Environmental Law Update

WEB CONFERENCE SERIES

The "Clean Power Plan" and Other Significant New Clean Air Act Developments

August 25, 2015

FOLEY

FOLEY & LARDNER LLP

Housekeeping

- Questions can be entered via the **Q&A widget** open on the left-hand side of your screen. We will address questions at the end of the program, time permitting.
- If you experience technical difficulties during the presentation, please visit the Webcast Help Guide by clicking on the **Help button** below the presentation window, which is designated with a question mark icon.
- The PowerPoint presentation will be available on our website at Foley.com in the next few days or you can get a copy of the slides in the **Resource List** widget.
- Foley will apply for CLE credit after the program. To be eligible for CLE, you will need to log into the On24 session and answer a polling question during the program. If you did not supply your CLE information upon registration, please e-mail it to ekemmeter@foley.com. Please note certificates of attendance will be distributed to eligible participants approximately 8 weeks after the web conference via email.
- **NOTE**: Those seeking Kansas, New York & New Jersey CLE credit are required to complete the Attorney Affirmation Form in addition to answering the polling question that will appear during the program. A 5-digit code will be announced during the presentation. Email the code and the form to ekemmeter@foley.com immediately following the program.

FOLEY

FOLEY & LARDNER LLP

Clean Power Plan, MATS Rule, and Cross-State Rule

- Common themes:
  - All directly regulate electric utilities, but much broader in impacts and precedents
  - All show key role of judicial review in EPA rulemaking

FOLEY
FOLEY & LARDNER LLP

Program Speakers

Brian H. Potts
Partner
Foley & Lardner LLP
608.258.4772
bpotts@foley.com

FOLEY
FOLEY & LARDNER LLP

Program Speakers

Richard G. Stoll
Partner
Foley & Lardner LLP
414.297.5882
rstoll@foley.com

FOLEY
FOLEY & LARDNER LLP

Program Speakers

Mark A. Thimke
Partner
Foley & Lardner LLP
414.297.5832
mthimke@foley.com

FOLEY
FOLEY & LARDNER LLP

The Clean Power Plan and Friends (FIP + NSPS)

FOLEY & LARDNER LLP

The Clean Power Plan Is Finally Here

- Forget what you knew → this is a new rule
- It's easier to say what's the same than what's different:
  - Still called the Clean Power Plan
  - Based on Clean Air Act section 111(d)
  - Regulates CO2 from existing power plants
  - Uses building blocks
  - Gives states flexibility

FOLEY & LARDNER LLP

Important Dates

- Initial SIPs due Sept. 6, 2016
  - But extension to 2018 available
- Start date moved back to 2022
  - BUT there is a mini-SIP due for pre-2022 period
- When will it hit the Federal Register?
  - Usually takes 2-3 months
  - Triggering date for lawsuits
    - Race to courthouse
  - After Paris in December?

FOLEY
FOLEY & LARDNER LLP

The Limits!

- One nationwide emission rate for each category:
  - Fossil fuel EUSGUs: 1,305 lbs of CO2 per MWh by 2030
  - Stationary CTs: 771 lb CO2/MWh by 2030
- State-specific rate and mass-based goals
  - Weighted aggregate of rates for the state's EGU's

FOLEY
FOLEY & LARDNER LLP

Which States Are The Biggest Losers Under the EPA's New "Formula"?

- Took the biggest hit b/w proposed and final:
  - States with the highest emission rates in 2012
  - Basically, coal heavy states
  - Sorry Kentucky
- Biggest winners:
  - States with lowest 2012 emission rates
- EPA admits this fact
- Too much change between proposed and final?

FOLEY
FOLEY & LARDNER LLP

Compliance Timeline

- Final rates – 2030
- Interim rates from 2022-2029
  - Three steps
- How is compliance measured?
  - "State has to ensure" limits are met
  - Sources must meet limits individually or in aggregate

FOLEY
FOLEY & LARDNER LLP

A Vacation From The CPP?

