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State Roles in the Clean Power Plan

A Primer for States

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State Roles under the Clean Power Plan

As architects of compliance plans and primary enforcers of performance standards, states will play lead roles under EPA's Clean Power Plan. This document outlines these roles.

The Clean Power Plan does not impose federally enforceable requirements on states or non-emitting entities, as the proposed rule contemplated. Only affected electric generating units (EGUs) have federally enforceable obligations in the final rule. Yet state decisions will determine pathways for EGU compliance and affect state and EGU obligations. Moreover, a well-designed plan can set market conditions that will attract investment in cleaner generation, energy efficiency, and electric system enhancements that will reduce CO₂ emissions.

I. Background

For more than forty years, the Clean Air Act (CAA) has taken “a cooperative-federalism approach to regulate air quality” (*Oklahoma v. EPA*, 723 F.3d 1201 (10th Cir. 2013)). Typically, EPA sets a “federal floor” for air quality or source performance standards, and states lead on implementing and enforcing these requirements.

The Clean Power Plan is consistent with this approach. EPA set performance targets two sub-categories of EGUs (Subpt. UUUU, Table 1); states will craft plans that set and implement EGU standards at least as stringent as the targets. EPA will then review each state plan to ensure it meets the CAA's requirements, as detailed in the rule. If a state does not file a satisfactory plan, EPA will regulate the EGUs in that state under a federal plan. Congress detailed this procedure in Section 110 of the CAA, and referenced it in Section 111(d).

An approved plan is “federally enforceable,” meaning that the implementing state *and* EPA may initiate an enforcement action when an EGU has violated a specific requirement or prohibition (42 U.S.C. §7413(a)(1), (b)). In addition, if EPA finds that violations “are so widespread that they appear to result from a failure of the state to enforce the plan or program,” (§7413(a)(2)), EPA can assume all plan enforcement. Congress also empowered citizens groups to file a civil action against an EGU who has violated or is in violation of a CAA emission standard or limitation (§7604(a)(1)).

II. Initial Submittal to EPA

By **September 6, 2016**, each state with at least one affected EGU is expected to submit either a final plan or a request for a two-year extension to submit a final plan (40 C.F.R. §60.5760).

An extension request must: 1) identify the plan approaches that the state is considering and describe progress toward a final plan; 2) explain why the state needs an extension; and 3) describe any opportunity for public comment and meaningful engagement with stakeholders, including vulnerable communities, on the initial submittal and going forward (§60.5765). Appropriate reasons for an extension include a state's intent to coordinate with other states and its legislative or administrative rulemaking schedules.

By **September 6, 2017**, a state receiving an extension must submit a report to EPA that commits to a plan approach and includes draft or proposed legislation and/or regulations (§60.5765(c)).

A state's extension request will be considered granted unless EPA notifies the state within 90 days that its submittal is deficient (§60.5765). EPA will promulgate a federal plan within one year of a deficiency notification (§60.5720). If a state makes no submittal, EPA will promulgate a federal plan within one year of the submittal deadline. A state can still submit a plan at a later date, to replace the federal plan.¹

III. Final Plan Submittal to EPA

By **September 6, 2018**, each state is expected to submit a final plan.² EPA proposes to inform a state within 60 days whether the submittal is complete;³ then, EPA will approve or disapprove a state's submittal within one year (§60.5715). If EPA disapproves a state's plan, EPA will promulgate a federal plan within one year (§60.5720).⁴

The required elements of a plan are similar regardless of the type of plan (§§ 60.5740–.5750, .5770–.5835, .5860). The core elements of a state plan, which will be federally enforceable, are: identification of affected EGUs and their CO₂ emissions from the most recent calendar year; emission standards for each affected EGU; triggers for corrective measures and backstop emission standards for state measures (in both cases where necessary, see part IV); EGU monitoring, reporting, and recordkeeping requirements. The plan will also describe the state reports that will be submitted to EPA throughout the compliance period.

States opting to participate in a multi-state plan may file one joint submittal, a joint submittal addressing common plan elements *and* individual submittals to address state-specific elements, or individual plans with “materially consistent” plan elements (§60.5750). Single-state “trading-ready” plans also permit EGUs to trade with EGUs in other states, provided they use an EPA-approved allowance registry or credit tracking system and comply with other requirements (Clean Power Plan (CPP) at 1197–98, 1293–95). States have two additional basic design decisions:

- First, states may set emission standards that are “rate-based” (limiting the pounds of CO₂ per megawatt hour of electricity produced) or “mass-based” (limiting the total tons of CO₂ emitted).
- Second, states must decide on one of two basic enforcement models. An **emission standard plan** requires each EGU to meet federally enforceable rate- or mass-based emission limits. Emission standards must be quantifiable, verifiable, non-duplicative, permanent, and enforceable (§60.5775(a)). A **state measures plan** identifies measures that the state adopts, implements, and enforces as a matter of state law and which are not federally enforceable. A state measures plan must include a backstop of federally enforceable emission standards that is automatically triggered if state measures fail to meet certain milestones (see part IV) (§60.5740).

¹ EPA proposed that under some types of state plans, it would delay the transition from a federal plan to a state plan until after the end of an interim step compliance period, to minimize disruption for EGUs. EPA's default interim steps end on December 31 in 2024, 2027, and 2029. A state may establish shorter interim steps (§60.5880).

² Pending state approvals, EPA proposes that a state may submit a draft plan to expedite review and provide an opportunity for the state to consider EPA's comments prior to submission of a final plan (proposed §60.27(g)).

³ See proposed §60.27(g). These proposed criteria are similar to the final rule's submittal requirements (§60.5745).

⁴ EPA also proposes to allow for a partial approval and partial disapproval of a state plan as well as conditional approval. If EPA partially disapproves a state plan, EPA would issue a federal plan to cover the disapproved portion of a state's plan.

