obama administration's Climate Action Plan, a policy document released on June 25, 2013. The Climate Action Plan was not a regulation and had no binding legal effect. Rather it described numerous actions the Obama administration would pursue, under existing authority, to address climate change. The EO similarly rescinds a presidential memorandum, also issued to EPA on June 25, 2013, entitled "Power Sector Carbon Pollution Standards." The memorandum directed EPA to use its authority under CAA sections 111(b) and 111(d) to issue standards, regulations or guidelines for modified, reconstructed and existing power plants and established a timeline for doing so.

Since EPA previously concluded the majority of the Climate Action Plan components related to the electric power sector and issued the standards outlined in the presidential memorandum, the revocation of these plans and reports has less significance than what lies ahead for the CPP and NSPS rules themselves. For full background on the CPP, the NSPS and the Obama Administration's proposed federal plan requirements and model trading rule to implement the CPP, please see the August 18, 2015 Latham & Watkins Client Alert White Paper, "[EPA Finalizes Historic Greenhouse Gas Emission Reduction Program](#)." For full background on the Climate Action Plan and Presidential Memorandum on Power Sector Carbon Pollution Standards, please see the July 1, 2013 Latham & Watkins Client Alert Commentary, "[President Obama Directs EPA to Regulate Carbon Emissions Under Clean Air Act](#)."

Implications for Pending Litigation

On the same day that President Trump signed the EO, DOJ filed motions in each of the two challenges, requesting that the Court hold the respective matters in abeyance while the agency conducts its review of the CPP and NSPS, respectively.²⁵ DOJ further requested that the abeyances "remain in place until 30 days after the conclusion of review and any resulting forthcoming rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period."²⁶ Finally, DOJ requested that the oral argument set for April 17, 2017 in *North Dakota v. EPA* be continued.²⁷ Notably, the motions state that certain of the Respondent-Intervenors of both suits opposed the filings and intend to file responses in opposition.²⁸ Whether the D.C. Circuit will agree to hold these matters in abeyance remains an open

question. In the CPP litigation — *West Virginia v. EPA* — for example, briefing is complete and the case has been argued and state and NGO Intervenor-Respondents are expected to vigorously oppose DOJ's motion.²⁹ Issuance of a decision in the CPP case — particularly if the rule were upheld — could have a major impact on EPA's options for any impending rulemaking to rescind or revise the existing rule. If the D.C. Circuit agrees to DOJ's requests, this will provide the agency greater latitude to proceed.

On March 30, 2017, by the Court's own motion, the D.C. Circuit removed *North Dakota v. EPA* from the April 17, 2017 oral argument calendar pending disposition of the motion to hold the cases in abeyance.³⁰

Administrative Law Implications of the EO

The EO does not result in any immediate changes to the CPP and NSPS, and it is a bedrock principle of administrative law that revision or repeal of regulations that are subject to notice and comment and legally binding cannot be accomplished by executive order. Accordingly, in order to revise or repeal the CPP and NSPS, EPA will have to undertake one or more new notice and comment rulemakings. This process will likely require over a year at a minimum—and potentially much longer, given the complex legal, technical and policy issues with which EPA will have to grapple (discussed below).

As part of this rulemaking, EPA will need to develop a record in defense of its decision to either revise or repeal the CPP and NSPS. One basic procedural requirement of rulemaking is that an agency must give adequate reasons for its decisions. Under the Administrative Procedure Act and CAA Section 307, which will govern EPA's rulemaking(s), "the agency must examine the relevant data and articulate a satisfactory explanation for its action including 'a rational connection between the facts found and the decision made.'" ³¹ A reviewing court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³² Therefore, EPA may change its view regarding policy actions, but successfully defend a resulting court challenge as long as the record supports the position. However, where the agency has failed to provide a reasoned analysis, courts will hold its action is "arbitrary and capricious" and cannot carry the force of law.³³

EPA developed a robust record in the process of crafting both the CPP and NSPS. The proposal for the CPP, for example, had a 165-day public comment period, and EPA received more than 4.2 million comments from a range of stakeholders that included state environmental and energy officials, local government officials, tribal officials, public utility commissioners, system operators, utilities, public interest advocates and members of the public.³⁴ EPA responded to the comments concurrent with release of the final version of the CPP.³⁵ As EPA develops a plan for how to proceed with the CPP, without a change in facts or different interpretation of the governing law, it will need to justify any modified rule or findings that may diverge from the current record.

