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EDITOR'S NOTE: WELCOME 2016!

Victoria Prussen Spears

DO YOU DARE TO FLARE? A NORTH DAKOTA FIELD OFFICE PROVIDES A VIEW INTO THE FEDERAL REGULATORY FUTURE

Mark S. Barron

FERC MODIFIES FILING REQUIREMENTS FOR MARKET-BASED RATE SELLERS AND CLARIFIES GEN-TIE PRIORITY RIGHTS RULES

James K. Mitchell, Nicholas A. Giannasca, and Carlos E. Gutierrez

CALIFORNIA LEGISLATURE BOOSTS RENEWABLES PORTFOLIO STANDARD TO 50 PERCENT AND INCREASES ENERGY EFFICIENCY GOALS; BALKS AT INCREASED REDUCTIONS IN GREENHOUSE GAS EMISSIONS AND PETROLEUM USE

Dario J. Frommer

FEDERAL CLEAN POWER PLAN IMPLEMENTATION UNDERWAY — AFFECTED INDUSTRIES (NOT JUST POWER GEN) NEED TO ACT

Thomas D. Goslin

THE SEC SETTLES CLAIMS AGAINST HITACHI FOR ALLEGED CORRUPT PAYMENTS TO OBTAIN CONTRACTS TO BUILD SOUTH AFRICAN POWER STATIONS

Keith M. Rosen and Christian Urrutia

IN THE COURTS

Steven A. Meyerowitz

LEGISLATIVE AND REGULATORY UPDATE

Victoria Prussen Spears

INDUSTRY NEWS

Victoria Prussen Spears

Pratt's Energy Law Report

VOLUME 16

NUMBER 1

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Editor's Note: Welcome 2016!

Victoria Prussen Spears 1

Do You Dare to Flare? A North Dakota Field Office Provides a View into the Federal Regulatory Future

Mark S. Barron 3

FERC Modifies Filing Requirements for Market-Based Rate Sellers and Clarifies Gen-Tie Priority Rights Rules

James K. Mitchell, Nicholas A. Giannasca, and Carlos E. Gutierrez 10

California Legislature Boosts Renewables Portfolio Standard to 50 Percent and Increases Energy Efficiency Goals; Balks at Increased Reductions in Greenhouse Gas Emissions and Petroleum Use

Dario J. Frommer 16

Federal Clean Power Plan Implementation Underway—Affected Industries (Not Just Power Gen) Need to Act

Thomas D. Goslin 20

The SEC Settles Claims Against Hitachi For Alleged Corrupt Payments to Obtain Contracts to Build South African Power Stations

Keith M. Rosen and Christian Urrutia 23

In the Courts

Steven A. Meyerowitz 26

Legislative and Regulatory Update

Victoria Prussen Spears 34

Industry News

Victoria Prussen Spears 39

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Federal Clean Power Plan Implementation Underway—Affected Industries (Not Just Power Gen) Need to Act

*By Thomas D. Goslin**

The author of this article discusses the Obama Administration's Clean Power Plan ("CPP") and why affected company managers and investors—and not just those in the power industry—should take steps soon to understand whether and how the CPP may impact their businesses.

The Obama Administration recently published in the Federal Register its Clean Power Plan, a rule that aims to reduce carbon dioxide ("CO₂") emissions from existing fossil-fuel fired power plants.¹ While nominally focused on power plants, the unprecedented scope of the new regulation has the potential to impact industries far removed from the generation of electricity. Moreover, given the tight compliance deadlines provided for in the rule, regulators already are working to develop plans to implement the CPP in their states. As such, company managers and investors—and not just those in the power industry—should take steps soon to understand whether and how the CPP may impact their businesses.

