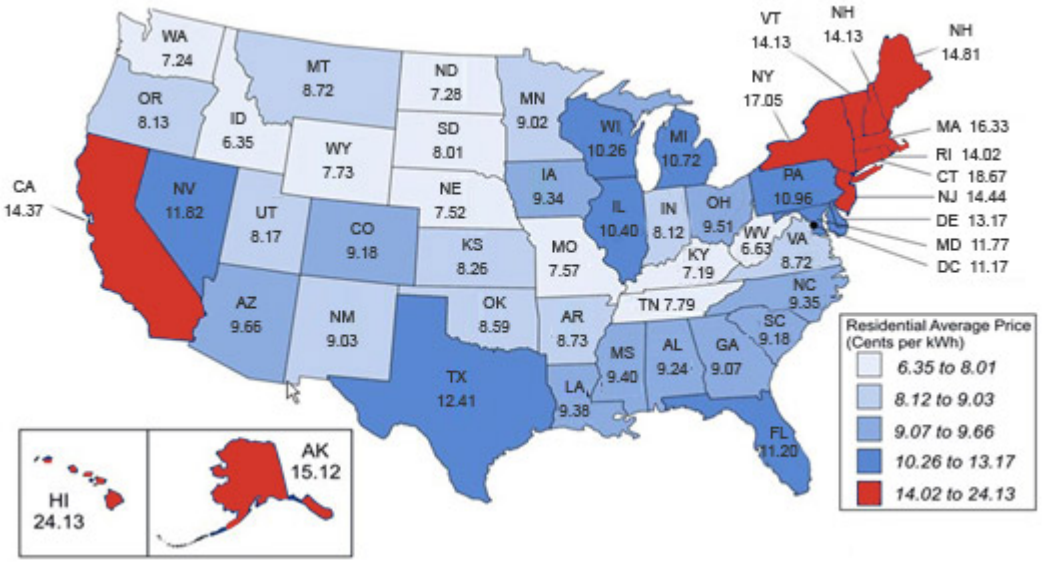
EPA's CO_2 Rule and 18 States' Resolutions and Legislation

EPA's Proposed CO_2 Rule Collides with Flexibility Asserted By States



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Raymond L. Gifford
Gregory E. Sopkin
Matthew S. Larson

WILKINSON) BARKER) KNAUER) LLP

Executive Summary

18 state legislatures passed either legislation or resolutions that EPA has rejected in its CO_2 Emission Guidelines. The states demanded that the EPA respect state primacy in setting performance standards under Section 111(d) and/or allow the state maximum flexibility to implement carbon standards, including allowing a more lenient standard and schedule based on the state's unique circumstances or cost or reliability factors.

EPA's CO_2 Emission Guidelines sets firm carbon reduction standards that must be met by each state beginning in 2020 and accelerating through 2030, and excludes "case by case" exceptions based on factors discussed in federal implementing regulations. These factors include: (1) unreasonable costs of control resulting from plant age, location, or basic process design; (2) the physical impossibility of installing necessary control equipment; or (3) other factors that make application of a less stringent standard or final compliance time significantly more reasonable.

The EPA CO_2 Emission Guidelines do not allow states to set their own carbon performance standards. This ignores the fact that states believe they have primacy pursuant to Section 111(d) in determining what standards should apply based on unique state circumstances.

According to EPA Administrator McCarthy, unless a state can show that EPA's data related to its four building block approach is flawed, EPA will not entertain a less stringent carbon reduction target. However, the state-specific data provided in EPA's proposed rule relates to meeting the carbon reduction standard, not cost or reliability. This does not afford states the opportunity to request EPA consideration of a less stringent standard based on cost or reliability factors.

The majority of states enacting resolutions or legislation regarding Section 111(d) would limit the carbon reduction standard to what is reasonably achievable inside the fence, i.e., at the EGU source. However, three of EPA's four building blocks reside outside the fence, and EPA's CO_2 Emission Guidelines do not allow for a state to deviate from its carbon reduction mandate by analyzing what is achievable at the source.

