

Political Implications of the Clean Power Plan for the 2016 Presidential Election

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On August 3, 2015, the Environmental Protection Agency (EPA) released the final version of the Clean Power Plan¹ which sets limits on carbon pollution from existing fossil fuel power plants. This plan is the first time national limits have been imposed for that purpose; power plant emissions account for almost 38 % of all carbon dioxide emissions in the U.S.²

Using its authority under Section 111(d) of the Clean Air Act, the EPA set emission guidelines for existing electricity generating sources. The guidelines are predicated upon the emission performance of the “best system of emission reduction” or BSER, as determined by the EPA. Central to the implementation of the BSER are three building blocks: (1) improving efficiency at coal-fired power plants; (2) shifting coal, oil, or gas steam electricity generation to lower-emitting combined cycle natural gas plants; and (3) shifting fossil fuel-fired electricity generation to renewable energy generation. Demand-side energy efficiency, a fourth building block in the proposed plan (issued in June 2014), was eliminated in the final plan but can still be used under certain conditions as a means of compliance in state plans.³

Emissions trading is a central component of the Clean Power Plan and some form of it has been used for other Clean Air programs in the past. The underlying idea is that some generating units can realize emission reductions at lower costs than can others. Therefore, emissions trading encourages facilities to purchase power from generating units that are owned by others if those units can realize emission reductions at lower-cost.⁴ Also included is an initiative (Clean Energy Incentive Program) to encourage early investments in solar and wind energy projects and demand-side energy efficiency projects in low-income communities.⁵ (Separate rules for that program are forthcoming.)

The EPA projects that implementation of the Clean Power Plan will realize a reduction of 32% in carbon dioxide emissions from U.S. power plants by 2030 from the 2005 baseline. States must develop compliance plans and submit them to the EPA by September 6, 2016 and must establish performance standards for regulated sources in their state plans. If a state needs more time, it can request a maximum two-year extension until September 6, 2018, when it makes its initial submittal in 2016. Interim compliance periods are set for 2024, 2027, and 2029. If the state does not submit a state plan

¹ For purposes of this paper, the “final plan,” [hereinafter “Clean Power Plan”] refers to the rule drafted on August 3, 2015. The rule will not take effect until 60 days after publication in the *Federal Register*. For the final plan, see Environmental Protection Agency (EPA), *Carbon Emission Guidelines for Existing Statutory Sources: Electric Utility Generating Units*, (RIN 2060-AR33) <http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf>.

² Electric power energy-related carbon dioxide emissions account for 2,043 million metric tons of 5,404 million metric tons or 37% in 2014. See <http://www.eia.gov/tools/faqs/faq.cfm?id=75&t=11>.

³ According to EPA, the first three building blocks “fell squarely within the paradigm” over which the agency maintained it had jurisdiction under Section 111 of the Clean Air Act, whereas the fourth building block did not. See p. 390 of the Clean Power Plan.

⁴ See p. 366 of the Clean Power Plan.

⁵ EPA, “Clean Energy Incentive Program,” The Clean Power Plan, Factsheet, <http://www.epa.gov/airquality/cpp/fs-cpp-ceip.pdf>.

approved by EPA, it will be subject to a federal plan. The guidelines for the federal plan are included in the final version of the Clean Power Plan. States have flexibility in achieving their reduction goals.⁶ In Florida's case, the reduction will be almost 25% from the adjusted 2012 baseline by 2030.⁷

The EPA received over 4.2 million comments on its proposed plan which was issued in June 2014. Following release of the proposed plan Murray Energy Corporation and 14 states filed petitions for review and a writ of prohibition (subsequently consolidated) challenging the legal basis upon which the proposed plan was developed. This challenge was dismissed on grounds that the rules were not finalized but proposed and thus it was premature.⁸

States have already sought judicial relief in response to the final plan. Sixteen states including Florida filed an emergency petition for extraordinary writ in the U.S. Court of Appeals for the District of Columbia Circuit.⁹ This writ asked for a stay before the final rule appears in the Federal Register. States based their argument on EPA's legal authority under Section 111(d), claiming that this section was never used for a pollutant with the magnitude of carbon dioxide. The plaintiffs defended the writ on the basis of compliance costs that states would incur prior to publication of the rule in the Federal Register.¹⁰ The U.S. Court of Appeals for the District of Columbia Circuit subsequently denied the requested stay and ruled that before taking legal action and requesting a stay the coalition must wait until the rule is published in the Federal Register.

