

Clean Power Plan Repeal: October 10th Notice of Proposed Rulemaking



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The United States Environmental Protection Agency (“EPA”) issued a Notice of Proposed Rulemaking (“NPRM”) October 10th that would repeal the Clean Power Plan (“CPP”).

The NPRM is titled:

Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

The CPP was originally promulgated on October 23, 2015. See 80 Fed. Reg. 64,662.

The regulation was issued pursuant to Section 111(d) of the Clean Air Act.

EPA states in the October 10th NPRM that it has since concluded that the CPP exceeds its statutory authority. As a result, the federal agency states it is proposing a change in the legal interpretation as applied to Section 111(d) of the Clean Air Act (on which the CPP was based) to an interpretation that it concludes is consistent with the:

. . . Act’s text, context, structure, purpose, and legislative history, as well as the Agency’s historical understanding and exercise of its statutory authority.

EPA solicits comments on the legal interpretation addressed in the NPRM.

EPA also states it has not determined whether it will promulgate a rule under Section 111(d) to regulate greenhouse gas emissions from existing Electricity Generating Units. The agency states it is considering whether it is appropriate to propose such a rule and intends to do so in an Advance Notice of Proposed Rulemaking (“ANPR”). It further states that this ANPR will solicit information on systems of emission reduction that are in accord with the legal interpretation proposed in the NPRM (referencing “those that are applicable at and to an individual source”).

EPA will also solicit information on compliance measures and state-planning requirements.

EPA submits as a rationale for the repeal:

CAA section 111(d) requires the EPA to promulgate emission guidelines for existing sources that reflect the “best system of emission reduction” (BSER) under certain circumstances. Notwithstanding the CPP, all of the EPA’s other CAA section 111 regulations are based on a BSER consisting of technological or operational measures that can be applied to or at a single source. The CPP departed from this practice by instead setting carbon dioxide (CO₂) emission guidelines for existing power plants that can only realistically be effected by measures that cannot be employed to, for, or at a particular source. Instead, the CPP encompassed measures that would generally require power generators to change their energy portfolios through generation-shifting (rather than better equipping or operating their existing plants),

including through the creation or subsidization of significant amounts of generation from power sources entirely outside the regulated source categories, such as solar and wind energy. This raised substantial concerns that the CPP would necessitate changes to a State's energy policy, such as a grid-wide shift from coal-fired to natural gas-fired generation, and from fossil fuel-fired generation to renewable generation.

[A copy of a prepublication version of the NPRM can be downloaded here.](#)