States have directed their environmental agencies to consider less stringent carbon reduction standards and compliance schedules based on cost; effect on electric rates, jobs, low-income populations, and the economy; effect on reliability of the system; engineering considerations; and other factors unique to the state. Based on language in the CO_2 Emission Guidelines, it does not appear that EPA will entertain variance requests that are based on any of these factors.

States that passed resolutions or legislation inconsistent with the EPA's CO_2 Emission Guidelines will not be able to comply with both legislatively-expressed declarations and EPA's mandate. EPA will either choose to revise its proposed rule to respect the rights asserted by the states, or reject these state assertions and invite litigation. States are then left in the impossible dilemma of ignoring state law to follow EPA's prescribed mandate, which would, by definition, be an illegal act by a state agency.

I. Introduction

In our earlier White Paper, "State Implementation of CO2 Rules," we discussed the significant institutional hurdles faced by states in implementing EPA's proposed rule to regulate carbon dioxide emissions (CO_2 Emission Guidelines) from electric generating units (EGUs). Briefly, we concluded:

- States will need to pass legislation to make it possible for state air regulators and utility regulators to implement the rule;
- Traditional non-state jurisdictional utilities will need to be made part of a unified "Carbon Integrated Resource Planning" (IRP) process;
- States pursuing a multi-state solution will need to enter into an Interstate Compact to make the rule enforceable, which will likely require congressional approval.

That White Paper of necessity elided some of the more nuanced state institutional questions embedded in the rule. Here, then, we embark on a follow-on series to explore some of those specific state issues.

The Opening Question for this Paper is:

How can states that have passed legislation or resolutions detailing how they will approach rule implementation "inside the fence" – and according to individual state policies, energy needs, resource mixes, and economic priorities – deal with EPA's proposed rule?

II. State Versus EPA-Defined "Flexibility"

On June 2, 2014, EPA issued its CO_2 Emission Guidelines under 42 U.S.C. § 7411(d) of the Clean Air Act (CAA) (Section 111(d)). Before that date, 18 state legislatures passed either legislation or resolutions[1] addressing the anticipated CO_2 Emission Guidelines. In virtually every case the legislatures requested or insisted that EPA respect state primacy in setting performance standards under Section 111(d), or allow the state maximum flexibility to implement carbon standards, including allowing a more lenient standard and schedule based on the state's unique circumstances, cost or reliability factors.

EPA effectively rejected these state requests and the notion of state primacy in its proposed CO_2 Emission Guidelines. The Guidelines set firm carbon reduction standards that must be met by each state beginning in 2020 and accelerating through 2030. The Guidelines also obviate the states' ability, promulgated in the Section 111(d) implementing regulations, to seek "case-by-case" exceptions (also called "variances") based on factors such as: (1) unreasonable costs of control resulting from plant age, location, or basic process design; (2) the physical impossibility of installing necessary control equipment; or (3) other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable. Finally, EPA's proposed rule rejects the possibility of a less stringent standard or final compliance time.[2] Instead, the proposed rule requires that state Section 111(d) plans show "achievement of emission performance equivalent to the goals established by the EPA, on a timeline equivalent to that in the emission guidelines."

It is unclear whether EPA will revise its final rule to allow for these exceptions, or more lenient carbon reduction standards or compliance time. Initial signals from the agency are not promising. Robert Kenney, Chair of the Missouri Public Service Commission, asked the following question of EPA Administrator Gina McCarthy at the National Association of Regulatory Utility Commissioners (NARUC) Conference in Dallas on July 14, 2014: "If a state does its own modeling and determines that it can't reach the target at a reasonable cost, will the EPA entertain a less stringent target that is proposed by a state?" Administrator McCarthy's response in full is as follows (emphasis supplied):

> Well I think that what we did was, we tried to identify what we thought was reasonable and appropriate and get it one way, but allow the states every flexibility to get it in more creative ways. And by doing that we think we met the underlying requirements in the statute *so there wouldn't be a*

[1] As set forth below, five state legislatures passed bills that were signed by the governor, and thirteen state legislatures passed resolutions. Eight of these resolutions were passed by both the house and senate chambers, and five were passed by one of the two chambers.