- Vermont
- Washington, D.C.
- Alaska
- Hawaii
- Guam
- Puerto Rico

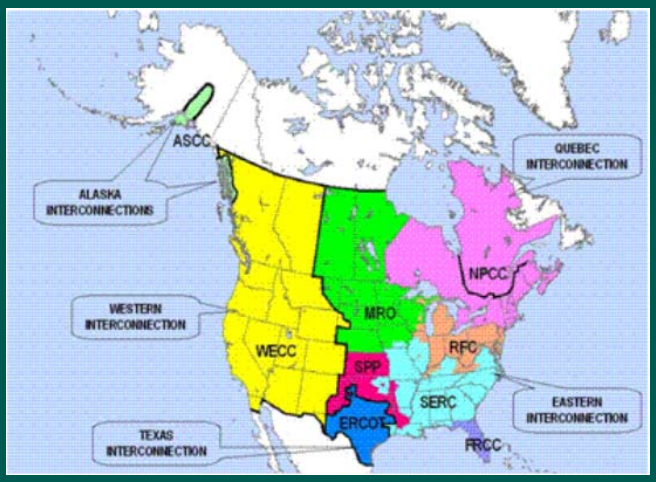
FOLEY
FOLEY & LARDNER LLP

How Did EPA Set Its New Rates?

- Magic!
- The formula is incredibly complicated
- Used 3 building blocks instead of 4
- And each building block was calculated differently than in the proposal
- Dropped nukes and EE
- Why the drastic change?

FOLEY
FOLEY & LARDNER LLP

EPA Divided The Country Into Three Zones



FOLEY
FOLEY & LARDNER LLP

Best System Of Emission Reduction

- Still based on same "BSER" tortured interpretation
- EPA set the BSER for each region
- Then picked the highest rate (i.e., least stringent) for each compliance year
  - EPA says provides "headroom"
- Remember the EPA is now trying to set one nationwide uniform rate rather than state-specific rates
- Why did the EPA switch to this nationwide approach?

FOLEY
FOLEY & LARDNER LLP

Next The EPA Set The Baseline For The 3 Regions

- Used 2012 data
- Basically averaged emissions rate of affected units across region
- Why did the EPA switch to using interconnects rather than state boundaries?
  - More of a system
  - But will it really help the CPP in court?

FOLEY
FOLEY & LARDNER LLP

New Building Block 1

- Efficiency projects “inside the fence-line”
  - 4.2% cut in Eastern
  - 2.1% cut in Western
  - 2.3% cut in Texas
- Why differences?

FOLEY
FOLEY & LARDNER LLP

New Building Block 2 (FKA BB3)

- EPA used a seven step formula
- In general:
  - Used past RE capacity installed over last 5 yrs
  - Figured out the average annual increase and the maximum annual increase for each type of RE
  - Applied annual average increase in 2022 and 2023
  - Applied max annual increase from 2024-2030
- All new RE capacity is assumed to offset coal/gas generation

FOLEY
FOLEY & LARDNER LLP

New Building Block 3 (FKA BB2)

- Assumed all of the existing NGCC in each region would increase utilization rate
- 75% utilization rate (based on summer capacity rating)
- Ramp up between 2022 and 2027
- Increased NGCC generation offsets REMAINING coal/gas after RE capacity is added

FOLEY
FOLEY & LARDNER LLP

Used Three BBs To Set NATIONWIDE Rate

- Again, EPA took the highest rate of the three regions for each year to set national rate
- State goals:
  - EPA basically just applied the rate to the 2012 generation
  - Mass/rate
- EPA says EGU's can buy RE to comply or pay another owner to run its NGCC plant more

FOLEY
FOLEY & LARDNER LLP

Compliance Options

- Affected unit compliance
- Utility wide cap
- State-wide trading/regional trading
- Emission Rate Credits!
  - NGCC
  - RE
  - EE
  - DG solar, off-shore wind, CHP, WHP, and transmission and distribution improvements

FOLEY
FOLEY & LARDNER LLP

Who Asked For Trading?

- AL
- CA
- HI
- MA
- MI
- MN
- NC
- OR
- WA
- WI

FOLEY
FOLEY & LARDNER LLP

How Much Does Each BB Cost?