EPA's Options for the CPP

EPA Administrator Scott Pruitt signed on March 28, 2017 two notices for publication in the Federal Register — each indicating that EPA will engage in notice-and-comment rulemaking if it determines that suspending, revising or rescinding either the CPP or NSPS is appropriate.³⁶ Guided by the EO, which articulates a policy of maintaining diverse and reliable energy resources to encourage domestic energy production, independence and security, EPA will review the current CPP and alternatives to determine whether the regulations:

- "are appropriately grounded in EPA's statutory authority and consistent with the rule of law"

- “appropriately promote cooperative federalism and respect the authority and powers that are reserved to the states”
- “effect the Administration’s dual goals of protecting public health and welfare while also supporting economic growth and job creation”
- “will provide benefits that substantially exceed their costs”³⁷

The EO directs EPA to determine the substantive course for the CPP. EPA may take a number of potential paths to rescind or revise the CPP — each with a degree of legal risk, given both the requirements of the CAA and the need to develop a robust administrative record and reasoned analysis supporting a departure from the existing rule.

Some opponents of the rule will undoubtedly advocate for full repeal of the CPP, without replacement. One potential approach EPA may consider to justify full repeal would be to adopt a legal argument advanced by opponents of the CPP in comments to EPA on the proposed rule and in D.C. Circuit litigation challenging the rule. Opponents of the CPP have argued that the rule is invalid because EPA cannot regulate power plant emissions under both section 111(d) and section 112 of the CAA, which governs emissions of hazardous air pollutants (HAPs).³⁸ In the 1990 amendments to the CAA, the House and the Senate adopted two competing versions of section 111(d), both of which were enacted into law without being reconciled.³⁹ The Senate version of section 111(d) limits EPA’s authority under that provision to pollutants that are neither criteria pollutants listed under CAA section 108(a) nor HAPs listed under CAA section 112(b). The House version of section 111(d), by contrast, limits EPA’s authority under that provision to pollutants that are not criteria pollutants “or emitted from a source category which is regulated under” section 112.

EPA concluded that the House and Senate amendments should be read to have the same meaning in the context of the CPP — “the Section 112 [e]xclusion does not bar the regulation under CAA section 111(d) of non-[hazardous air pollutants] from a source category, regardless of whether that source category is subject to standards for HAP under CAA section 112.”⁴⁰ However, opponents argued before EPA and the D.C. Circuit that EPA’s interpretation was legally flawed and that the CAA unambiguously precludes EPA from regulating under 111(d) a source that is regulated under section 112 — as are steam power plants under EPA’s Mercury and Air Toxics Standards (MATS) rule.⁴¹ The currency of this argument therefore depends in part on the ultimate fate of the MATS rule, which is still in litigation.⁴² If the MATS rule were to be struck down or if EPA were to repeal the rule, any attempt to rely upon the section 112 exclusion argument in relation to the CPP would be undermined. Regardless, reliance on the so-called “112 exclusion” argument to justify rescission of the CPP would require EPA to reverse its longstanding interpretation of section 111(d) — articulated in rules under both the Bush and Obama administrations — and would carry with it significant legal risk.

One of the important implications of a decision not to regulate emissions from existing power plants could be to reignite state common law nuisance, trespass and negligence litigation against such plants. The Supreme Court in *AEP v. Connecticut* held that federal common law “public nuisance” suits were displaced by Congressional delegation of authority to EPA through the CAA, but the Court did not reach the question of whether the CAA preempts state law claims.⁴³ An express decision by EPA not to exercise its authority under Section 111 could give new life to such state-law litigation.

