

Client Alert.

March 27, 2012

EPA Proposes Nationwide Limits on Greenhouse Gas Emissions from Power Plants

By William Sloan, Michael Steel, Peter Hsiao, and Megan Jennings

Today, the U.S. Environmental Protection Agency (EPA) proposed a landmark rule that would establish the first national limits on greenhouse gas emissions from power plants. The proposal, which would set a limit of 1,000 pounds of carbon dioxide per megawatt hour, would effectively prevent new coal-fired power plants from operating without carbon-capture technology. While environmental interests are applauding the effort, certain industry and congressional representatives are warning that the requirements will have dire economic consequences.

BACKGROUND

Five years ago this week, the U.S. Supreme Court held in Massachusetts v. EPA that greenhouse gases, including carbon dioxide, qualify as “pollutants” under the Clean Air Act, and as a result the EPA was required to determine whether greenhouse gases endanger public health and welfare. In December 2009, the EPA issued the finding required by the Supreme Court’s decision, concluding that greenhouse gases threaten the public health and welfare of current and future generations by contributing to long-term changes in climate. The new regulations, proposed under the Clean Air Act’s New Source Performance Standards, represent a major milestone in the agency’s effort to drive the energy industry to adopt technology to combat climate change.

EFFECT OF RULE

The EPA’s proposed rule would apply only to future—not existing—power plants, and would exempt newly permitted plants beginning construction within a 12-month window. Natural gas-fired plants already generally operate below the proposed threshold. However, coal plants would need to install new technological controls, which industry groups warn are not cost-effective. According to the EPA, the economic effects will be limited, in part because the energy industry is already shifting away from reliance on coal and toward natural gas.

OBSTACLES TO ADOPTION

Even if the EPA finalizes the rule in its current form, it is almost certain to face challenges in Congress and the courts. Senator James Inhofe (R-Oklahoma) has already stated he would spearhead Congressional action to overrule the measure, and prevent the agency from taking similar steps in the future. At the same time, an industry challenge to EPA’s adopted permitting thresholds for GHGs (*Coalition for Responsible Regulation v. EPA*) is working its way through the courts, and it appears inevitable that the power plant rule will result in litigation as well.

NEXT STEPS

Members of the public will have 60 days to comment on the proposed rule, and the EPA will be holding hearings to receive testimony on it. Given the lightning-rod nature of the issue of energy prices in this election year, it does not appear likely that the agency will adopt a final rule before November. The EPA’s proposal will, however, stoke the fire of the national debate over energy and climate change policy.

Client Alert.

Morrison & Foerster's lawyers are some of the nation's leading experts in energy, environmental, and clean technology law. For more information, please contact:

Peter Hsiao
(213) 892-5731
phsiao@mofo.com

William Sloan
(415) 268-7209
wsloan@mofo.com

Michael Steel
(415) 268-7350
msteel@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.