- BB1 - $23/ton
- BB2 (NGCC) - $24/ton
- BB3 (RE) - $37/ton

FOLEY
FOLEY & LARDNER LLP

New NGCC – Continued Confusion

- NOT “affected units” under CPP
- NOT included in the rate calculation
- NOT able to help with compliance unless they offset existing, higher emitting affected unit generation (which is very possible)
- BUT EPA says SIP can include them
  - New unit set-aside?
  - Will the EPA let their inclusion impact affected unit compliance?

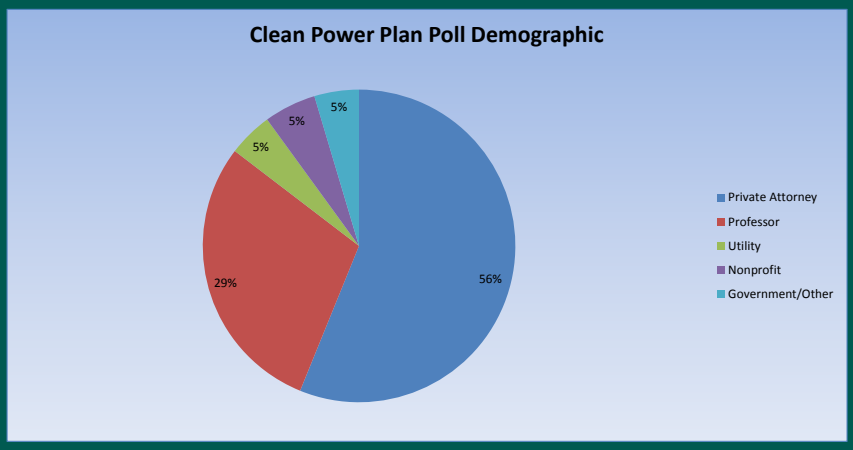
FOLEY
FOLEY & LARDNER LLP

The Mini-SIP/CEIP

- Each SIP submittal must:
  - “include a timeline with all of the programmatic milestone steps the state will take b/w the time of the state plan submittal and the year 2022 to ensure that the plan is effective as of 2022”
  - 2021 progress report to EPA
- Optional CEIP
  - ERCs/allowances granted
  - Post-SIP RE/EE in low-income communities
  - Creates incentive for early SIPs
  - Capped at 300 million tons of CO2

FOLEY
FOLEY & LARDNER LLP

So Is It Legal? Our Poll.



FOLEY
FOLEY & LARDNER LLP

Some Of The Results…

Question 1: Do you believe the Clean Power Plan, as currently written, is legal?	
Response	Count
Total-Yes	59
Total-No	58
Total-Don't Know	13
Private Attorneys-Yes	20
Private Attorneys-No	45
Private Attorneys-DN	8
Professors-Yes	30
Professors-No	4
Professors-DN	4
Utility-Yes	1
Utility-No	5
Nonprofit-Yes	6
Nonprofit-No	1
Government/Other-Yes	2
Government/Other-No	3
Government/Other-DN	1

FOLEY
FOLEY & LARDNER LLP

Some More Results…

Question 2: If you think the Clean Power Plan is legal, please go to question (4). If you think the Clean Power Plan is illegal, please identify which of the following parts you believe are illegal (you may select more than one):	Count	Percent of Respondents
Total Responses	56	
(a) The entire Clean Power Plan is illegal because it's unconstitutional	10	17.9
(b) The entire Clean Power Plan is illegal because the EPA doesn't have the authority to regulate power plant CO2 emissions under section 111(d)	32	57.1
(c) Building block one (6% reduction at coal plants) is illegal	11	19.6
(d) Building block two (running combined cycle natural gas plants instead of coal plants) is illegal	32	57.1
(e) Building block three (increased renewables and new nuclear) is illegal	42	75.0
(f) Building block four (increased energy efficiency) is illegal	42	75.0

FOLEY
FOLEY & LARDNER LLP

How EPA Helped Itself

- Harvard Law Professor Freeman loves the EPA's changes!
- EPA eliminated BB4
  - Shouldn't be required to reduce consumption
- Delayed start date to 2022
- More flexible SIP submittal deadlines
- Helped itself on constitutional questions by focusing more on source compliance

FOLEY
FOLEY & LARDNER LLP

EPA's Whiffs and Zingers

- Keeping CCS in new plant rule
- EPA admits MATS rule was in place when it issued CPP (page 178)
- Drastic flip-flop on 111(d) v 112 issue
- Betting entire rule on one totally new argument (pages 266-270)
- Essentially admits "outside the fence-line" isn't ok
- Talks about EGUs as if they were people!

