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The Clean Power Plan's Winners And Losers

Law360, New York (August 19, 2015, 10:37 AM ET) --

Citing "immediate risks" to national security, public health and the economy, the Obama administration adopted ambitious regulations and policies to implement its Clean Power Plan, establishing the first national standards to limit greenhouse gas emissions from existing power plants. The final rule, issued by the U.S. Environmental Protection Agency on Aug. 3, 2015, requires states to reduce carbon emissions from power plants 32 percent below 2005 levels by 2030. If fully implemented, the rule will have significant implications for how energy is generated, transmitted and consumed in the United States.

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The EPA's proposed rule faced withering criticism on legal and policy grounds by the coal industry, various states, market participants and others. Certain of the EPA's modifications from the proposed to the final rule appear to be a well-orchestrated attempt to shore up the agency's legal defenses in the face of an anticipated fusillade of legal challenges. At the same time, the final rule makes certain emission reduction requirements more stringent.

Three "Building Blocks" to Reduce GHGs, Not Four

The rule, adopted pursuant to Section 111(d) of the Clean Air Act, specifies interim state-level compliance targets or "glide paths" for 2022 through 2029 (the start date was moved back from 2020 in the proposed rule). Final compliance targets for 2030 are to be maintained thereafter. Individualized targets for each state are established by analyzing pounds of carbon emissions per megawatt-hour of electricity generated based on 2012 historical data and applying a best system of emissions reduction. The BSER consists of three "building blocks" for reducing emissions:

- Building Block 1: Improve heat rates at coal-fired steam power plants.

- Building Block 2: Increase generation from lower-emitting existing natural gas combined cycle power plants, while reducing generation from higher-emitting steam power plants.

- Building Block 3: Increase generation from new zero-emitting renewable energy generating capacity while reducing generation from fossil fuel-fired power plants.

The final rule excludes a previously proposed fourth building block, which would have employed energy efficiency to reduce the overall generation required. However, energy efficiency is still an option for compliance as the building blocks are only a guide and states may use a range of options for meeting their targets. States are also presented with opportunities to cooperate with other states in achieving their goals.

Further, states will be confronted with a federal implementation plan as a backstop in the event of noncompliance with the rule. Here is the EPA's proposed federal plan and model rules.

Under the final rule, states must submit final implementation plans for achieving their compliance targets by 2018 and start taking action by 2022. Worth highlighting is the final rule's flexibility in allowing states to adopt individually tailored approaches. By allowing conversion of rate-based target emission goals into standards based on tons of emissions per year (mass-based standards), the rule leaves the door wide open for adoption and further elaboration of state and regional cap-and-trade programs to achieve compliance. Inspired by the relatively stable track record of California's ambitious trading program and the Regional Greenhouse Gas Initiative in the Northeast, other states may pursue similar market-based approaches so that the federal decarbonization mandate may lead to a nationally (or at least regionally) integrated approach to GHG regulation.

Clean Energy Boost

Of particular note to wind and solar project developers and others, the final rule expands the Clean Energy Incentive program to offer credits to states acting quickly to invest in renewable energy and energy efficiency. Although participation in the program will be optional, states that opt in would be able to take advantage of bankable emission rate credits or allowances to comply with performance requirements.

The final rule includes several other features not present in the proposed rule, including changes favorable to nuclear energy and incentives for utilities to construct renewable energy projects in poorer neighborhoods.

The EPA also issued a concurrent rule setting standards for *new* coal-fired power plants. In the future, these plants will need to meet a pound-per-MWh standard that will require the use of technologies such as carbon capture and storage technology or cofiring with natural gas. The EPA's final rule for new plants includes a carbon emissions limit of 1,400 pounds per MWh. That is more lenient than the EPA's proposed mandate of 1,100 pounds of carbon emissions per MWh. Together, these new rules are intended to mark the beginning of a significant shift away from coal as a source of electricity.

Reliability Safety Valve, Federal Coordination and Energy Regulation

There was much debate about the extent to which the proposed Clean Power Plan might adversely impact electric system reliability. The final rule provides a "reliability safety valve" for individual sources where there is a conflict between the requirements a state plan imposes on a specific affected

generating unit and the maintenance of electric system reliability in circumstances that present substantial reliability concerns. Although the rule language uses the phrase “unforeseen emergency” to describe the standard that must be met for the safety valve to apply, the preamble describes the standard as an “unanticipated system energy” or “unanticipated catastrophic event” to be used “only in exceptional situations.”

The EPA, U.S. Department of Energy and Federal Energy Regulatory Commission have agreed to coordinate their efforts to help ensure continued reliable electricity generation and transmission during implementation of the rule. The agencies put out a memorandum that reflects their joint understanding of how they will work together to monitor implementation, share information and resolve any difficulties that may be encountered.

There is no question that FERC, state energy and environmental regulators, the North American Electric Reliability Corporation and regional reliability entities will have numerous challenges under the Clean Power Plan with respect to reliability. In addition, FERC and state public service/utility commissions will have their hands full managing the transition, minimizing rate impacts to consumers and determining how best to regulate wholesale and retail electricity markets, respectively, in an era of increased “environmental dispatch.”

Winners and Losers

At the risk of oversimplifying, renewables (especially solar and wind), natural gas (though not quite to the extent proposed in the draft rule) and nuclear are the winners. The anticipated increase in renewable (including distributed) sources of electricity will require substantial transmission system upgrades and development. Increased electric transmission and natural gas infrastructure development and construction will present challenges in harmonizing decarbonization with other impacts to natural resources, including species and water sources.

Coal is the big loser.

For this reason, while President Obama’s announcement touts the Clean Power Plan as the “single most important step America has ever taken in the fight against global climate change,” litigation challenging the final rule is certain. As the statewide emission targets have changed from the proposed to final rule, many states are beginning to grapple with the challenges of compliance. And after urging states to delay compliance or “just say no,” it’s been reported that Senate Majority Leader Mitch McConnell plans to have the Senate devote time this fall to trying to topple the rule through any means available, including the Congressional Review Act and riders on legislation to fund the federal government.

Nonetheless, many states and utilities have started taking steps to comply with the Clean Power Plan and are evaluating their options for meeting the compliance targets. Depending on how states choose to implement the rule, this means likely increased opportunities in the development of wind, solar and natural gas generation, energy efficiency, and projects to build and operate new natural gas and electric transmission/distribution infrastructure.

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