The Clean Power Plan and Florida's Responses to the Plan

In his announcement of the Clean Power Plan, President Obama stated that it was "the biggest most important step we've ever taken to combat climate change," He continued: "We're the first generation to feel the impact of climate change and the last generation that can do something about it."¹¹ The White House touted the Clean Power Plan's benefits as follows: "By setting the first-ever national standards to limit carbon pollution from power plants, the largest single source of U.S. carbon pollution,

⁶ States can develop plans to meet those goals using a state-wide rate for all fossil fuel-fired generating plants or through a mass-based equivalent emission program. The methodology used for setting state goals is summarized by EPA in a fact sheet accessed at <http://www.epa.gov/airquality/cpp/fs-cpp-state-goals.pdf>.

⁷ EE Publishing LLC, "Florida," http://www.eenews.net/interactive/clean_power_plan/states/florida. The final plan projects a 24.7% emissions rate reduction from 2012 adjusted baseline emissions rate (1,221 pounds of carbon dioxide per MWh) to the final goal of 919.

⁸ *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015), <http://www.cadc.uscourts.gov/internet/opinions.nsf/61AA9C6759829C8B85257E5F005110D8/%24file/14-1112.pdf>. See also Coral Davenport, "Court Gives Obama a Climate Change Win," *New York Times*, June 9, 2015, <http://www.nytimes.com/2015/06/10/us/coal-epa-clean-power-plan.html>.

⁹ *In re: State of West Virginia*, http://www.eenews.net/assets/2015/08/14/document_gw_04.pdf. The states are West Virginia, Alabama, Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, Wisconsin, and Wyoming. Colorado and New Jersey subsequently joined the initial 14 states in the petition. Florida, Colorado and Michigan were not part of the petition to stay the preliminary rule. Alaska and South Carolina were petitioners requesting a stay of the preliminary CPP but are not party to the petition to stay the final rulemaking.

¹⁰ The petitioners stated: "Today, the States filed the Emergency Petition, seeking an order to prevent the irreparable harm they are experiencing from the already-running deadlines for State Plans."

¹¹ Allie Malloy and Sunlen Serfaty, "Obama unveils major climate change proposal," *CNN Politics*, August 3, 2015, <http://www.cnn.com/2015/08/02/politics/obama-climate-change-plan/>.

it will improve the health of Americans across the country, create clean energy jobs, and help households and businesses save on their energy bills.”¹²

The threats of climate change for Florida and the region include impacts from sea level rise, increased temperatures, and ecosystem degradation.¹³ The EPA projects that for the entire nation, including Florida, emissions reductions from the plan will translate into net climate and health benefits of \$25 billion to \$45 billion in 2030.¹⁴

After years of failed Congressional effort to reduce carbon dioxide emissions, the Obama Administration essentially opted for rulemaking that bypassed Congress. That rule is already an issue to be reckoned with in the run up to the 2016 presidential election. Several Republican candidates have opposed it including the two Florida presidential candidates, former Governor Jeb Bush and Senator Marco Rubio. Democratic presidential candidate Hillary Clinton declared that she would defend the plan if she were elected: “It will need defending. Because Republican doubters and defeatists - including every Republican candidate for president - won't offer any credible solution.”¹⁵ The other Democratic presidential candidates also support the plan.

In the campaign, the Clean Power Plan may be considered a proxy for the myriad issues associated with climate change. Most voters and their governor, legislators, and the presidential candidates will not read and digest the 1,560 pages of the plan which is fairly technical and contains long passages of legal arguments. So an issue for presidential candidates is whether they want to support measures to mitigate climate change and, as noted above, the response seems to be divided thus far along party lines. A second question is: even if they do, is an EPA rulemaking process the best way to do it? The latter question touches on the broader issue of federal-state jurisdictional issues.

Florida did not join other states in challenging the proposed rule although, as noted, it is a party to the challenge against the final rule. Nonetheless, comments that were largely critical of the proposed rule were submitted to the EPA by Florida's Attorney General, the Florida Office of the Consumer Counsel, the Florida Department of Environmental Protection, and the Florida Public Service Commission, along with other potentially affected Florida-based parties. Many of the comments were technical but the jurisdictional issue was raised by the Florida Public Service Commission and Florida Attorney General in their respective comments on the proposed rule.¹⁶

The Florida Legislature also weighed in on the proposed rule. During the 2015 Session, the Florida House and Senate each introduced legislation requiring that any Florida compliance plan be approved by the Florida legislature prior to submittal to EPA. Both bills died.¹⁷

¹² The White House, “A Cleaner, More Efficient Power Sector in Florida,” https://www.whitehouse.gov/sites/default/files/image/Climate/Florida_Factsheet.pdf.

¹³ Ibid.