FOLEY
FOLEY & LARDNER LLP

D.C. Circuit Challenges Pending and Looming

- *Murray Energy* case
  - Rehearing?
- Will the same panel stay?
- States have asked EPA for a stay
- Race to the court house when it hits FR
- What are the chances of the court granting a stay?

FOLEY
FOLEY & LARDNER LLP

Will The CPP Make It Through The Courts Unscathed?

- Makeup of the D.C. Circuit panel is critical
- Same panel strongly favors industry on merits
- BUT en banc favors EPA on merits
- Supreme Court is a wild card
  - New Chevron standard?
  - UARG language?
  - BB2 and BB3 most vulnerable
- My guess

FOLEY
FOLEY & LARDNER LLP

Mercury Air Toxics Standard (MATS): Implications on Environmental Rulemaking

FOLEY
FOLEY & LARDNER LLP

Background

- 1990 Clean Air Act
  - Hazardous air pollutants
  - Utility deferral of hazardous air regulations until a finding regulation was "**appropriate and necessary**"
  - 2000 finding – regulation was "appropriate and necessary" (Clinton Administration)
  - 2012 "appropriate and necessary" finding reaffirmed (Obama Administration)

FOLEY
FOLEY & LARDNER LLP

Background

- 2012 MATS rule
  - Mercury regulation – **appropriate**
    - Harmful to health/environment
    - Controls available to reduce
  - And **necessary** – Clean Air Act's other provisions did not control mercury from power plants
  - U.S. EPA imposed mercury limits on power plants based on the "**appropriate and necessary**" finding

FOLEY
FOLEY & LARDNER LLP

37

Legal Challenge

- Brought by primarily states and trade groups
- Issue – "costs" required to be considered in decision to regulate power plants?
- Supreme Court decision – June 29, 2015
  - Narrow view – costs must be considered
  - Broader implication – judicial willingness to reconsider U.S. EPA interpretation of law/ reasonableness test

FOLEY
FOLEY & LARDNER LLP

38

Supreme Court Decision

- Legal issue – whether U.S. EPA's interpretation of "appropriate" correctly excludes cost
  - Short answer – "no"
- Broader implications
  - Historic judicial deference to U.S. EPA interpretations of statutes
  - Particularly where words ambiguous
  - Here, the key word – "appropriate"
  - U.S. EPA defined "appropriate" excluding cost
  - Supreme Court disagreed; imposed a "reasonableness" test on U.S. EPA interpretation of "appropriate"

FOLEY
FOLEY & LARDNER LLP

39

Legal Next Steps

- D.C. Circuit – vacate or order U.S. EPA to fix record or redo rule
- U.S. EPA claims – will complete cost review by spring 2016
- Issue raised in Tri-state litigation – Nucla coal-fired power plant

FOLEY
FOLEY & LARDNER LLP

40

Practical Considerations

- Most utilities already installed controls to meet April 2015 deadline (roughly 80% of coal-fired electric generation)
  - Either part of utility planning
  - Or new source review settlement
- 200 power plants – one-year extensions
  - Rate commission issue for regulated utilities
  - Proceed or not?
- Beyond utilities
  - Conservative Supreme Court majority – future deference to U.S. EPA open to question
  - Scope of new "reasonableness" approach? Procedural or what cost benefit deemed "reasonable"
  - Could affect future rule reviews
    - Clean Power Plan
    - Ozone
    - Future NAAQS revisions