Others suggest that EPA may instead decide to promulgate a more limited replacement rule or revision to the CPP — for example with regulation limited to “inside the fenceline” (Building Block 1) measures — *i.e.*, heat rate (efficiency) improvements to covered EGUs — as opposed to the CPP’s “outside the

fenceline” system-based measures (Building Blocks 2 and 3). Recent reports point to a 2014 policy paper on section 111(d) that Administrator Pruitt released as Oklahoma attorney general, advocating for purely “inside the fence line” measures as BSER and for substantial state latitude to determination application of those measures.⁴⁴ Under such an approach, EPA might seek to define BSER for GHGs more narrowly than the Obama EPA has done, requiring only modest efficiency upgrades to EGUs on-site, rather than setting more stringent standards based on the variety of measures that could be taken on the interconnected grid to substitute cleaner natural gas-fired power for coal-fired power, and renewables for both. To support such an approach, EPA might argue that the statute leaves room for more than one interpretation, and that its newly adopted (and less stringent) view is reasonable — or, alternatively, that its authority under section 111(d) is unambiguously limited to “inside the fence line” measures.⁴⁵

Revising the CPP along these or similar lines would require EPA both to justify reversal of its prior reading of section 111(d) and to build and defend a new administrative record supporting its change in course. In promulgating the CPP, EPA set forth its conclusion that the three Building Blocks collectively constitute BSER, applying EPA’s legal interpretation of the requirement and addressing relevant considerations such as the degree of reductions achieved, costs, energy requirements, and non-air quality health and environmental impacts.⁴⁶ EPA performed predictive modeling premised on real-world operating data to make the assessment that Building Block 1 of the CPP reflects an achievable degree of emission limitation by applying heat-rate-improvement measures, but EPA found that limiting regulation to heat-rate improvements would be far less effective than the three-Building Block approach — because it would result in dramatically lower emission reductions.⁴⁷ Promulgating a revised CPP based solely on Building Block 1 would either require EPA to change its legal interpretation of BSER — revisiting the legal question of whether EPA can base BSER on reduction measures that arguably lie outside the control of the source —or require EPA to otherwise support and defend the conclusion that, notwithstanding this prior record, “inside the fence” measures alone constitute the “best system of emission reduction” for GHGs from power plants.⁴⁸

Any approach that EPA takes will carry legal risks and is almost certain to invite legal challenges. If EPA opts to promulgate a revised and narrower CPP, regulated entities may opt to challenge the rule. Revision of the CPP would require EPA to confront a number of very complex policy and legal decisions. The legal rationales employed to craft and defend a new CPP, and the record established to support a new rule — and to counter the original — will be consequential for the new rulemaking and future CAA rulemaking. Any such rule, as well as the court decisions rendered on subsequent review of such rule, will shape the scope of actions that can be used to determine BSER for existing sources under 111(d) for years to come. Sectors not yet subject to EPA regulation under 111(d) — for example, refining, specialty chemical manufacturing and other specialized industrial sectors — could be regulated under whichever BSER approach survives judicial scrutiny.

Implications for the NSPS

The EO similarly directs EPA to review the final NSPS for new, modified and reconstructed EGUs with an eye toward suspending, revising or rescinding the standards. These standards promulgated pursuant to CAA section 111(b) are the legal predicate to EPA establishing guidelines for existing sources under 111(d).

As with the CPP more broadly, EPA faces a decision whether solely to rescind the 111(b) standards (which would eliminate the legal predicate for the existing source guidelines under 111(d) and effectively moot the discussion above), or instead to promulgate a revised version of the NSPS. Mere rescission would require the agency to adopt a reasoned justification for declining to address GHG emissions from fossil-fueled power plants, the largest single source of such emissions, notwithstanding the agency’s

extensive record-based statements regarding the dangers to public health and welfare that such emissions pose. Any such determination would undoubtedly be subject to challenge.

Alternatively, EPA may attempt to revise the NSPS to make it less stringent. One of the primary issues in the D.C. Circuit litigation challenging the NSPS is the establishment of standards of performance based on, among other technologies, partial CCS, which new coal-fired plants must implement in order to meet the new standards. Critics argue that CCS technology has not been successfully demonstrated on a commercial scale and therefore has not been “adequately demonstrated” nor is it BSE under section 111(b).⁴⁹ Some commenters proposed alternative standards, based on CO₂ emissions rates achieved by recently built and highly efficient coal-fueled power plants.⁵⁰ Intervenors have also criticized EPA’s failure to recognize lignite’s distinctive emissions characteristics, which present unique technological challenges, arguing that a special sub-category for new lignite-fueled EGUs should have been created.⁵¹

In light of these challenges, EPA at a minimum may opt to promulgate revised standards that do not require partial CCS for new coal-fired plants. Without opining on the legal defensibility of such an approach, the consequences of any such revision are likely less significant than would be potential revisions to the CPP, given that few new coal plants are projected to be built in the foreseeable future. As EPA reviews the NSPS for EGUs, the agency may unsurprisingly face the same challenges as it endeavors to reform the CPP if it chooses to depart from the established administrative record.

