

[Major news outlets](#) are [reporting](#) that the U.S. Environmental Protection Agency (EPA) will release on Monday a proposed rule for the regulation of existing power plants under Clean Air Act section 111(d) that would reduce carbon emissions from the electrical generating sector **30 percent from 2005 levels by 2030**. This rule follows the recent release of portions of the IPCC's [Fifth Assessment Report](#) and the [U.S. National Climate Assessment](#), and represents one of the most significant actions ever taken by the United States to mitigate climate change.

According to the reporting news outlets, the proposed regulation represents a reduction of 500 million metric tons of carbon dioxide. The 2005 baseline year is a boon for the [13 states \(and the District of Columbia\) that have already cut carbon emissions by 30 percent or more](#) from that baseline.

The rule reportedly resembles an influential NRDC proposal. NRDC released a [report](#) in March 2013 that proposed EPA set state-specific “mass-based” emission performance standards, and credit energy efficiency and renewable energy improvements. According to reports, the proposed rule will give states a choice of four options to determine how to achieve the necessary reductions, with options contemplating investments in renewable energy and energy efficiency, demand management programs, shifting from coal to natural gas, and state or regional cap-and-trade programs.

Below, I provide a brief overview of Clean Air Act section 111, some legal questions raised by the rule, and the positions of key stakeholders and political players. Look out for more on LegalPlanet tomorrow when the full text of the rule is released!

### **Brief Background: Clean Air Act § 111**

As [Ann Carlson](#) described in greater detail last week, the Clean Air Act requires EPA to regulate greenhouse gas emissions from certain new and existing stationary sources. EPA's current proposal for regulation of existing power plants follows its proposed regulation for new power plants, issued several months ago.

#### ***New Power Plants—Clean Air Act § 111(b)***

Under Clean Air Act § 111(b), EPA must create a list of categories of stationary sources that cause or contribute significantly to air pollution that endangers public health or welfare. EPA then has one year to propose a **New Source Performance Standard (NSPS)** for new facilities in each category. The NSPS must reflect the **best adequately demonstrated system of emission reduction (BSER)**.

Pursuant to a settlement agreement, EPA proposed an NSPS for new power plants in 2012, and then withdrew its proposal in response to a considerable number of comments. EPA [issued a new proposal in January](#) under which new coal- or pet coke-fired power plants would have to install partial carbon capture and storage (CCS) technology, and new large natural gas plants would have to incorporate the latest combined-cycle technology. The comment period on the proposed NSPS has closed, and EPA expects to finalize the rule in January 2015. EPA has yet to issue a proposed rule for emissions from modified power plants, but a proposal is expected soon.

### ***Existing Power Plants— Clean Air Act § 111(d)***

EPA and the states have a shared responsibility to regulate existing sources under § 111(d). EPA must publish a draft emission guideline document for greenhouse gases after proposing an NSPS that regulates greenhouse gases. **Emission guideline** documents include one or more standards regulating emissions of a particular pollutant from existing sources in a particular source category. Emission guidelines must reflect BSEER and describe systems of emissions reduction that “have been adequately demonstrated.”

Once EPA finalizes its emission guideline, states typically have nine months to prepare, adopt, and submit to EPA a **state plan** for control of the pollutant. Congress intended this process to mimic the flexible state implementation plan (SIP) process under Clean Air Act § 110. State plans must include an **emission standard** for existing sources in the state that, in most cases, shall be no less stringent than the corresponding federal emission guideline.

In June 2013, President Obama issued a [Climate Action Plan](#) directing EPA to use its authority under Clean Air Act § 111(d) to regulate existing power plants by June of this year. Over the past year, EPA has engaged in an extensive stakeholder engagement process, working closely with states and other interested parties to gather information to inform its rule.

### **Some Relevant Legal Questions**

Section 111(d) grants EPA wide discretion, broadly stating that the “Administrator shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan . . . .” Many commentators have speculated and theorized about whether §111(d) is so broad as to permit EPA to adopt a rule or approve a state plan considering systems of emission reduction that fall “**outside the fenceline**” of power plants, such as end use energy efficiency, renewable energy, and cap-and-trade programs. Policies that displace the need for fossil fuel generation reduce emissions more effectively

and cost effectively than technology or process changes “inside the fenceline.” For instance, California’s comprehensive approach to climate mitigation has secured very cost-effective carbon pollution reductions through efficiency and renewable energy programs, storage procurement processes, and an economy wide cap-and-trade program.