¹⁴ Clean Power Plan, p. 16.

¹⁵ BBC News, “Climate Change: Obama Unveils Clean Power Plan,” August 3, 2015, <http://www.bbc.com/news/world-us-canada-33753067>.

¹⁶ See *Regulations.gov*: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-23650> (Florida Public Service Commission) and <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-25433> (Attorney General, State of Oklahoma, to which Florida's Attorney General was a co-signatory).

¹⁷ See House Bill 849, <http://www.flsenate.gov/Session/Bill/2015/0849> and Senate Bill 1076, <http://www.flsenate.gov/Session/Bill/2015/1076>.

Florida's electric utilities companies were predominantly critical of the proposed plan with only Florida Power & Light (FPL), among investor-owned utilities, publicly supporting the plan's overall goal. "Unlike many electric utilities across the country, FPL is well-positioned to meet the goals of the Clean Power Plan -- with no expected additional costs," spokeswoman Sarah Gatewood said.¹⁸ Regardless of the formal positions of electric utility companies toward the Clean Power Plan, even the threat of its implementation may have contributed to electric companies' decisions to invest more in natural gas and renewable sources. For example, Southern Company, which includes Gulf Power, announced a \$12 billion deal to purchase AGL Resources, thereby expanding its natural gas distribution and storage facilities. FPL and Duke Energy are also pursuing similar strategies to expand natural gas access.¹⁹

If nothing were to change in terms of state policies and utility activities, how much progress would Florida make by 2030 toward meeting the goals set by EPA? The Union of Concerned Scientists made progress projections based on the final plan. In that scenario, Florida would only make slight progress-- 7% (mass-based) or 11% (rate-based) -- toward meeting its compliance goals by 2030. Projections of this sort are always informed by the methodology used.²⁰ Arguably, states such as those already participating in a carbon reduction trading exchange like the Regional Greenhouse Gas Initiative may be in a better position to engage in emissions trading which is a key component of the Clean Power Plan. Public policies that promote reduced emissions such as a state's renewable portfolio standards and energy efficiency resource standards and utility decisions that reduce carbon emissions such as plans to retire coal plants and construct nuclear power plants may also serve to bring states closer to their compliance goals. The Union of Concerned Scientists considered such factors in making its projections and Florida did not fare as well as many other states in making progress toward the compliance goals sets by EPA. The Union of Concerned Scientists did not include Florida among states having an energy efficiency resource standard.²¹ However, Florida-based utilities have retired and are planning to retire coal plants; those retirements were projected to contribute to modest progress without additional actions. With respect to nuclear power plant construction, the Union of Concerned Scientists included

¹⁸ EE Publishing LLC, "Florida," http://www.eenews.net/interactive/clean_power_plan/states/florida. According to information furnished by the company, FPL has been investing in high-efficiency natural gas and utility-scale solar facilities and expanded its nuclear generation capacity. See "FPL announces plans to install more than 1 million solar panels at three additional solar power plants as part of continued strategy of advancing affordable clean energy in Florida," January 26, 2015, <http://newsroom.fpl.com/2015-01-26-FPL-announces-plans-to-install-more-than-1-million-solar-panels-at-three-additional-solar-power-plants-as-part-of-continued-strategy-of-advancing-affordable-clean-energy-in-Florida>.

¹⁹ The causality between the proposed CPP and Duke Energy Corp.'s decision was captured in an article by *BloombergBusiness*. Referring to Duke Energy, the article stated: "The largest U.S. utility owner plans to use more gas in its plants in part because of proposed U.S. Environmental Protection Agency carbon-dioxide regulations that will force it to shut some coal-fired facilities." November 11, 2014, <http://www.bloomberg.com/news/articles/2014-11-11/duke-energy-sees-potential-shale-gas-investment>.

²⁰ Union of Concerned Scientists, "State of Progress: Update," Updated August 13, 2015, <http://www.ucsusa.org/sites/default/files/attach/2015/08/States-of-Progress-Update-Slidedeck.pdf>.

