

A Reasonable Approach to Replacing the Clean Power Plan

A White Paper from the Coalition for Innovative Climate Solutions

On March 28, 2017, President Trump signed an Executive Order (EO), entitled “*Promoting Energy Independence and Economic Growth*,” directing EPA to review and, if appropriate, suspend, revise, or rescind the Clean Power Plan (CPP).¹ The order is part of the Trump Administration’s new approach to energy and climate issues, which includes a focus on increased responsibility for states and a more streamlined role for executive agencies. On April 4, 2017, EPA published a notice announcing its review of the CPP, including its intention to “follow each of the principles and policies set forth in the Executive Order.”² On June 8, 2017, EPA submitted a proposed rule entitled, “*Review of the Clean Power Plan*,” to the White House Office of Management and Budget for interagency review.

The Coalition for Innovative Climate Solutions (CICS) submits this white paper to assist EPA and OMB in their review process and to offer the perspectives of a group of diverse electric generating companies and electric service providers located across the country. CICS members reflect our nation’s diverse geography with widely varying energy resources, state regulatory frameworks, and electricity market conditions. CICS has long advocated for and continues to believe that any greenhouse gas regulation under Section 111(d) of the Clean Air Act (CAA) must recognize regional and state differences. CICS urges EPA to focus its Section 111(d) program on empowering state and local authorities to take appropriate steps suited to local needs and resources, as the principal of cooperative federalism is intended under the Act.

CICS looks forward to engaging with EPA in the process of crafting a replacement rule. A replacement rule should:

- Provide the electric generating industry with regulatory certainty and a workable framework to facilitate implementation of practical, achievable, and effective programs.
- Provide states with clear guidance that reflects the cooperative federalism structure of the CAA and the Administration’s commitment to respecting state authority.
- Accommodate the broad diversity in state energy resource profiles and allow flexible and tailored compliance options at the state level.

¹ EO 13783, 82 Fed. Reg. 16,093 (Mar. 28, 2017). The CPP, published in October 2015, established emission guidelines for state plans to limit greenhouse gas emissions from existing fossil fuel-fired power plants. 80 Fed. Reg. 64,662 (Oct. 23, 2015). Various parties, including industry groups and 27 states, challenged the rule in court. *West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.). In February 2016, the U.S. Supreme Court stayed the rule pending judicial review.

² 82 Fed. Reg. 16,329, 16,330 (Apr. 4, 2017).

Recommendations

➤ **Promulgate a Replacement Rule**

CICS believes that EPA should promulgate a replacement rule for the CPP. Repealing the rule without promulgating a replacement would create a regulatory vacuum, leading to uncertainty about the requirements that may be imposed in future rulemakings and, potentially, exposing companies to increased risk of citizen suits. The electric industry, which has decades-long planning horizons, requires long-term regulatory certainty to make infrastructure investment and related business decisions. CICS encourages this Administration to develop a CPP replacement rule to provide companies with the regulatory certainty they need, which will benefit electric customers nationwide.

➤ **Base BSER on Source Performance**

EPA should establish BSER guidance that is clear and narrow. Importantly, the BSER determination should be **based on what can be achieved by individual facilities**.³ For example, BSER could be based on heat rate improvements at existing plants.⁴ When assessing the availability of heat rate improvements at individual facilities, EPA should take into consideration the technological feasibility and cost of such measures.⁵ BSER should *not* be based on measures that are not achievable at the source or force units to reduce utilization to achieve reductions, such as re-dispatch to other units using alternative fuels or renewable sources. Such measures cannot be accomplished by any given “designated facility” subject to regulation under Section 111(d).^{6,7}

➤ **Recognize State Authority**

EPA should **acknowledge states’ broad authority** to develop state plans. States have widely varying energy generating mixes, energy supply options, economies, customer profiles, and geographical conditions. As a result, states must be allowed to develop plans that account for this diversity and avoid problems associated with “one-size-fits-all” programs.