FOLEY
FOLEY & LARDNER LLP

DC Circuit Decision on "Cross-State" Rule: *EME Homer*, decided July 28, 2015

FOLEY
FOLEY & LARDNER LLP

EME Homer: Background

- EPA issued final Cross-State rule August 2011
- Under CAA "good neighbor provision" regulated electric generating units NOX and SO2 emissions in 27 "upwind" States to achieve downwind attainment/maintenance of PM and ozone NAAAQs
- Mostly eastern and mid-western States
- Many parties filed DC Circuit judicial review petitions -- consolidated under lead case name *EME Homer*

FOLEY
FOLEY & LARDNER LLP

EME Homer: Background

- Several issues raised, but two most basic:
  - Could EPA base State budgets on "uniform" source emission limits (based on cost-effectiveness thresholds) as opposed to limits tailored to each State's contribution to downwind NAAAQs attainment?
  - Could EPA issue "FIP-first" emission limits, as opposed to giving States first crack?

FOLEY
FOLEY & LARDNER LLP

EME Homer: Background

- August 2012 D.C. Circuit 2-1 ruled against EPA on both basic issues, vacated entire rule
- April 2014 U.S. Supreme Court reversed on both basic issues, with qualifications:
  - EPA could use cost-effective approach with no need for state-by-state tailoring, BUT not if result is "overcontrol" of sources in any State – (if so, parties can make "as applied" challenges)
  - EPA could issue "FIP-first" emission limits, BUT only if EPA had first validly disapproved a particular State's SIP for "good neighbor" deficiencies
- Remanded case to DC Circuit to consider issues left by two "qualifications." Also, several other issues had been left undecided by DC Circuit when it vacated rule in 2012.

©2010 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP

New DC Circuit Ruling

- New round of briefing, argument, resulting in July 28 DC Circuit opinion (3-0)
  - Found “overcontrol” on SO2 State budgets/plans for Alabama, Georgia, South Carolina, and Texas, and on ozone-season NOx budgets for Florida, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and West Virginia
  - But did not vacate the “overcontrolled” State budgets/plans, instead remanded to EPA to take expeditious action to fix
  - Upheld EPA’s SIP disapprovals as valid
  - Resolved all remaining issues in EPA’s favor (with abundant deference to EPA on technical/scientific points)

FOLEY
FOLEY & LARDNER LLP

New DC Circuit Ruling

- Limited practical impact for now, as EPA had previously extended current rule’s compliance deadlines, and with EGUs generally cutting emissions due to other regulations and switches from coal to gas, fewer sources face current Cross-State controls
- More Cross-State rulemaking coming however, since revised NAAAQs on horizon and rulemaking necessary to comply with remand
- Latest word from EPA (July 28, 2015): "We are reviewing the decision and will determine appropriate further course of action once our review is complete."

FOLEY
FOLEY & LARDNER LLP

New DC Circuit Ruling

- So after all these years, who won/lost anything?
  - EPA gets clearance on "FIP-first" approach
  - EPA gets clearance on cost-effectiveness vs. tailor for each state approach, IF no "overcontrol“
  - EPA gets more favorable DC Circuit language to quote in future cases showing great judicial deference on technical/scientific issues (especially modeling)

FOLEY
FOLEY & LARDNER LLP

Questions & Answers

FOLEY
FOLEY & LARDNER LLP

Contact Information

Brian H. Potts
Partner
608.258.4772
bpotts@foley.com

Richard G. Stoll
Partner
414.297.5882
rstoll@foley.com

Mark A. Thimke
Partner
414.297.5832
mthimke@foley.com

FOLEY
FOLEY & LARDNER LLP

Thank You!

- A copy of the PowerPoint presentation and a multimedia recording will be available on the event Website early next week http://www.foley.com/the-clean-power-plan-and-other-significant-new-clean-air-act-developments/
- Past Environmental Law Update Web Conference materials available at: http://www.foley.com/environmental/?op=events
- CLE questions? Contact Ellie Kemmeter at ekemmeter@foley.com.
- We welcome your feedback. Please take a few moments before you leave the Web conference today to provide us with your feedback

FOLEY
FOLEY & LARDNER LLP