Implications of the EO for the Power Sector

By directing EPA to reconsider the CPP and NSPS, the EO sets the country on a path of continued regulatory uncertainty for new and existing power plants for what may be a years-long period. State and regulated entities that viewed the requirements of the CPP as costly compliance burdens will consider this action a boon. However, some regulated entities welcomed some form of national uniformity in GHG regulation. Companies with multi-state portfolios will continue to navigate a patchwork of state- and regional-specific GHG regulations.⁵² Meaningful regional, multi-state coordination is unlikely to occur in the near term, unless a private sector effort emerges — for example, corporate leadership to develop national private sector GHG performance guidelines.

Regardless of the fate of the NSPS and CPP, the power sector continues to move towards lower-emitting sources, as a result of a combination of market forces and state and federal policies. One of the most dominant drivers has been low natural gas prices — which have promoted significant and continuing growth in gas-fired electric generation and a corresponding decrease in coal-fired generation. The Energy Information Administration projects an increase in natural gas-fired generating capacity by 11.2 gigawatts (GW) in 2017 and 25.4 GW in 2018.⁵³ Natural gas-fired generation, which has long stood second to coal-fired generation for electricity, first surpassed coal-fired generation on a monthly basis in April 2015.⁵⁴ If new gas-fired plants come online as planned, annual net additions in natural gas capacity will reach their highest levels since 2005. On a combined basis, these 2017–2018 additions would increase natural gas capacity by 8% from the capacity existing at the end of 2016.⁵⁵ The upcoming expansion of natural gas-fired electricity generating capacity corresponds with a trend of shuttering coal-fired plants, reported by EIA.

State policies are also playing a key role in driving change. According to the latest figures from the National Conference of State Legislatures, 29 states and the District of Columbia have mandatory renewable portfolio standards requiring utilities to purchase minimum levels of electricity generated from renewable sources. Another eight states have voluntary standards for promoting renewable energy.⁵⁶ Other states have implemented market-based programs to reduce GHG emissions. For example, the Regional Greenhouse Gas Initiative (RGGI), an effort by nine northeastern states to reduce carbon

dioxide emissions from power plants in the region, establishes a cap-and-trade program based on proportional regional emissions.⁵⁷ California similarly utilizes an economy-wide, mandatory cap-and-trade program for GHGs, and has a mandatory GHG reporting and registry system.⁵⁸

A broad array of federal regulatory requirements, including the MATS Rule, the Cross-State Air Pollution Rule, the Steam Electric Power Effluent Limitation Guidelines, and the Coal Combustion Residuals Rule, have also played a role reinforcing the trend towards retirement of coal plants and towards lower-emitting generation.

However, current trends in decarbonization are likely to follow a different trajectory in the absence of the CPP, particularly in later years.⁵⁹

International Climate Change Implications

The Paris Agreement, which resulted from the 21st meeting of the parties to the 1992 United Nations Framework Convention on Climate Change (UNFCCC) in 2015, contains commitments by numerous countries to reduce their GHG emissions. More than 70 countries, including the United States, ratified or otherwise agreed to be bound by the COP-21 Paris agreement. The United States was among the countries that submitted a declaration of intended GHG reductions (nationally determined contribution or NDC) in early 2015. The nation's goal under the Paris Agreement is a net reduction of GHG emissions of 26–28% below 2005 levels by 2025.⁶⁰

The extent to which the United States meets its NDC will likely depend on several factors. However, the fate of the CPP is undoubtedly significant to meeting the intended reductions. Because the electricity sector is the largest source of GHG emissions in the US, EPA itself noted that the CPP was a key aspect of achieving the United States' NDC.⁶¹ But just as the CPP signaled the Obama administration's desire for an ambitious agreement coming out of COP-21, a reversal or weakening of the CPP will likely be taken as a further signal of the Trump administration's desire to distance itself from the previous administration's international commitments.