³ See 40 C.F.R. § 60.21(e) (BSER determinations are based on what EPA “has determined has been adequately demonstrated **for designated facilities**”) (emphasis added).

⁴ CICS urges EPA to address the fact that some on-site efficiency upgrade projects could trigger new source review (NSR) permitting requirements. EPA should ensure that current NSR policies do not discourage power plants from undertaking heat rate improvement projects to comply with the new rule.

⁵ See 42 U.S.C. § 7411(a)(1) (Standards of performance reflect “the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”).

⁶ See 40 C.F.R. § 60.21(e).

⁷ How sources implement BSER will depend on each source’s individual circumstances, but **on-site** implementation measures could include traditional projects like turbine upgrades and non-traditional projects like combined heat and power conversions or fuel cleaning.

Deferring to the state aligns with the structure and intent of Section 111(d), which gives states broad authority to establish and implement standards of performance for individual sources based on EPA’s “best system of emission reduction” (BSER) guidelines. When “applying a standard of performance to any particular source,” states must be allowed to consider not only the elements identified in the definition of “standard of performance,” but also “other factors,” including “the remaining useful life of the existing source.”⁸

States are in a better position than EPA to assess their own energy resources, identify constraints and opportunities, determine which measures can be implemented on a manageable time table, and develop appropriate programs and measures. Importantly, states are better positioned to evaluate and account for both (1) internal relationships between the state’s environmental and utility/energy regulators, who are often in different agencies, as well as the separate laws and regulations that govern those agencies; and (2) external relationships between the state, any applicable regional transmission authority or independent system operator, and the Federal Energy Regulatory Commission.

States also can rely on their unique authorities to regulate under state law, which may allow states to provide more compliance options than is possible under EPA’s limited Section 111(d) authority. An approach that defers to state authority therefore allows for more flexible, tailored, and effective state plans. Such an approach also promotes the cooperative federalism principles that are a hallmark characteristic of the CAA,⁹ and would align with EPA’s commitment to avoiding coercive federalism.¹⁰

➤ **Allow States to Implement BSER Through Equivalent State Plans**

EPA should recognize that state regulatory authorities have been given broad powers under state environmental statutes to address myriad environmental issues, including in some cases climate change. These authorities are unrelated to Section 111(d) of the Clean Air Act. States have used this authority to establish programs that, either directly or collaterally, produce energy efficiency and greenhouse gas emissions benefits. EPA should expressly give states the option of relying on or developing ***state plans that are equivalent or superior to BSER***.

BSER-equivalent programs could be mass-or rate-based and include regional trading programs (e.g. the Regional Greenhouse Gas Initiative), fleet modernization (e.g., Colorado’s Clean Air-Clean Jobs Act¹¹), renewable energy programs or standards (e.g., renewable portfolio

⁸ 42 U.S.C. § 7411(d)(1).

⁹ See 42 U.S.C. § 7401(a)(3) (“air pollution prevention . . . is the primary responsibility of States and local governments”).

¹⁰ See Letter from E. Scott Pruitt, EPA Administrator, to the Honorable Matt Bevin, Governor of Kentucky (Mar. 30, 2017), available at https://www.epa.gov/sites/production/files/2017-03/documents/ky_bevin.pdf. See also EO 13781, 82 Fed. Reg. 13,959 (Mar. 16, 2017) (directing agencies to consider “whether some or all of the functions of an agency, a component, or a program are appropriate for the Federal Government or would be better left to State or local governments...”).

¹¹ HB10-1365

standards, capacity standards, tax incentives, or other renewable promotional programs), and energy efficiency programs.¹² Certainly, states that have implemented such state or regional greenhouse gas emissions reduction programs should be allowed to demonstrate compliance with the Section 111(d) rule by showing that in-state mass-based reductions or allowance trading under a cap-and-trade program would achieve emissions reductions equivalent to those that would be achieved through BSER.¹³

For many states, BSER-equivalent programs would have the same or greater environmental benefits at lower costs than programs based on BSER. Allowing states to rely on these highly effective, existing programs is good policy because it rewards state-based environmental initiatives by minimizing regulatory burdens on the state. EPA should encourage such reliance by recognizing that state programs developed pursuant to state legislative authority would not become federally enforceable just because the state relies on such programs to demonstrate superior results. For example, a state renewable energy program that is designed to achieve significant greenhouse gas reductions by displacing fossil energy cannot be made federally enforceable pursuant to Section 111(d). EPA's authority to enforce Section 111(d) is limited to requiring compliance with the underlying, unit-specific performance standards.