[2] *See* EPA's CO_2 Emission Guidelines, at 520.

> *second opportunity to look at costs unless you think we blew the first analysis.* Okay, so it's really important, and I don't want to say this casually, it's really important to take a look at the underlying analysis for the states, take a look at it. Did we miss it, were the numbers not right? We've teed up a couple of alternatives which we're open to, because there's a lot here, and so take a look at it. There is two things to consider. One is, did we get this framing correct? But very importantly out of the gate is the data question. And so that's what led us to believe that we could do this in a way that was reliable and affordable, and the reliability and affordability of the electricity sector is not something that we're going to compromise. And so *we don't think it's required, we think there's ways in which we can move forward and we've shown that*. But if you see any problems with that data we really would like to see it soon and see if there's other things that we can consider.[3]

Administrator McCarthy's response strongly suggests that EPA will not entertain a less stringent target unless a state can show that EPA's data is flawed. Notably, the data provided by EPA in its proposed rule relates to the EPA's four "building blocks"[4] as one approach to meet the carbon reduction standard. However, EPA did not attempt to estimate the cost impact to any individual state in its CO_2 Emission Guidelines. Accordingly, there can be no "second opportunity" for a state to request EPA review of costs because EPA has not analyzed state-by-state costs as part of its "first analysis." Thus, a state showing that electric rates will substantially increase as a result of complying with EPA's carbon reduction mandate cannot be a basis for a less stringent standard or compliance schedule under the proposed rule.

If a state's only basis to challenge the CO_2 Emission Guidelines is the EPA's data on the four building blocks approach to emission reduction, then factors other than cost likewise cannot provide a basis for a variance. Factors such as system reliability, physical possibility of installing necessary control equipment, or other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time more reasonable are excluded by EPA. Because EPA did not undertake unit-specific or state-specific analyses to determine whether meeting the carbon reduction standard will result in reliability or other problems, there is no data on these issues that a state can contest. The only issue for which the EPA provided state-specific data is whether a state can achieve the carbon reductions mandated in the proposed rule.

Even if a state can show flaws in the four building blocks data as applied to the state, it is not clear this would be sufficient to obtain a variance. Beyond EPA's denial of "case-by-case" exceptions, Administrator McCarthy stressed at the NARUC conference that the EPA's four building blocks approach is just "one way" to meet the standards. It is unknown whether a state would need to show that other possible "ways" of meeting the standard also are unworkable to obtain a variance. For example, if a state shows that the 70 percent gas combined cycle dispatch assumption (in Building Block 2) is not achievable because of, say, gas pipeline infrastructure, electric transmission constraints, or need for the gas capacity to load-follow intermittent resources, a state may still be able to achieve the carbon reduction mandate by shuttering a number of coal generation plants. It may be that states will have to prove impossibility of meeting the performance targets from any of the four pathways outlined in EPA's proposed rule[5] before EPA would consider flexibility.

We conclude that, while EPA's CO_2 Emission Guidelines may provide "flexibility" on the issue of how a state goes about meeting its carbon reduction mandate, the Guidelines do not allow for a less

[3] Remarks of EPA Administrator Gina McCarthy at NARUC Summer Conference in Dallas Texas, July 14, 2014. We believe our contemporaneous notes faithfully represent these remarks and Chairman Kenney's question of Administrator McCarthy.

[4] EPA calculated the CO_2 performance goal using four "building blocks": (1) assuming a six percent heat-rate efficiency improvement to each existing coal-fired EGU; (2) assuming a 70 percent capacity utilization rate for combined-cycle gas-fired EGUs; (3) calculating a renewable portfolio standard (RPS) based on the average RPS of states in the same region of the country, and assuming usage of nuclear power plants based on existing and expected nuclear units; and (4) assuming a one and one-half percent per year reduction in electric usage through demand-side management (DSM) measures.

