



“Dear EPA...”

Yesterday, EPA announced its decision to extend the comment period on the Clean Power Plan—the agency’s proposed rule to regulate power plant greenhouse gas (GHG) emissions under Clean Air Act § 111(d)—until **December 1, 2014**. The comment period was originally scheduled to last 120 days, until October 16th. **You can find a list of compiled resources and background information on the Clean Power Plan [here](#).**

Stakeholders may see EPA’s comment deadline extension as either a blessing or a curse. On one hand, most of us are still trying to unpack the hundreds of pages of rule text and technical support documents. On the other hand, given the breadth, length, and complexity of the proposal, we could hold hearings and seminars until judgment day and still have issues left to discuss. Not to mention that the Monday deadline means many poor lawyers will be finalizing comments over the Thanksgiving holiday. (Ask mom to set aside a slice of pie for your staff attorney.)

I view the comment deadline extension as a positive development for the state regulators who are positioned to do much of the heavy lifting to gather relevant data, coordinate relevant entities, and communicate with EPA about gaps in the proposal.

What exactly should states be doing between now and December 1st as they prepare their comments to EPA? It just so happens that I was asked to speak about this very topic today as a panelist on a [National Regulatory Research Institute \(NRRI\) teleseminar](#). I share a version of my presentation here in the form of a roadmap for state comments on the Clean Power Plan. First, I outline a few useful, informative things you, state regulators, can do in advance of sitting down to draft comments to help you think about what the proposed rule means for your state. Then, I present several substantive issues you may wish to consider as you develop your comments.

- 1. Adopt the appropriate commenting mindset.**

It is important to emphasize that the proposed rulemaking is just an early step in the regulatory process. EPA set forth a variety of regulatory alternatives and open questions for comment. The contours of the rule remain unsettled. Ultimately, the final rule (expected June 2015) could look very different from this proposal. No doubt EPA will receive an extraordinarily large volume of comments, and the agency may materially alter the content of the rule in the course of responding to comments and preparing the final rulemaking.

If there is anything you would like to see in the final rule that is not in the proposal, or any challenges you or the stakeholders in your state see with the proposed rule, now is a good time to flag these issues and begin a conversation with EPA. *EPA is actively seeking feedback and wants to hear from states about the proposal, including suggestions of which legal design options to adopt and what additional guidance to include in the final rule.*

2. Consult with other relevant public entities.

Your state air pollution regulator is responsible for submitting the state plan and likely will play a key role in determining your state's emission reduction pathway—but not the only role. Other entities may be essential for federal compliance or simply beneficial to include in this process because they have relevant information or expertise, or play a role in implementing relevant emission reduction programs. A few entities you may want to consider consulting include:

- air pollution control agency,
- state energy agency/office,
- public utilities commission,
- department of natural resources,
- governor's office,
- consumer/ratepayer advocate, and
- utility representatives.

As an example of interagency collaboration, Colorado's energy agencies have a weekly standing call to discuss issues related to the Clean Power Plan. In the course of your consultations, you might consider whether it makes sense to develop joint state agency comments.

3. Consult with stakeholders.

You may want to hold a public meeting and/or request formal or informal input from stakeholders such as:

- utilities (IOUs, POU, cooperatives),
- utility associations,
- environmental groups,
- renewable energy developers, and
- major electricity customers.

States have utilized a variety of methods to engage with stakeholders to date. As a few examples:

- California's energy agencies recently held a joint [public meeting](#) guided by a [discussion document](#) that outlined some of the key questions and considerations on which the energy agencies sought feedback.
- Iowa's Department of Natural Resources is holding a series of [meetings](#) allotting each stakeholder a few minutes to share an overview of the comments it plans to provide to EPA.
- Arkansas' Department of Environmental Quality and Public Service Commission host a [111\(d\) Stakeholder Workgroup](#) to share information and discuss options for the Arkansas plan.

4. Inventory existing “outside the fenceline” policies and programs; consider how they mesh with the proposed rule; identify implementing entities.

Begin taking inventory of any existing “outside the fenceline” state energy and environmental policies and programs that are relevant to reducing the carbon intensity of your state's electricity sector. A few examples include:

- RPS,
- energy efficiency standards,
- renewable energy incentive programs,
- integrated resource plans,
- ISO/RTO demand response protocols,
- voluntary standards,
- loading orders,
- smart metering programs,
- planned transmission upgrades,
- building energy codes, and
- any energy efficiency measures already in SIPs to achieve NAAQS.

