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EPA Reproposes Sweeping Greenhouse Emission Standards For New Power Plants, Which Would Require Carbon Capture and Sequestration For All New Coal-Fired Units

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The Environmental Protection Agency ("EPA") repropose its sweeping greenhouse gas New Source Performance Standards ("NSPS" or "Standards") for new electric utility generating units ("EGUs") on September 20, 2013. EPA's justification for the reproposal—issued in response to President Obama's June 2013 Climate Action Plan—differs from the NSPS initially proposed by EPA in April 2012.¹ The stringency of the Standards, however, remain essentially the same and would require installation of carbon capture and sequestration ("CCS") at all newly constructed coal-fired EGUs. EPA acknowledges that the NSPS as proposed would forestall construction of any new coal-fired generation for at least the next decade. A 60-day public comment period will commence after the proposal is officially published in the Federal Register.

The NSPS does not address the existing source standards that President Obama directed EPA to propose by June of 2014, although the stringency of the NSPS likely will inform EPA's development of existing source standards.

The most substantial change from EPA's April 2012 proposal, which EPA will rescind upon publication of the new proposal, is the creation of separate subcategories and separate standards for natural gas-fired and coal-fired EGUs. The NSPS for natural gas-fired EGUs remains at 1,000 lbs CO₂ per megawatt hour ("MWh") for larger units and 1,100 lb CO₂/MWh for smaller EGUs, based on the use of "modern, efficient" natural gas combined-cycle ("NGCC") boilers. EPA is proposing a similarly stringent standard of 1,100 lbs CO₂/MWh for coal-fired EGUs—only 100 pounds more than the April 2012 proposal—which according to EPA reflects partial CCS as the "best system of emission reduction" ("BSER") that has been adequately demonstrated. EPA also is soliciting comment on a range of 1,000 lbs CO₂/MWh to 1,200 lbs CO₂/MWh for coal-fired EGUs,

although any standard within the range would require CCS.

The standards are based on a rolling 12-month average, although EPA is requesting that the public comment on use of an annual compliance period. Additionally, EPA is soliciting comment on an 84 operating-month rolling average compliance option for coal-fired EGUs to address short-term excursions that result from the startup of the facility and the CCS system. The standard for the 84-month period would be within the range of 1,000 lbs CO₂/MWh to 1,050 lbs CO₂/MWh. EPA also proposes to require compliance with the standards at all times, including periods of startup and shutdown. Consistent with EPA's recent demand that States modify their State Implementation Plan provisions regarding excess emissions related to startup, shutdown, and malfunctions (SIP Call),² EPA asserts that it is required to ensure that compliance with all standards, including NSPS, is "continuous."

EPA's repropoed regulatory language also omits references to "transitional sources." EPA's April 2012 proposal carved out a special category of 15 sources that EPA proposed to treat as existing sources not subject to the NSPS if they commenced construction prior to finalization of the standards. The new proposal, however, reflects the statutory language and EPA's general practice by treating as an existing source any project that "commences construction" prior to publication of the proposal in the Federal Register. Any source that commences construction *after* publication of the proposed standards would be subject to the NSPS. Although EPA asserts that the standards would not apply to reconstructed or modified sources and would not necessarily be considered Best Available Control Technology for permitting purposes, some interested parties have questioned EPA's authority to limit applicability of the NSPS in such a manner.

The reference to BSER in the proposal is intended to be equivalent to Best Demonstrated Technology ("BDT"), which EPA has used previously to reflect the appropriate "standard of performance" under Section 111 of the Clean Air Act ("Act"). The Act defines a "standard of performance" as "a standard for emissions of air pollutants which reflects 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." ³

EPA asserts in the proposal that its determination that "partial" CCS is BSER based on a four-part analysis: (1) the technology is technically feasible; (2) the costs are reasonable; (3) the technology results in substantial emission reductions; and (4) the technology promotes implementation and further development of CCS.

EPA focuses on development of four CCS projects for this analysis: (1) Southern Company's Kemper County facility; (2) SaskPower's Boundary Dam in Saskatchewan, Canada; (3) Summit Power's Texas Clean Energy Project; and (4) the Hydrogen Energy California Project. EPA concludes that unlike supercritical and ultra supercritical technology, which are

"clearly technologically feasible and present little cost," the use of CCS would result in substantial reductions in emission of CO₂ at a reasonable cost. EPA determines that the costs of partial (as opposed to full) CCS range from \$92/MWh to \$110/MWh and "are comparable to costs of other non-NGCC generation."

Although the finding that partial CCS is BSER for coal-fired EGUs does not require a finding that the same technology is appropriate for existing sources, EPA will have to address this issue when it issues existing source standards next year. The statute defines an "existing source" as "any stationary source other than a new source."⁴ The standards for existing sources also are referred to as "standards of performance," although the Act specifies a different procedure for promulgation. Rather than setting the standards, the Act requires EPA to "prescribe regulations which shall establish a procedure" similar to the SIP regime under Section 110 of the CAA, whereby each State must submit to EPA a plan that "establishes standards of performance for any existing source" and identifies implementation and enforcement procedures for the standards.⁵ When developing the regulations governing submittal of the State plans, the statute authorizes EPA to take into consideration "among other factors, remaining useful lives of the sources in the category of sources to which such standard applies."⁶

The proposal has not yet been published in the Federal Register but can be found here: <http://www2.epa.gov/carbon-pollution-standards/2013-proposed-carbon-pollution-standard-new-power-plants>. EPA will accept public comments on the proposal for 60 days after publication in the Federal Register.

¹77 Fed. Reg. 22392 (Apr. 13, 2012).

²78 Fed. Reg. 12460 (Feb. 22, 2013).

³42 U.S.C. § 7411(a)(1).

⁴Id. § 7411(a)(6).

⁵Id. § 7411(d)(1)(A)-(B).

⁶Id. § 7411(d)(2).

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