²¹ Florida has energy efficiency goals which were significantly reduced by the Florida Public Service Commission in November 2014.

only three states - Georgia, Tennessee, and South Carolina -- which have nuclear plants currently under construction. Duke Energy and FPL have a total of 4 units under active review.²²

One challenge for Florida going forward is that the state is expected to rely increasingly on natural gas as it retires aging coal plants. However, natural gas prices are volatile. Testifying on the proposed plan, Art Graham, the Chairman of the Florida Public Service Commission, expressed concern that Florida already relies too heavily on natural gas.²³ He observed that in 2013 Florida's energy generation was almost 65% natural gas but was projected to increase to 85% in 2025 as more coal plants are retired.²⁴

Role of the Media and the Average Voter

With a rule spanning over 1,500 pages, the average voter will undoubtedly turn to the media for information. Media coverage of the plan reflects the diversity of attitudes toward climate change in general. For example, at the national level, the *Wall Street Journal* has been very critical of the plan, taking issue with its potential impact on electricity prices, as well as on the poor²⁵ and appealing to states to boycott the plan.²⁶ On the other side of the spectrum, an article in the journal *Scientific American* makes the case that the plan does not go far enough.²⁷ That position is taken by Democratic presidential candidates Bernie Sanders who supports a tax on carbon and Martin O'Malley who supports expansion of carbon regulation to other major sources.²⁸

At the state level, Florida's news media have also reflected divergent opinions, mainly printing findings from studies or reprinting views posted elsewhere. An article first appearing in *BloombergView* and reprinted as an op-ed piece in the *Tampa Tribune* and the *Miami Herald* argued that Clean Power Plan is not killing the coal industry; rather, the coal industry has been declining steadily for a decade and implementation of the plan would continue that trajectory.²⁹ Several Florida newspapers, such as the *Daily Commercial* (Leesburg), the *Ledger* (Lakeland), and *Florida Times-Union* (Jacksonville) included articles focused on the adverse economic impacts of the Clean Power Plan³⁰

²² See Nuclear Energy Institute, "New Nuclear Plant Status," Updated July 15, 2015, <http://www.nei.org/Knowledge-Center/Nuclear-Statistics/US-Nuclear-Power-Plants/New-Nuclear-Plant-Status>.

Duke Energy has Levy 1,2 and FPL has Turkey Point 6,7.

²³ Testimony of Art Graham Chairman Florida Public Service Commission before the Committee on Energy and Power, U.S. House of Representatives, March 17, 2015, p. 8.

²⁴ Ibid.

²⁵ "Obama's Climate Plan and Poverty," *Wall Street Journal*, August 12, 2015.

<http://www.wsj.com/articles/obamas-climate-plan-and-poverty-1439420266>.

²⁶ Kenneth Hill, "Why States Should Boycott the Federal Clean Power Plan," *Wall Street Journal*, April 21, 2015, <http://www.wsj.com/articles/why-states-should-boycott-the-federal-clean-power-plan-1429659225>.

²⁷ David Biello, "How Far Does Obama's Clean Power Plan Go in Slowing Climate Change?" *Scientific American*, August 6, 2015, <http://www.scientificamerican.com/article/how-far-does-obama-s-clean-power-plan-go-in-slowing-climate-change/>.

²⁸ Senator Bernie Sanders, "Why We Need a Carbon Tax," *The Huffington Post*, July 9, 2014, <http://www.sanders.senate.gov/newsroom/must-read/why-we-need-a-carbon-tax>. Rebecca Leber. "Clinton and Sanders Have a Shared Weakness and Martin O'Malley is Exploiting It," *The New Republic*, July 2, 2015, ..

²⁹ Michael Bloomberg, "Obama Didn't Kill King Coal – It's Dying of Natural Causes," *Tampa Tribune*, August 10, 2015, p. 11; *Miami Herald*, August 4, 2015, <http://www.miamiherald.com/opinion/op-ed/article29986863.html>.

³⁰ See, e.g., Nick Loris and Joyce Morgan Fellow, "It's Bad News for Low-Income Families," *Daily Commercial*, August 24, 2015, A9; Mario H. Lopez, "Guest- Column: Florida Lawmakers Should Fight for Affordable Energy,"

How have Floridians reacted to the Clean Power Plan to date? From early indications, there appears to be much of the same partisan divide toward it and climate change policy in general as has been exhibited by the presidential candidates. A Public Policy Polling Survey of Florida voters conducted immediately preceding release of the final plan showed 85% of Florida Democrats to be strongly or somewhat in favor of the plan compared to 50% of Republicans.³¹ Yet, less than a third of Republican respondents indicated strong opposition to it. Although support and opposition fall along party lines, more Florida Republican voters support than oppose the plan, and Florida Democrats overwhelmingly support it. There are 14 months to go before the November 2016 presidential election and much can happen to either elevate or diminish climate change policy as an issue of significant importance for Florida's voters or to change the degree of partisan response toward the Clean Power plan. Stay tuned!

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³¹ Public Policy Polling, Florida Survey Results, survey of 612 Florida voters, July 31-August 2, 2015, <http://www.americansunitedforchange.org/page/-/FL-PPP-CPP-Results%208-3-2015.pdf>.