Conclusion

The issuance of the EO kicks off a long and complex process for EPA to review both the CPP and NSPS, draft and publish proposals to revise or rescind the rules, accept notice and comment on the proposals, address comments on the proposals, and then issue final rules. Regardless of whether EPA proposes to suspend, revise or rescind the rules, legal challenges are sure to follow. The outcome of these rulemakings and subsequent litigation will be consequential for the future of federal regulation of GHGs under the Clean Air Act (CAA).

The current uncertainty over the GHG regulations governing the electric power sector is likely to remain for the foreseeable future. Since CPP implementation was stayed by the Supreme Court, existing sources in the electric power sector will be free of federally imposed emissions constraints while EPA reevaluates the CPP and NSPS and completes its rulemakings, and while EPA faces legal challenges to its determinations, assuming the agency opts for full rescission of the CPP rather than a limited, inside-the-fence regulation. Some states and regulated entities will view potential revision or rescission of the CPP and NSPS as a welcome reprieve from the requirements imposed by these rules. Other states and regulated entities will fight attempts to weaken the CPP and NSPS, which they supported as a framework for achieving emission reductions or as a competitive advantage based on their portfolio mixes and for setting the stage for more uniform regional or nationwide GHG regulations and markets. In the interim of federal regulatory uncertainty, states will assume the principal role of GHG regulators, and the electric power sector will continue to

encounter a patchwork of regulations lacking any degree of national uniformity. In any event, strong economic and policy drivers are likely to continue to move the country towards lower-emitting generation.

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Endnotes

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- ¹ Press Release, The White House, Presidential Executive Order on Promoting Energy Independence and Economic Growth (Mar. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1> [hereinafter "Executive Order"].
 - ² The Executive Order rescinded or ordered review of a number of other Obama Administration Policies, but this Client Alert focuses on the implications of the rollback on policies most relevant to the electric power sector.
 - ³ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015); see also Latham & Watkins Client Alert No. 1867, EPA Finalizes Historic Greenhouse Gas Emission Reduction Program (Aug. 18, 2015), <https://www.lw.com/thoughtLeadership/lw-epa-issues-final-ghg-rules> [hereinafter "Latham & Watkins Client Alert No. 1867"].
 - ⁴ Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,509 (Oct. 23, 2015); see also Latham & Watkins Client Alert No. 1867.
 - ⁵ Executive Order § 4(a).
 - ⁶ 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).
 - ⁷ *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. 2015 filed Oct. 23, 2015).
 - ⁸ *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. filed Oct. 23, 2015).
 - ⁹ For more information on the Climate Action Plan, see Latham & Watkins Client Alert No. 1546, President Obama Directs EPA to Regulate Carbon Emissions Under Clean Air Act (July 1, 2013), <https://www.lw.com/thoughtLeadership/LW-obama-carbon-emissions-plan>.
 - ¹⁰ Notice of Review of the Clean Power Plan, Attachment 2 to Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. 2015 filed Mar. 28, 2017), ECF No. 1668274 [hereinafter "West Virginia ECF No. 1668274"]; Notice of Review of the Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, Attachment 2 to Notice of Executive Order, EPA Review of Rule and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance, *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. 2015 filed Mar. 28, 2017), ECF No. 1668276 [hereinafter "North Dakota ECF No. 1668276" or "Notices" together with West Virginia ECF No. 1668274.].
 - ¹¹ Withdrawal of Proposed Rules: 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; and Clean Energy Incentive Program Design Details, 82 Fed. Reg. 16,144 (Apr. 3, 2017).
 - ¹² 42 U.S.C. § 7411(d)(1).
 - ¹³ *Id.* § 7411(a)(1).
 - ¹⁴ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,663 (Oct. 23, 2015) [hereinafter "Carbon Pollution Emission Guidelines"].
 - ¹⁵ *Id.* at 64,787-95.
 - ¹⁶ *Id.* at 64,666-67.
 - ¹⁷ *Id.* at 64,744-51.
 - ¹⁸ See *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015).
 - ¹⁹ See *id.* ECF No. 1613489 (scheduling *en banc* hearing); ECF No. 1637882 (courtroom minutes of oral argument).
 - ²⁰ *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.).