[5] In its State Plan Considerations Technical Support Document, EPA proposes four "state plan pathways": (1) rate-based CO_2 emission limits; (2) mass-based CO_2 emission limits; (3) a state-driven portfolio approach; and (4) a utility-driven portfolio approach. The EPA's four building blocks suggestion is one portfolio approach, which includes "emission limits for affected EGUs along with other enforceable end-use energy efficiency and renewable energy measures that avoid EGU CO_2 emissions."

stringent carbon reduction standard or compliance schedule based on a state showing of expected increase in electric rates, system reliability issues, physical impossibility of installing controls, or other factors based on a state's unique circumstances.

The state institutional dilemma arises because EPA's proposed rule contravenes the legislatively expressed expectations of 18 states for state primacy and EPA flexibility, as well as the Section 111(d) implementing regulations.

Accordingly, states with resolutions or legislation inconsistent with the EPA mandates will be placed in a very difficult position. State environmental agencies must follow state statute, and arguably should follow the language of legislatively-passed resolutions. To the extent they do so and their actions are inconsistent with the CO_2 Emission Guidelines, EPA will either choose to revise its proposed rule to respect the rights asserted by the states, or reject these state assertions. If EPA takes the latter course, then it may be impossible for states to comply with both the EPA CO_2 Emission Guidelines and the directives of their legislatures.

III. Legislation and Resolutions of 18 States

The following state legislatures passed either legislation or a resolution consistent with their reasonable expectation that the EPA CO_2 Emission Guidelines will preserve state rights and flexibility under Section 111(d) of the CAA:

Legislation

1. Kansas – House Bill 2636
2. Kentucky – House Bill 338
3. Louisiana – Act 726
4. Missouri – House Bill 1631
5. West Virginia – House Bill 6346[6]

Resolutions[7]

6. Alabama – Joint Resolution 57
7. Arkansas - Senate Resolution 2*
8. Arizona – Concurrent Resolution 1022
9. Florida – SM 1174
10. Georgia – House Resolution 1158
11. Illinois - House Resolution 0782*
12. Indiana - House Resolution 11*
13. Nebraska - Legislative Resolution 482
14. Oklahoma - Concurrent Resolution 39
15. Pennsylvania - House Resolution 815*
16. South Dakota - Concurrent Resolution 1022
17. Tennessee - House Joint Resolution 663*
18. Wyoming – Senate Joint Resolution 1

* Not Concurrent with other chamber

Consistent themes emerge from these legislative pronouncements. The overwhelming majority of these 18 states demand that the EPA respect state primacy in setting CO_2 performance standards, look at the individual circumstances of each state, and allow more lenient carbon reduction performance based on cost and other considerations. Many states also limit the carbon reduction goal to measures achievable "inside the fence" (*i.e.*, at the EGU source), disallow fuel switching at the EGU to meet the goal, require that any assumed technology to meet the goal be commercially demonstrated, and apply separate standards for coal and gas generation units. As explained below, it appears that virtually all of these expectations have been rejected in EPA's proposed CO_2 Emission Guidelines.

A. State Primacy

The states that passed resolutions and legislation concerning Section 111(d) assert primacy in

[6] Notably, the Ohio State House unanimously passed House Bill 506, although it was not passed by the Ohio State Senate. Ohio State House Bill 506 is similar to the legislation passed in Kansas, Kentucky, and West Virginia.

[7] To be sure, a Resolution is hortatory, not mandatory, like a law. Nevertheless, a state agency has some obligation to follow the policy direction set by the legislature.

determining what legally-enforceable carbon performance standards apply in each respective state. This is consistent with the plain language of the federal Section 111(d) implementing regulations. For example, Alabama Joint Resolution 57 states that the EPA "must maintain Alabama's and other states' authority as provided by the Clean Air Act, to rely on state regulators to develop performance standards for carbon dioxide emissions that take into account the unique policies, energy needs, resource mix, and economic priorities of Alabama and other states." Florida also urged EPA to "respect the primacy of Florida and rely on state regulators to develop performance standards for carbon dioxide emissions" that take into account Florida's unique policies, needs and priorities. Resolutions passed in Illinois, Indiana, Nebraska, Oklahoma, Pennsylvania, South Dakota, Tennessee, West Virginia, and Wyoming contain nearly identical language.

