BICKLAW LLP
exclusively environmental

EPA FORMALLY ADOPTS CLEAN POWER PLAN

Tue Aug 11th, 2015 | Categories: Environmental Law |

On August 3, 2015, President Obama and the U.S. Environmental Protection Agency ("EPA") released the final version of an ambitious regulation for cutting greenhouse gas pollution. The "Clean Power Plan" sets forth EPA's first ever emission reduction standards on carbon pollution from U.S. power plants, standards that every state will be required to meet based on their individual energy consumption. The Plan also includes an incentive program for states to get a jump on meeting standards with early deployment of renewable energy and low-income energy efficiency.

This final rule is a revised version of one proposed by the Obama administration a year ago and sets a goal of cutting carbon pollution from power plants by 32 percent from 2005 levels by the year 2030. This is slightly more ambitious than the 30 percent reduction goal in last year's proposal; however, power plant emissions dropped 15 percent between 2005 and 2013, meaning the country is already half way there.

Under the Plan, EPA will assign each state an individualized goal for reducing emissions. States then will have the flexibility to decide for themselves how to achieve the goal. For example, states can decide to switch from coal to natural gas, focus on renewable resources, set up programs to increase energy efficiency in homes, enact regional cap-and-trade systems, or choose other options that make sense for them.

Although the revised plan sets a higher reduction goal than the original plan, concessions were made by EPA in response to opposition to last year's proposal, particularly by states reliant on coal. In particular, the revised plan requires states to comply by 2022 rather than 2020 as originally proposed, and states will be able to submit their plans on meeting the targets by 2018 instead of 2017. If states fail to submit a plan, EPA will impose its own federal plan.

Despite these revisions, many states announced plans to fight the rule before it was even announced, and it also is certain to face fierce opposition from the Republican-controlled Congress. The revised rule also angered the natural gas industry (which will still be a large beneficiary of the switch from coal to gas-fired power plants) because it rewards states for utilizing wind and solar power. Conversely, hundreds of business including eBay, Nestle, and General Mills wrote a letter to the National Governors Association expressing their strong support for the Plan, which they said would benefit the economy and create jobs. The letter applauds the focus on clean energy solutions and offers the business community's support in the timely finalization of their respective state's implementation plans.

EPA has promulgated this rule using its powers under the Clean Air Act, which applies to greenhouse gases, as set forth by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Plan nevertheless is in relatively new legal territory as it is an unprecedented regulation. Further, the Plan is being implemented pursuant to Section 111(d) of the Clean Air Act, a rarely used provision, which requires EPA to develop regulations for categories of sources that cause or significantly contribute to air pollution that may endanger public health or welfare. Thus, while this does not make the Plan illegal or improper, it does mean that there is little precedent to guide EPA, states, and industry on how the regulation can and will play out. It also provides another basis for legal challenges.

If the rule stands, it could substantially alter the U.S. energy landscape by driving the use of “clean” energy and improving air quality and fighting climate change. Furthermore, because the Clean Power Plan only applies to one sector of the U.S. economy – coal-burning power plants – EPA could also regulate other sectors with substantial emissions in the future, thus making the Plan the first part of a much broader regulatory program. Other sectors that EPA may regulate include oil and gas wells, refineries, and pulp and paper production.

We will continue to monitor the implementation of the Clean Power Plan and provide updates and discuss major developments here.