

President Obama Announces Broad Climate Action Plan, with Power Sector GHG Emissions as Centerpiece

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On June 25, 2013, during a speech at Georgetown University, President Barack Obama unveiled a suite of measures and approaches contained in The President's Climate Action Plan (or Plan) aimed at reducing greenhouse gas (GHG) emissions and adapting to the impacts of climate change. The Plan signals that regulation of GHG emissions by the Environmental Protection Agency (EPA) will be a major focus of the President's second term in Office and has significant implications for particular industries, most notably, for the electric power sector. The Climate Action Plan focuses on three broad areas: (1) reducing GHG emissions in the U.S., (2) preparing the U.S. for the effects of climate change, and (3) partnering with other countries to reduce GHG emissions and adapt to climate change. The Plan reaffirms the President's commitment to "reduce U.S. [GHG] emissions in the range of 17 percent below 2005 levels by 2020." According to the Plan, the GHG mitigation measures outlined are designed to be collectively sufficient to achieve that overarching goal.

New Power Plant Standards

On the same day, in a Memorandum to the EPA Administrator, the President directed EPA to issue a new proposed rulemaking by September 30, 2013 to address carbon emissions from new power plants. In April 2012, EPA proposed a New Source Performance Standards (NSPS) for emissions of carbon dioxide (CO₂) from new electric utility generating units (EGUs) of greater than 25 megawatts capacity. The proposed NSPS would have required these new EGUs, regardless of the type of fuel they use, to meet a "standard of performance" of no more than 1,000 pounds of CO₂ emitted per megawatt-hour (lb CO₂/MWh), approximately the performance of natural gas combined-cycle power plants. Because new coal-fired power plants typically emit at least 1,800 lb CO₂/MWh, the April 2012 proposed rule would have effectively prohibited the construction new coal-fired power plants unless they were equipped with carbon capture and sequestration (CCS) technology at some time within the first ten years of operation and would therefore achieve the 1,000 lb CO₂/MWh as a weighted average over a 30-year period. This proposal acknowledged that CCS technology is still under development and not yet commercially available.

EPA failed to finalize the April 2012 proposed rule within a year of its proposal, as required by the Clean Air Act (the Act). Many observers speculated that EPA was considering how to avoid legal vulnerabilities associated with its proposed decision to set one standard for both coal- and natural gas-fired power plants. The President's Memorandum states that EPA had indicated its intention to propose

a new rule “in light of the information conveyed in more than two million comments” on the April 2012 proposed rule. The Memorandum provides no specific direction on whether EPA should propose a single standard addressing both new coal-fired and natural gas-fired power plants, or instead separate standards based on fuel type.

Existing Power Plant Standards

In addition, the Memorandum directs EPA, using its authority under section 111(b) and 111(d) of the Act, to issue “standards, regulations, or guidelines, as appropriate” to address carbon emission from “modified, reconstructed, and existing power plants and build on State efforts to move toward a cleaner power sector.” Specifically, EPA is directed to (i) propose standards, regulations or guidelines for modified, reconstructed and existing plants by June 1, 2014, (ii) finalize them by June 1, 2015, and (iii) include in its guidelines for existing plants a requirement that states must submit to EPA their implementation plans required under section 111(d) of the Act by no later than June 30, 2016.

Notably, under section 111(b) of the Act, EPA can issue a NSPS that directly regulates new power plants. EPA’s authority to regulate GHGs from existing power plants, is a bit different, however, as section 111(d) authorizes EPA to establish guidelines that will then be used by the states to develop their own standards of performance for existing sources. While this authority has seldom been relied upon by EPA, the process is supposed to mirror the well-known process whereby states submit state implementation plans (SIPs) for achievement of the national ambient air quality standards (NAAQS). For states that fail to adopt an adequate plan or to enforce it, EPA has the same authority it has to step-in and issue a plan as it does when a state fails to develop or implement a SIP to achieve the NAAQS. The President’s Memorandum highlights the “cooperative federalism” framework under the Act, which has been tested in recent decisions of the U.S. Court of Appeals for the D.C. Circuit, most notably in rejecting EPA’s Cross-State Air Pollution Rule.

In issuing the guidelines under section 111(d), the Memorandum further requires EPA to “develop approaches that allow the use of market-based instruments, performance standards, and other regulatory flexibilities” and to “ensure that the standards enable continued reliance on a range of energy sources and technologies” and are also “consistent with the continued provision of reliable and affordable electric power for consumers and businesses.” The mandate to develop an approach that allows for use of “market-based instruments” may affirm the position of prominent environmental groups and thought leaders who have suggested that EPA has the authority under section 111(d) to establish guidelines that rely upon existing market-based trading programs, such as the Regional Greenhouse Gas Initiative (RGGI) implemented for the power sector by several northeastern states or California’s economy-wide Cap-and-Trade Program, to achieve the standards of performance. While several legal questions arise as to whether such trading programs or, likewise, states’ renewable goals and energy efficiency programs could be relied upon to meet section 111’s mandate that the performance standards represent the “best system of emission reduction” that has been adequately demonstrated, the President’s Memorandum certainly provides further impetus for EPA to think hard about how to accommodate such programs within its forthcoming section 111(d) guidelines.

High Global Warming Pollutants

Additional measures in the Climate Action Plan to reduce U.S. GHG emissions include incentivizing the development of more renewable energy on federal lands, finalizing more stringent energy efficiency standards for federal buildings and home appliances, and tightening fuel economy standards for heavy-duty vehicles after 2018. The Plan calls for reducing emissions of high global warming potential gases, such as methane and hydrofluorocarbons (HFCs), which are much more potent GHGs than

CO2; but the Plan fails to include anything as clear as to how this will be achieved as its centerpiece element for reductions within the power sector.

International Efforts

Finally, the Climate Action Plan calls for a renewed focus on international efforts to address and prepare for climate change. Most notably, the Climate Action Plan states that the U.S. will end government support for public financing of new foreign coal-fired power plants, except for (1) the most efficient coal technology in cases where no other economically feasible alternative exists, or (2) facilities deploying CCS technologies. Additionally, the Climate Action Plan supports expanding programs for reducing emissions from deforestation and forest degradation (REDD) in developing countries, controlling emissions of short-lived GHGs, and continuing the process under the United Nations Framework Convention on Climate Change (UNFCCC).

Conclusion

While some may perceive the Climate Action Plan as a mere repackaging of the Administration's current climate change policies and overdue obligations under existing settlement agreements, the Plan is significant for signaling that the Administration will use all the levers at its disposal to mitigate GHG emissions and prepare for the effects of climate change. The Administration has powerful tools in this regard, especially with respect to EPA's rulemaking authority under the Act, as affirmed by the *Supreme Court in Massachusetts v. EPA*. The fact that the President has had to rely exclusively on executive authority to achieve his goals is illustrative, however, of the fractured political environment around climate change issues and the lack of bi-partisan support in Congress to adopt comprehensive federal legislation. Notwithstanding this stalemate, the President appears committed to keeping his State of the Union pledge to take executive action in the absence of federal legislation. His leadership in this respect may also take some of the heat off of EPA, whose regulation of GHGs has been villainized by many in Washington, most recently during the Senate confirmation hearings for the President's nominee to lead EPA, Gina McCarthy.



Paul Hastings Environment and Energy lawyers are deeply involved in the development of climate change policy, including EPA's regulation of power sector emissions. If you have any questions concerning these developing issues, please do not hesitate to contact any of the following San Francisco Paul Hastings lawyers:

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