Nothing in the Clean Air Act explicitly limits EPA to analyzing only emission reduction systems within the fenceline. Indeed, “system” is a very broad term. In addition, §111(d) is structured to grant states broad flexibility to determine the content of state plans. Historically, however, EPA has issued only 13 emission guideline documents under section 111(d), and most of these emission guidelines look like traditional unit-based emissions limits achievable through installation of a technology control device. Two guidelines diverge from a traditional unit-based standard:

1. The guideline for large municipal waste combustors allows states to comply with emission rate limits for NO<sub>x</sub> via a trading program; however, no state has yet utilized a trading program.
2. The Clean Air Mercury Rule would have established a cap-and-trade program for mercury emissions from coal- and oil-fired power plants, but the D.C. Circuit struck down the rule on other grounds in *New Jersey v. EPA* (2008).

The legal defensibility of a rule or state plans that consider “outside the fenceline” systems of emission reduction hinges on EPA’s authority under the Clean Air Act to allow grouping of emissions under a mass-based emission budget. Section 111 does not explicitly discuss grouping, but industry has argued that certain language in section 111 (such as “degree of emission limitation,” “enforceable,” “system,” and “any existing source”) imply a standard that reduces the mass of emissions from—or even the emissions intensity of—each and every electric generating unit.

This issue likely will be litigated, in which case EPA should receive *Chevron* deference in interpreting the Clean Air Act. (For more on the subject of deference, see [Kate Konschnik’s](#) excellent post from last week.) Notably, a broad reading of section 111(d) is supported by the fact that EPA has implemented multi-sector market-based regulatory schemes in other Clean Air Act programs (e.g., the Acid Rain Program, NO<sub>x</sub> SIP Call Rule, Clean Air Interstate Rule, and stratospheric ozone-depleting substances (ODS) phase-out rule).

### **Positions of Key Stakeholders**

States, industry, politicians, and environmentalists alike are anxiously awaiting the rule with

concern about how it might affect their various interests.

Regulation of existing power plants is significant as power plants are responsible for nearly [40 percent of overall U.S. greenhouse gas emissions](#). **Environmentalists** have been hoping for an ambitious rule leading up to the next international climate agreement, which is due to be signed at the Paris climate conference in 2015. Some have argued that significant U.S. efforts to reduce greenhouse gases under 111(d) will influence China and India to expand their climate mitigation efforts, too.

The **states** in the [Regional Greenhouse Gas Initiative](#) (RGGI) (including the New England states, New York, Delaware, and Maryland) and California have been particularly interested to see how the 111(d) rule might affect their existing greenhouse gas mitigation programs and whether the rule will acknowledge their historical efforts as climate change regulation “early movers.” In a [letter to EPA](#) in December, California, the RGGI states, and several other early-mover states urged EPA to adopt a flexible rule that “equitably recognizes the different starting points and circumstances of different states” and “[a]llow[s] for a variety of rigorous state compliance options.” Meanwhile, states such as Kentucky, which [generates approximately 93 percent of its electricity from coal](#), and Texas, which [emits the most greenhouse gases of any state](#), are wary of the rule’s impacts. Several states, including Nebraska, have even attempted to pass laws to limit the effect of any federal climate rules.

**Industry** has highlighted the rule’s potential costs and alleged that stringent regulation will result in significant job losses. The U.S. Chamber of Commerce released a [report](#) last week projecting that EPA’s rules for new and existing power plants could cost the United States a combined 224,000 jobs and \$51 billion per year over the next several decades, while increasing electricity prices by \$289 billion per year. EPA [called the estimates “grossly overstated.”](#) NRDC has released a [rival cost analysis](#) suggesting that regulating power plant carbon emissions could save consumers \$37.4 billion in electricity costs in 2020 while creating many energy efficiency-related jobs.

**Republicans** are expected to target **Democrats** running for reelection this fall with campaigns opposing the rule. Senate Minority Leader Mitch McConnell has already filed a [resolution of disapproval](#) seeking an up-or-down Congressional vote on the rule. The White House Press Secretary Jay Carney recently [remarked](#), “We know that special interests and their allies in Congress will make doomsday claims about harm to jobs and harm to the economy. . . . Every time, they’ve been wrong. So, the president believes strongly that this is the right thing to do.” Indeed, reports from the **White House** suggest that President Obama considers the 111(d) rule a significant piece of his [climate change legacy](#).

## **What's Next?**

There will be a public comment period, during which EPA is likely to receive a very large volume of comments. Rep. Bill Johnson (R-OH) led 178 House members in drafting a bipartisan [letter to EPA Administrator Gina McCarthy](#) last week seeking at least a 120-day comment period on the proposed rule.

President Obama set a deadline of **June 1, 2015** for a final rule for existing power plants.

***Again, look out for more on LegalPlanet tomorrow when the full text of the rule is released!***