Similarly, Georgia and Kentucky found that "Congress charges the states, not EPA, with establishing standards of performance under [Section 111(d)] of the federal Clean Air Act." The State of Arkansas "urges EPA to withdraw the proposed guidelines for reducing carbon dioxide emissions from fossil fuel-fired power plants under [Section] 111(d) of the Clean Air Act and propose new guidelines that respect the primacy of the State of Arkansas to determine the emission reduction requirements that are in the best interest of its citizens." The remainder of the 18 states either explicitly or implicitly presume that their state agencies, not the EPA, will set the applicable carbon reduction standard.

> As described above, EPA's CO_2 Emission Guidelines reject the notion that states have any authority in setting the carbon emission standard. Instead, EPA has set the numeric carbon emission pounds per Megawatt hour limit for each state from 2020 through 2030. EPA's proposed rule further provides that the agency will evaluate and approve state plans based on four general criteria: 1) enforceable measures that reduce EGU CO_2 emissions; 2) <u>projected achievement of emission performance</u> <u>equivalent to the goals established by the EPA, on a timeline equivalent to that in the emission guidelines</u>; 3) quantifiable and verifiable emission reductions; and 4) a process for biennial reporting on plan implementation, progress toward achieving CO_2 goals, and implementation of corrective actions, if necessary.[8]

No latitude is provided for states to either set their own carbon reduction standard or deviate from the goals established by EPA.

B. <u>Inside the Fence</u>

The majority of states that passed a resolution or legislation regarding Section 111(d) would limit the carbon reduction standard to what is reasonably achievable inside the fence, *i.e.*, at the EGU source. For example, Alabama, Florida, Illinois, Indiana, Nebraska, Oklahoma, Pennsylvania, South Dakota, Tennessee, West Virginia, and Wyoming passed resolutions that convey that EPA should "approve state-established performance standards that are based on reductions of carbon dioxide emissions determined to be achievable by measures undertaken *at fossil-fueled electric generating units*," or language to the same effect.

Similarly, Louisiana and Missouri passed legislation directing their state environmental agencies to set the standard of performance based on reductions in emissions of carbon dioxide that can reasonably be achieved through measures undertaken *at each fossil fuel-fired electric generating unit*, including efficiency improvements. In each case the legislation allows utilities and EGUs to *implement* the standard through outside the fence measures, but the *setting* of the standard may only consider what is achievable inside the fence.

Three of EPA's four building blocks reside outside the fence. Perhaps recognizing that inside the fence measures are insufficient to meet EPA's 30 percent carbon reduction goal by 2030, only one building block assumption -- average heat rate improvement of six percent for coal-fired EGUs -- is source-focused. Building blocks 2, 3 and 4 of the CO_2 Emission Guidelines assume that utilities can meet certain outside the fence metrics. Although the proposed rule does not require states and utilities to actually implement these metrics, they are the root of each state's CO_2 performance goal.

The EPA's CO_2 Emission Guidelines do not allow for a state to deviate from its carbon reduction mandate by analyzing what is achievable at the source. EPA has assumed that greater carbon reductions may be achieved by looking outside the fence, so states must presumably employ these tools.

[8] CO_2 Emission Guidelines at 46 (emphasis supplied).

EPA has effectively rejected state resolutions and legislation that would afford the states flexibility to focus their carbon reduction efforts on what is reasonably achievable at the source. Whether EPA may lawfully force states to look at outside the fence measures or essentially require the closure or fuel switching of EGUs is in serious question given the focus on source-based emissions and state primacy in Section 111(d) of the CAA.

C. Variance Flexibility

Every state that passed resolutions or legislation requested that EPA grant "maximum flexibility" for states to set carbon reductions standards, implement the standards, or both.

The substantial majority of states passing legislation or resolutions express the right to an emissions reduction variance based on factors of cost, physical possibility, effect on local economy, and other factors unique to the state. These factors are based on the federal implementing guidelines, 40 C.F.R. § 60.24(f), which provides that states may make a case-by-case determination that a specific facility or class of facilities are subject to a less-stringent standard or longer compliance schedule due to: (1) cost of control; (2) a physical limitation of installing necessary control equipment; and (3) other factors making the less-stringent standard more reasonable.