IV. State Roles During Compliance Periods

Regardless of the type of plan that it submits, a state will monitor compliance, submit reports to EPA, and take enforcement actions against EGUs if necessary. Under some plan designs, EPA will require more reporting and additional state responsibility during implementation, to ensure achievement of the standards.

State Roles under All Plan Designs:

1. *Basic Monitoring and Reporting:* A state must submit a report by **July 1, 2021** to demonstrate that it is on track to implement the approved plan (§60.5740). Once compliance periods begin, a state must submit reports by **July 1 of the year** following each interim step period and **biannually by July 1** during the final period. These reports must include each EGU's actual emissions performance and compliance status, and projections about whether it will meet the plan's goals. Reports must also address "all aspects of the administration of the state plan and overall program" (§60.5870).
2. *Enforcing the Plan:* The state assumes primary responsibility for determining compliance and taking enforcement actions, if necessary. EPA defers to a state's interpretation of its plan so long as it is reasonable and does not conflict with the CAA.⁵

Additional State Roles under Some Plan Designs:

Overseeing Emission Reduction Credits: If a state's rate-based plan allows EGUs to hold ERCs to demonstrate compliance, the state must ensure the ERC market's integrity. The state or its agent must evaluate eligibility applications from entities seeking to generate ERCs; review measurement and verification reports submitted by those entities; and issue ERCs through an EPA-approved or -administered tracking system (§60.5805, .5810). Further, the state must approve at least one accredited independent verifier to review each ERC provider's reported results. A state could perform these functions jointly with other states, even absent a multi-state plan (CPP at 1294–95).

Regulating New Sources: If a state chooses a mass-based plan, it must address the potential for emissions leakage to new sources. The state could subject new sources to an emissions budget under state law in conjunction with federally enforceable emission limits for affected EGUs (§60.5790(b)). EPA provided mass emissions goals for states that choose this option (Subpt. UUUU, Table 4). Other options for addressing leakage might require additional demonstrations to EPA at the outset, but might not require as much ongoing involvement by the state during the compliance period (§60.5790(b); CPP at 1175–76).

Submitting Corrective Measures: Depending on the form of the emission standards in its plan, a state may need to provide for corrective measures, to make up for any shortfall and assure achievement of future goals.

- Under a rate-based plan, corrective measure provisions are required if the state does not apply the subcategory emission rates (Table 1) to each affected unit or the statewide rate (Table 2) to all units.
- Under a mass-based plan, corrective measure provisions are required if the state allows for interstate trading or does not include state-enforceable limits on new sources.

These types of plans must include the corrective measures or identify triggers that would require the state to notify EPA and propose corrective measures within two years (§60.5785). Triggers listed in the rule

⁵ See, e.g., *Wisconsin's Env'tl Decade, Inc. v. Wis. Power & Light Co.*, 395 F. Supp. 313, 323 (W.D. Wis. 1975).

include if aggregate EGU performance is deficient by at least ten percent during the interim step 1 or step 2 periods, or if EGUs miss the interim 2022–2029 goal or any final goal period starting in 2030 (§60.5740).

Implementing State Measures: If a state chooses a mass-based plan, the state may include measures the state will design, implement, and enforce to help EGUs meet the required performance standards (§60.5780). These “state measures” could include renewable energy programs, state-run market-based emission budget trading programs (such as RGGI), or a state fee on CO₂ emissions from EGUs. They are not federally enforceable.

As noted, any plan containing state measures must include a backstop of federally enforceable emission standards to be imposed on affected EGUs if triggered or when state measures miss a programmatic milestone (§60.5740). In addition to the basic reporting requirements, the state must submit a separate state measures progress report annually beginning in 2022 and biannually beginning in 2032 (§60.5870).

V. Federal Plan

While the Clean Power Plan is final, EPA’s federal plan is proposed.

The Supreme Court has held that “Congress may urge a State to adopt a legislative program consistent with federal interests” by preempting state regulation or attaching conditions to Federal funding.⁶ The CAA tracks this framework. Congress “offer[s] States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation.”⁷ Here, if a state does not act, EPA will promulgate a federal plan that imposes equivalent standards directly against EGUs (§60.5720).

Under other CAA programs, Congress conditioned federal funding on state cooperation. However, the Clean Power Plan prohibits EPA from withholding federal funds (§60.5736). Neither is EPA’s proposed federal plan intended to be a punitive response to states choosing not to submit plans; instead, it is designed as a parallel track for program implementation. In fact, EPA proposes that a state could seek a delegation of authority to implement the federal plan (proposed federal plan at 334–336). Moreover, EPA has proposed to allow any state to replace EPA’s allocation of mass-based tradable emission allowances with a state-developed allocation (proposed federal plan at 307–318). A state could also submit a state plan at any time, to supplant a federal plan (§60.5720).

EPA has proposed both a rate-based and mass-based federal plan, but expects to finalize one option as the final plan in the summer of 2016. EPA will promulgate a federal plan in any state that (1) does not timely submit a complete plan or revision; or (2) submits an unsatisfactory plan (§60.5720; proposed §60.27(c)).

VI. EPA Calls for Plan Revisions

EPA proposes to adapt the so-called “SIP Call” mechanism that EPA has used for state plans under section 110 (proposed § 60.27(j)). A “call” for revisions may be necessary if a state plan is “substantially inadequate”, or if a state were not implementing or enforcing its own plan. Under the proposed terms of the “call,” EPA would notify a state of deficiencies; within 18 months, the state would need to submit revisions to correct the problem or EPA would impose a federal plan (proposed §60.27(j)).

⁶ New York v. United States, 505 U.S. 144, 166-67 (1992).

⁷ Id., 505 U.S. at 167.