Keep in mind that many of these programs may be administered by entities other than air

pollution control regulators. It may be beneficial to consult with these entities. Consider also how well existing state programs harmonize with the proposed rule. For example, the scope of a state policy may be broader or narrower than the electricity sector, or its compliance timeframe might differ from that of the Clean Power Plan.

5. Do some rough unit- and system-level baselining.

Comparing the 2030 target to the 2012 baseline is not sufficient to understand the impact of the rule. The electricity sector in every state will undergo major transformations between now and 2030 even absent the Clean Power Plan—and EPA largely ignored these dynamic changes when it calculated the state targets. Understanding roughly where your state’s electricity sector will be in terms of carbon intensity by 2030 under a “business as usual” scenario is essential. It may be challenging to model the state’s energy system exactly according to the parameters of the Clean Power Plan, but do what you can with existing tools and capacity to get a basic picture.

Some specific things you might want to inventory include:

- planned power plant repowering projects,
- expected divestments and retirements,
- impacts of existing energy efficiency and renewable energy programs
- in-state and out-of-state facilities supplying electricity to customers in your state,
- unit-level GHG emission data (EPA has a mandatory emissions reporting rule for large GHG sources; your state also may have a GHG emission inventory).
- future load projections (including any electrification increases associated with electrified transportation),
- top electricity users and top GHG emitters in your state,
- known “inside the fenceline” emission reduction opportunities, and
- state/regional renewable energy and energy efficiency potential studies.

All of this information can inform your state comments. Once you have a basic understanding of your state’s baseline emission trajectory and strategies that have reduced emissions in the past or are projected to reduce future emissions, you can think about where your state stands in relation to the following substantive issues.

1. Interstate Collaboration

While the Clean Power Plan does not require interstate collaboration, it supports and encourages regional and multistate approaches. There has been much discussion of the fact

that the default state-by-state structure of the Clean Power Plan is complicated by electricity import/export relationships on the ground. For example, here in West, there are many long-distance electricity transfers across state lines. In some regions, RTOs play a major role in dictating how a state's generation is dispatched to a regional grid.

The proposal envisions that states can account for these and other cross-state impacts through multistate partnerships. For example, states can establish an agreed-upon accounting methodology for emission reductions associated with renewable energy and energy efficiency investments. States may want to comment on whether the rule properly recognizes import/export relationships and the interconnected nature of the grid, ensures that credit for emission reduction investments is distributed to the appropriate state without double-counting, and adequately supports and facilitates multistate partnerships that would improve compliance efficiency in your state.

Some issues to consider:

- **Would a regional approach make sense for your state?** What are the regional import/export and transmission dynamics? What states fall into the footprint of your RTO/ISO? Do you already participate in a relevant interstate partnership (e.g., the Regional Greenhouse Gas Initiative (RGGI) or Pacific Coast Collaborative)? With which states might you partner?
- **What forms of interstate collaboration might be best?** Begin evaluating the potential challenges and opportunities of different design options (e.g., multistate plans designed to achieve a multistate target, MOUs, state-specific plans that include common plan elements, such as a common accounting system). Take inventory of any existing interstate agreements, and think about how they might serve as a legal design model.
- **What tools could be helpful to account for cross-state impacts?** Take stock of tools that currently facilitate interstate collaboration in the electricity sector (e.g., the Western Renewable Energy Generation Information System (WREGIS), which creates renewable energy certificates for states in the Western Electricity Coordinating Council).
- **Given competitive market dynamics and interstate grid dynamics, what actions could other states take that could impact your state's compliance?** Could interstate agreements help address these issues?
- **What types of accounting rules/federal guidance would support regional collaboration?** There may be interstate conflicts over credit for emission reductions, and the interstate nature of the grid raises the possibility of double-counting. EPA seeks comment on how, if at all, it may be able to allow states to take credit for out-of-

state emission reductions resulting from energy efficiency programs while avoiding double-counting. What guidance regarding legal responsibilities and emission reduction measurement would facilitate interstate agreements with your desired partners?

- **Should EPA develop multi-state goals that track RTO/ISO footprints?**
- **How should multi-state goals be calculated?** For states submitting a multi-state plan, EPA declares that individual state goals would be replaced with a multi-state goal. How should multi-state goal calculation differ from individual state goal calculation?

2. Rate-Based vs. Mass-Based Targets.

The proposal would give states the option to use as a compliance standard either the EPA-issued rate-based target (lbs CO₂/MWh) or a mass-based goal (tons CO₂/state/yr). A state opting to use a mass-based target must describe the process used to calculate the target.