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- ²¹ Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015).
- ²² 42 U.S.C. § 7411(d)(1)(A).
- ²³ *North Dakota v. EPA*, No. 15-1469 (D.C. Cir. 2015 filed Oct. 23, 2015).
- ²⁴ Oral argument was scheduled for April 17, 2017, but on March 30, 2017 the D.C. Circuit removed *North Dakota v. EPA* from the April 17, 2017 oral argument calendar pending disposition of the motion to hold the cases in abeyance. See Order, *North Dakota, et al. v. EPA*, No. 15-1381 (D.C. Cir. filed Mar. 30, 2017), ECF No. 1668612.
- ²⁵ West Virginia ECF No. 1668274; North Dakota ECF No. 1668276.
- ²⁶ See *id.*
- ²⁷ North Dakota ECF No. 1668276.
- ²⁸ West Virginia ECF No. 1668274; North Dakota ECF No. 1668276.
- ²⁹ See docket in *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015).
- ³⁰ Order, *North Dakota, et al. v. EPA*, No. 15-1381 (D.C. Cir. filed Mar. 30, 2017), ECF No. 1668612.
- ³¹ *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted).
- ³² 5 U.S.C. § 706(2)(a); see also 42 U.S.C. § 7607(d)(9).
- ³³ See *State Farm*, 463 U.S. at 57 (“An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis” (citation omitted)).
- ³⁴ On September 18, 2014, in response to requests from stakeholders, the EPA extended the comment period by 45 days, to December 1, 2014, giving stakeholders over 165 days to review and comment upon the proposal. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015).
- ³⁵ *Id.*
- ³⁶ See Notices, *supra* note 10.
- ³⁷ West Virginia ECF No. 1668274.
- ³⁸ Carbon Pollution Emission Guidelines, 80 Fed. Reg. at 64,710.
- ³⁹ *Id.*
- ⁴⁰ *Id.* at 64,711.
- ⁴¹ See, e.g., Opening Brief of Petitioners on Core Legal Issues at 61-74, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb. 19, 2016).
- ⁴² The Supreme Court in 2015 held that EPA erred in failing to consider costs in its threshold (“appropriate and necessary”) determination whether to regulate HAPs from power plants. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015). On remand, the Obama Administration EPA reaffirmed that threshold determination after considering costs. EPA, Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016). However, litigation challenging this determination and the MATS rule continues, and this could conceivably be one of the rules EPA reviews in light of the broader policies of the EO. Executive Order § 2(a)-(b).
- ⁴³ *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423-424, 429 (2011).
- ⁴⁴ Andrew Childers, *Is Pruitt’s 2014 Plan a Blueprint for Carbon Rule Replacement?*, Bloomberg BNA News (Mar. 29, 2017), <https://www.bna.com/pruitts-2014-plan-n57982085903/>.
- ⁴⁵ Arguably, the “beyond the fence line” building blocks in the BSER, such as dispatch shifts and reliance on generation by sources other than regulated EGUs (i.e., renewables) are novel uses of EPA’s authority under section 111(d). Critics questioned whether EPA overstepped its legal bounds by requiring power plants to be responsible for emission reductions that could only be accomplished through means “outside the fence” or outside their direct control.
- ⁴⁶ 80 Fed. Reg. at 64,744-51; see also *id.* at 64,801-02, 64,810-11 (cost considerations); *id.* at 64,670-71, 64,693-94, 64,800, 64,874-81 (energy considerations); *id.* at 64,746, 64,748 (non-air quality health and environmental impacts).
- ⁴⁷ 80 Fed. Reg. at 64,787.
- ⁴⁸ *Id.* at 64,745, 64,748.
- ⁴⁹ See generally, e.g., Murray Energy Corp., Opening Brief of Non-State Petitioner, *North Dakota v. EPA*, Nos. 15-1381 (D.C. Cir. filed Oct. 13, 2016).
- ⁵⁰ See American Coalition for Clean Coal Electricity Comments on EPA’s Proposed Performance Standards for Greenhouse Gas Emissions from New Fossil-Fueled Electric Utility Generating Units, Docket ID No. EPA-HQ-OAR-2013-0495 (May 9, 2014), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0495-9472>.
- ⁵¹ See Final Reply Brief of Petitioner-Intervenors Gulf Coast Lignite Coalition and the Lignite Energy Council, *North Dakota et al. v. EPA*, et al., No. 15-1381 (D.C. Cir. 2015 filed February 3, 2017), ECF No. 1659297.
- ⁵² Many states have already mandated renewable portfolio standards or state or regional cap-and-trade programs to reduce CO₂ emissions. See, e.g., Regional Greenhouse Gas Initiative, *Welcome*, <http://www.rggi.org/> (last visited Mar. 29, 2017) (discussing