➤ **Recognize Unit Diversity Through Subcategorization or Exclusions**

EPA's guidance should recognize the inherent differences between and among EGU classes, sizes and types.¹⁴ EPA has the authority to, and should, **appropriately subcategorize** different types of EGUs based on the type of EGU and type of services. This approach would be consistent with EPA's implementing regulations for Section 111(d), which recognize that different types of facilities face different operating constraints that impact the availability of emissions control technologies and emission rates.¹⁵ EPA should use this authority to establish separate systems of emission reduction for coal-fired and natural gas-fired units, including natural gas combined-cycle units. EPA also should recognize the differences between peaking, intermediate load, and baseload units (e.g. provide longer averaging periods based on run times, compliance through mass-based limits and/or exclusions due to infrequent operation). Such an approach would recognize that different modes of operation (e.g. start-up and shut-

¹² The variation among existing state-driven carbon reduction programs demonstrates the importance of tailoring reduction measures to the sources and resources within an individual state.

¹³ To the extent that standards under a state program might be more stringent than federal standards, the state **standards** implementing 111(d) still must be based upon individual source performance and not "beyond the fenceline" measures. States should have the flexibility to allow facilities to **implement** "beyond the fenceline" measures to demonstrate greater emission reductions in lieu of on-site projects.

¹⁴ See 40 C.F.R. § 60.22(b)(5) ("The Administrator **will** specify different emission guidelines or compliance times or both for different sizes, types, and classes of designated facilities when costs of control, physical limitations, geographical location, or similar factors make subcategorization appropriate.") (emphasis added).

¹⁵ Likewise, Section 111(b) provides that EPA "may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing [new source performance] standards." 42 U.S.C. § 7411(b)(2). EPA's implementing regulations for Section 111(b) provide for different CO₂ emission standards based on subcategorization. See, e.g., 40 C.F.R. Part 60, Tables 1-2 of Subpart TTTT.

down periods, load following, etc.) by generating units can result in higher emissions and thus require higher emission limits.

➤ **Considerations for Baseline and Compliance Schedule**

The guidelines should include identification of an appropriate baseline year. Because many states and companies already have taken significant steps to reduce greenhouse gas emissions, as discussed above, CICS urges EPA to allow states to rely on activities that predate a new Section 111(d) rule to demonstrate compliance with a new rule. This should include investments in performance upgrades, plant retirements, emission reductions achieved through renewable energy development and end-use energy efficiency programs.

CICS encourages EPA to proceed quickly with a Section 111(d) replacement rule. However, EPA must recognize that the time frame for state plan development and implementation will be considerable. CICS believes the schedule below represents a reasonable timeline.

- EPA proposes guidelines in Q1 2019.
- EPA finalizes guidelines by the end of Q4 2019.
- States allowed two years to develop state plans and submit to EPA for approval by the end of 2021.
- Compliance January 1, 2035 to allow a flexible, phased approach.

CICS appreciates EPA's careful consideration of the recommendations in this white paper. The Group looks forward to continuing to engage with the Agency in its review of the CPP and any associated rulemaking processes.

Coalition for Innovative Climate Solutions Members

- Ameren Corp.
- Avista Corp.
- Entergy
- Great River Energy
- Idaho Power Company
- Portland General Electric Company
- Puget Sound Energy
- LG&E and KU, and their affiliate PPL Corporation
- Public Service Company of New Mexico
- Salt River Project Agricultural Improvement and Power District
- Talen Energy
- Westar Energy, Inc.
- Xcel Energy

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