Some issues to consider:

- **What type of target might make sense for your state?** Which might provide greatest flexibility for the state? What are the pros and cons of each (e.g., some states, such as California, have climate mitigation programs that are already pegged to a mass-based target)?
- **What guidance would you want from EPA about converting from a rate-based to a mass-based target?** In practice, the process of converting between rate-based and mass-based targets is complex. EPA is seeking comment on how to calculate mass-based goals, and what form of guidance to provide to states about the calculation process.
- **Is there an advantage to working with states that adopt the same compliance metric?**

3. Evaluating, Measuring, Verifying, and Reporting (EMV&R) Emission Reductions.

Emission reductions associated with “outside the fence line” emission reduction strategies need to be accurately evaluated, measured, and verified so that states can count them toward compliance. Your state may need additional tools to calculate the emission reductions associated with measures such as appliance standards and building codes that are not typically subject to regulatory EMV. At the same time, your state may want to balance its desire for clear guidance with its desires to retain autonomy to innovate in state

policies and to reduce unnecessary procedural hassles.

Some issues to consider:

- **Evaluate existing EMV tools.** Your state may already use certain EMV protocols. Your regulatory agencies may have their own methodologies, or interstate coordinating bodies may require specific protocols. As a first step, you can investigate the utility of existing EMV tools and think about whether they could serve as a model for EMV in this context.
- **What additional guidance does your state want from EPA about EMV** that is not already in the rule and technical support documents?
- **What would you want to see in federal interagency guidance regarding EMV?** EPA states in the proposal that the agency intends to develop, in concert with other federal agencies, new guidance specific to the EMV of renewable energy and demand-side energy efficiency programs for the purposes of state plans.

4. **Federal Approval Requirements and “Enforceability.”**

EPA’s proposal reiterates the statutory requirement that state plans must include “enforceable” measures that reduce EGU emissions. Typically, enforceable measures include things like state statutes, state regulations, or state PUC orders. By virtue of their inclusion in a state plan, enforceable state measures are federally enforceable.

In the context of the Clean Power Plan, enforceability raises concerns about expanding federal presence into areas that are traditionally the province of state regulators. States have an interest in ensuring that state cap-and-trade, renewable energy, and energy efficiency programs can be used to comply with the Clean Power Plan while retaining state flexibility and autonomy over these policies, and with minimal procedural hassle.

EPA seeks comment on specific open questions related to enforceability, including: **1)** whether EGUs must be held accountable for implementing renewable energy and energy efficiency measures, or whether other entities, such as the state itself, can be responsible; and **2)** whether inclusion in a state plan renders such measures federally enforceable. Notably, nothing in the Clean Air Act prohibits states from including other stuff in state plans in addition to enforceable measures.

In the proposal, EPA set forth several approaches to state plans that could avoid rendering all state emission reduction programs federally enforceable.

Some issues to consider:

- **What enforceability method would be best for your state?** Ideally, what would the state like to put forth as the federally enforceable component of its plan? Which state programs would the state prefer not be federally enforceable? Would it benefit the state to commit to achieving emission reductions without making its emission reduction programs themselves federally enforceable, as some states (e.g., California, Texas, and New York) do in their SIPs under Clean Air Act § 110?
- **How can the state show that its chosen strategy will achieve the required emission reductions?** What types of data would the state need to report to show compliance? Does the state already collect this data from its facilities?

5. State Goal Calculation.

Some environmental groups have criticized EPA for not setting more ambitious state targets. Some industry groups and states have criticized EPA for adopting overly aggressive targets. EPA writes in the Clean Power Plan that it aimed to calculate “reasonable rather than maximum possible” state targets so as to allow for state flexibility. EPA made a number of general assumptions in calculating the four building blocks that went into development of the state target (e.g., projected demand growth, energy mix, cost-effectiveness of RE/EE). EPA made some of these assumptions on a state-by-state basis, others on a national or regional basis. States may wish to comment on whether the state targets *strike the correct balance between stringency, so as to ensure national carbon emission reductions, and state compliance flexibility.*

Some issues to consider:

- **Could EPA’s target calculation methodology be improved?** How would improvements affect your state’s target? Other states’ targets?

The Clean Power Plan is complex, and there are obviously more issues to consider than I have listed here. These are simply a few of the “big-ticket” issues for states. [Other LegalPlanet posts](#) lay out additional questions worthy of consideration. The LegalPlanet Team will continue to post analysis about the proposal. In the meantime, happy commenting!