how RGGI, a cooperative among nine northeastern states, is the first market-based program in the United States to reduce carbon dioxide emissions through regional cap and trade); see also Assembly Bill 32, Cal. Health & Safety Code § 38501(a) (includes scoping and reporting requirements to achieve maximum technologically and economically feasible reductions, see, e.g., id. § 38561(a); a cap and trade program to enforce limits on carbon emissions from a variety of domestic sources, id. § 38562(c); and regulations seeking to reduce GHG emissions from the transportation sector, see, e.g., id. § 38562(a)).

⁵³ See U.S. Energy Info. Admin., Today in Energy: Natural Gas-Fired Generating Capacity Likely to Increase over Next Two Years (Jan. 30, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=29732>.

⁵⁴ See U.S. Energy Info. Admin., Today in Energy: Natural Gas-Fired Electricity Generation Expected to Reach Record Level in 2016 (July 14, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=27072>.

⁵⁵ See *id.*

⁵⁶ See Nat'l Conference of State Legislatures, State Renewable Portfolio Standards and Goals (Dec. 28, 2016), <http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx>.

⁵⁷ It pertains to Delaware, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine, Maryland and Pennsylvania. See, e.g., Regional Greenhouse Gas Initiative, *Welcome*, <http://www.rggi.org/> (last visited April 5, 2017) Under a cap-and-trade program, an emissions limit, or “cap,” is set for an entire geographic area. Emission sources within the area are given “allowances,” each of which permits the source to emit one ton of carbon dioxide. The number of allowances distributed is equal to the level of the cap. If a source does not possess enough allowances to cover its emissions, it can either reduce its emissions or buy extra allowances from another source. A trading system that covers a large geographic area provides more potential trading partners and consequently more opportunities for efficient trades.

⁵⁸ See Cal. Health & Safety Code § 38570 (West 2006).

⁵⁹ Analysis by the Rhodium Group compares projected U.S. GHG emissions under the EO compared to the Climate Action Plan, and shows a divergence that grows through 2030. Rhodium Grp., *Trump's Regulatory Rollback Begins* (Mar. 27, 2017), <http://rhg.com/notes/trumps-regulatory-rollback-begins>. See also Emily Holden, E&E News, *CO₂ cuts will grind to a halt if Trump EO succeeds – analysis* (March 29, 2017), <http://www.eenews.net/climatewire/stories/1060052260/search?keyword=clean+power+plan>.

⁶⁰ United Nations Framework Convention on Climate Change (UNFCCC), United States Cover Note to Intended Nationally Determined Contribution (INDC), <http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf> (last visited Mar. 29, 2017).

⁶¹ In the CPP itself, EPA states: “This final rule demonstrates to other countries that the U.S. is taking action to limit GHG emissions from its largest emission sources, in line with our international commitments. The impact of GHGs is global, and U.S. action to reduce GHG emissions complements and encourages ongoing programs and efforts in other countries.” 80 Fed. Reg. at 64,700. According to some models, the Final CPP could account for almost half of the total reductions in the INDC. See Karl Hausker et al., *Delivering on the U.S. Climate Commitment: A 10-Point Plan Toward a Low-Carbon Future* (World Resources Institute, Working Paper May 2015), http://www.wri.org/sites/default/files/Delivering_on_the_US_Climate_Commitment_ES.pdf; see also, e.g., Doug Vine, Ctr. for Climate & Energy Sols., *Achieving the United States' Intended Nationally Determined Contribution* (2016), <https://www.c2es.org/docUploads/achieving-us-indc.pdf>.