However, EPA has rejected the possibility of granting a variance based on any of these factors. The CO_2 Emission Guidelines state at page 520 as follows:

> The EPA therefore proposes that the remaining useful life of affected EGUs, and the other facility-specific factors identified in the existing implementing regulations, should not be considered as a basis for adjusting a state emission performance goal or for relieving a state of its obligation to develop and submit an approvable plan that achieves that goal on time.

Whether EPA may lawfully dismiss this implementing regulation is beyond the scope of this paper.

The state-passed resolutions and legislation assert a right to a variance. For example, the resolutions passed by Florida, Illinois, Indiana, Nebraska, Pennsylvania, South Dakota, Tennessee, and Wyoming would allow the state "to set less stringent performance standards or longer compliance schedules for fossil-fueled electric generating units," or language to the same effect.

Kansas, Louisiana, and West Virginia passed statutes directing their state environmental departments to consider whether to adopt less stringent performance standards or longer compliance schedules for EGUs based on the following factors:

> (1) Consumer impacts including any disproportionate energy price increases on lower income populations;
> (2) Unreasonable costs of reducing emissions of carbon dioxide resulting from the age, location, or basic process design of the electric generating unit;
> (3) Physical difficulties with or the impossibility of implementing emission reduction measures for carbon dioxide;
> (4) The absolute cost of applying the performance standard to the electric generating unit;
> (5) The expected remaining useful life of the electric generating unit;
> (6) The economic impacts of closing the electric generating unit, including expected job losses, if the unit is unable to comply with the performance standard; and
> (7) Any other factors specific to the electric generating unit that make application of a less stringent performance standard or longer compliance schedule more reasonable.[9]

Apart from granting variances, several states list cost and reliability as factors that should be considered in the initial setting of the carbon emissions reduction standard. These states include the ones listed above, as well as Georgia, Kansas, and Kentucky.

[9] West Virginia's statute adds the additional factors of: (1) Non-air quality health and environmental impacts; (2) Projected energy requirements; (3) Market-based considerations in achieving performance standards; and (4) Impacts on the reliability of the system. Missouri's statutory factors include the ones listed in the federal implementing guidelines, as well as (1) the absolute cost of applying the emission standard and compliance schedule to the existing affected source; (2) the outstanding debt associated with the existing affected source; (3) the economic impacts of closing the existing affected source, including expected job losses if the existing affected source is unable to comply with the performance standard; and (4) the customer impacts of applying the emission standard and compliance schedule to the existing affected source, including any disproportionate electric rate impacts on low income populations.

State laws direct their environmental agencies to consider less-stringent carbon reduction standards and compliance schedules based on such factors as cost; effect on electric rates, jobs, low-income populations, and the economy; effect on reliability of the system; engineering considerations; and other factors unique to the state. The EPA appears to have foreclosed the possibility of considering these factors in its proposed rule.

D. Other Factors

States have asserted several other rights associated with Section 111(d) of the CAA, including disallowing fuel switching (*e.g.*, from coal to gas), co-firing with other fuels, or decreased unit utilization as bases to meet carbon reduction standards (Kansas, Kentucky, Louisiana, West Virginia); precluding the assumption of technology that is not adequately demonstrated as a basis for carbon reduction (Georgia, Kansas, Kentucky, Louisiana, West Virginia); and the right to set carbon reduction standards separately for coal and gas-fired EGUs (Kansas, Kentucky, West Virginia).

In sum, the states' views and the EPA's proposed rule essentially talk past one another. The states assert rights and direct their agencies how to approach analysis under 111(d), and the EPA proposal expects a State Implementation Plan (SIP) that goes beyond those boundaries expressed in state law.

This gives rise to the question of what rights a state has if the four building block assumptions prove to be inaccurate or impractical for the state. If a state cannot reasonably achieve the mandated carbon reduction through increased renewable energy, demand side load reduction, increased utilization of gas-fired combined cycle units, and heat rate improvements to coal EGUs, it may need to look at the very measures precluded by legislation, such as fuel switching, decreased utilization of certain EGUs, and attempting to use technology that has not been adequately demonstrated. EPA's rejection of legislatively-passed declarations and statutes places states agencies tasked with implementing the rules in a very difficult position.