THE CLEAN POWER PLAN

The CPP, spelled out over 1,609 pages in the Federal Register, is an exceedingly complicated regulation promulgated by the U.S. Environmental Protection Agency ("EPA") under the federal Clean Air Act. At its most basic, the rule generally requires states to reduce CO₂ emissions from fossil fuel-fired power plants consistent with state-specific levels established by EPA. In the rule, EPA suggests approaches—referred to as "building blocks"—that states can employ to meet these standards. That said, states generally are free to adopt whatever measures they choose, so long as those measures result in reductions in CO₂ emissions that meet or exceed the standards set forth by EPA. States have until September 6, 2016, to submit plans for achieving these required emissions reductions, though states may request extensions of up to two years if they need additional time, so long as states submit an initial filing by the 2016 date summarizing in some specificity how that state will meet their goals.

The CPP is unique in that it largely lets the states determine how they will meet EPA air emissions targets. While this freedom provides states with latitude to determine the best means for achieving compliance, the approaching September 2016 deadline for making such determinations means that states are scrambling to assess their options. These options are varied, and include retiring old, inefficient power plants; developing new renewable energy sources; generating more electricity

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¹ 80 FR 64662 (Oct. 23, 2015).

from cleaner natural gas-fired plants; and reducing demand for electricity in their states. States are also able to enter into multi-state cap-and-trade programs, similar to the Regional Greenhouse Gas Initiative in place in the Northeast, which provide states with additional flexibility for meeting CO₂ emission reduction goals. States are free to choose any of the above options, or any others they can think of, so long as they reduce CO₂ emissions to the levels set forth in the CPP.

While the potential for the CPP to impact the electricity generation and other closely related industries (e.g., coal and natural gas) is obvious, less obvious are the potential impacts to other industries. For example, businesses that use significant amounts of electricity face the likelihood of increased energy prices resulting from shifts to more expensive (but cleaner) generating technologies. One study of an earlier draft of the CPP found that its implementation could increase the price of delivered electricity nationwide by 22 percent, and that in some states the increases could be significantly greater: e.g., the study found that electricity prices could increase by up to 54 percent in Texas.² The severity of the projected price increases is dependent upon several factors, including in large part the methods employed by the states to achieve their CPP goals.

One of those methods includes reducing demand for electricity by employing energy efficiency measures. In fact, an earlier draft of the CPP specifically called for states to use such measures to reduce CO₂ emissions. While the energy efficiency “building block” was dropped from the final rule, states are free (and in some ways, encouraged) to use energy efficiency measures to meet emission reduction targets. EPA has suggested that states examine programs to improve efficiency in several common electric loads, including: chiller and refrigeration systems, compressed air systems, motors and drives, ventilation and fan systems, packing systems, and lighting. To the extent that businesses manufacture, or make significant use of, such products or systems, there is a strong possibility that CPP implementation will impact operations.

CONCLUSION

Businesses concerned about potential impacts from the CPP (or interested in potential opportunities arising from the rule) need to engage with state policymakers soon. As noted above, states have until September 6, 2016, to submit compliance plans, and while it is expected that most states will seek a deadline extension, many state regulators already are meeting with stakeholders to discuss their CPP plans. And though it may be tempting to refrain from engaging with regulators until litigation challenging the CPP winds its way through the courts, doing so could be foolhardy. Not only is it unclear whether such challenges will succeed, but as we have seen in recent decisions concerning EPA rules, even when courts strike down parts of a rule or criticize certain aspects of its promulgation, they have been willing to let the

² http://www.nera.com/content/dam/nera/publications/2014/NERA_ACCCE_CPP_Final_10.17.2014.pdf.

unaffected aspects of the regulation stand.³ In fact, even states that are challenging the rule in court, such as Arkansas, are holding meetings to discuss compliance options, while environmentally-progressive states, such as Washington, are working quickly to have final compliance plans ready by the 2016 deadline. As such, companies and investors in industries that may be affected by the CPP would be wise to study the complexities of the regulation and engage with policy makers soon to ensure that their voices are heard as CPP implementation plans are designed over the course of the next several months.

³ See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699 (U.S. 2015) (holding that EPA failed to adequately consider costs in promulgating regulations restricting emissions of certain pollutants from power plants, remanding the case to the lower court for additional consideration, but not vacating the rule).