IV. State Agencies Bound to Follow State Law

Given the state resolutions and legislation discussed above, state agencies may find themselves in the unenviable position of not being able to follow both the EPA mandate and state legislative pronouncements. In such a case, state agencies are bound to follow applicable state legislation.[10]

Put another way, a state agency cannot conduct a preemption analysis and declare that a state law directing how the agency should perform its Section 111(d) determination must give way to a rule promulgated by EPA. State environmental agencies may not, for example, ignore statutory commands to set carbon reduction standards based on what is reasonably achievable in light of cost, reliability, and engineering considerations.

The state statutes that have been rejected by EPA control the state agencies that will conduct Section 111(d) proceedings. The eight resolutions passed by state legislatures (and five by one chamber of state legislatures) indicate that many states may pass new legislation in 2015 or 2016 that likewise collide with EPA's proposed rule. Two conclusions follow: (1) courts will likely decide which regulations are more consistent with the CAA, the state statute or EPA's proposed rule; and (2) EPA will either back down and respect state pronouncements, or subject these states to a federal implementation plan, or FIP. The latter choice also calls for court resolution.

V. Initial Conclusions and Takeaways

We offer these tentative conclusions and takeaways based upon the above analysis and discussion:

- 18 state legislatures passed either legislation or resolutions that EPA has rejected in its CO_2 Emission Guidelines.
- EPA's CO_2 Emission Guidelines sets firm carbon reduction standards that must be met by each state beginning in 2020 and accelerating through 2030, and denies "case by case" exceptions based on factors discussed in federal implementing regulations.

[10] Some may argue that the state statutes discussed in this Paper create an impermissible obstacle that frustrates the federal purpose of the CAA and EPA's CO_2 Emission Guidelines. We see no such conflict. The state laws direct the appropriate state regulator to conduct specific analyses in formulating legally enforceable emission standards – a right explicitly reserved to the states under Section 111(d) and its federal implementing regulations. These state laws do not attempt to frustrate the federal purpose of the proposed CO2 Emission Guidelines or put in place an impermissible obstacle to its implementation. Rather, they exert state primacy and the rights left to the states under Section 111(d).

- The EPA CO_2 Emission Guidelines do not allow states to set their own carbon performance standards, notwithstanding the fact that states believe they have primacy pursuant to Section 111(d) in determining what standards should apply based on unique state circumstances.

- According to EPA Administrator McCarthy, unless a state can show that EPA's data related to its four building block approach is flawed, EPA will not entertain a less stringent carbon reduction target. However, the state-specific data provided in EPA's proposed rule relates to meeting the carbon reduction standard, not cost or reliability. This does not afford states the opportunity to request EPA consideration of a less stringent standard based on cost or reliability factors.

- The majority of states enacting resolutions or legislation regarding Section 111(d) would limit the carbon reduction standard to what is reasonably achievable inside the fence, *i.e.*, at the EGU source. However, EPA's CO_2 Emission Guidelines do not allow for a state to deviate from its carbon reduction mandate by analyzing what is achievable at the source.

- States have directed their environmental agencies to consider less stringent carbon reduction standards and compliance schedules based on cost; effect on electric rates, jobs, low-income populations, and the economy; effect on reliability of the system; engineering considerations; and other factors unique to the state. It does not appear that EPA will entertain variance requests that are based on any of these factors.

- States with resolutions/legislation inconsistent with the CO_2 Emission Guidelines will not be able to comply with both legislatively-expressed declarations and EPA's mandate. EPA will either choose to revise its proposed rule to respect the rights asserted by the states, or reject these state assertions and invite litigation. States are then left in the impossible dilemma of ignoring state law to follow EPA's prescribed mandate, which would, by definition, be an illegal act by a state agency.

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Wilkinson Barker Knauer, LLP
rgifford@wbklaw.com
gsopkin@wbklaw.com
mlarson@wbklaw.com
1755 Blake Street
Suite 470
Denver, CO 80202
Phone 303.626.2350
Fax 303.626.2351