



National Tribal Air Association's Analysis of the EPA's Final Clean Power Plan, NTAA Comments And Final Rule Outcomes

Introduction

The National Tribal Air Association (NTAA) produced this white paper to identify items contained in the U.S. Environmental Protection Agency (EPA's) Proposed Clean Power Plan (Proposed Rule) for which NTAA provided comments and how EPA addressed such items in the Final Clean Power Plan (Final Rule).

Building Blocks

The Proposed Rule prescribed four building blocks for the best system of emissions reduction representing the most effective strategies for reducing carbon dioxide (CO₂) emissions from electric generating units (EGUs).

1. Building Block #1. Reduce carbon intensity of electricity generation at affected EGUs under the Proposed Rule (affected EGUs) through heat rate improvements on the average of 6% nationally.

a. NTAA Comments. The NTAA recommended that EPA work closely with states to get them to place a greater emphasis on Building Block #1 within their state implementation plans, understanding that this was the only block focused on reducing CO₂ emissions from EGUs. Further, the NTAA recommended that individual EGUs meet heat rate improvements of 10%, the average percentage rate nationally that EPA found could be achieved by EGUs at a reasonable cost. A 6% heat rate improvement would require EGUs to adopt best practices for operation and maintenance, and a 4% heat rate improvement would require equipment upgrades.

b. Final Rule Outcome. The NTAA does not find that the Final Rule places a greater emphasis on Building Block #1. Further, the Final Rule reduces the national 6% heat rate improvement under the Proposed Rule to a regional heat rate improvement range of 2.1% to 4.3% (*e.g.*, 2.1% improvement in the Western Interconnection, 2.3% improvement in the Texas

Interconnection, and 4.3% improvement in the Eastern Interconnection). These values reflect improvements achievable through both best practices and equipment upgrades.

2. Building Block #2. Substitute energy generation from the most carbon-intensive affected EGUs to less carbon-intensive EGUs (*e.g.*, natural gas).

a. NTAA Comments. The NTAA indicated that it was not opposed to substituting energy from the most carbon-intensive EGUs to less carbon intensive EGUs, such as those EGUs that use natural gas. However, the NTAA communicated its concerns with the use of fracking to extract natural gas from the subsurface and recommended that the Proposed Rule acknowledge the potential dangers of fracking associated with natural gas extraction and that states take all precautions necessary to protect drinking water supplies from fracking.

Further, the NTAA indicated that natural gas extraction is subject to leakage and loss of methane during transportation, a greenhouse gas whose comparative impact on climate change is over 20 times greater than CO₂ over a 100-year period. Understanding that EPA would be proposing a rule to address methane emissions from EGUs, the NTAA recommended that EPA look to guidance from those states that have a comprehensive plan for cleaning up methane pollution from their natural gas sector, and require natural gas drillers to conduct quarterly inspections to detect and fix methane leaks in their systems.

b. Final Rule Outcome. The Final Rule provides that natural gas plants can run at 75% of “net summer capacity” based on how much power that such plants have produced historically. The Proposed Rule called for natural gas plants to run at 70% of how much power that such plants were designed to produce. The result is the same, but EPA finds that net summer capacity is the more reliable metric.

Further, the Final Rule doesn’t make any acknowledgments about fracking related to natural gas extraction. However, EPA’s proposed rule for addressing EGU methane emissions references the methane pollution cleanup activities of states, and requires quarterly inspections for leaks (*e.g.*, fugitive emissions), as well as annual and semiannual inspections, from affected EGUs.

3. Building Block #3. Substitute energy generated by affected EGUs with energy generation from low- or zero-carbon emitting units.

a. NTAA Comments. The NTAA communicated its support of renewable energy use as a way to reduce carbon emissions. However, the NTAA identified its concerns with the continued use of nuclear energy and the waste that it generates which necessitates safe transportation to a storage facility that should also be safe. The NTAA recommended that EPA engage in a government-to-government consultation with Indian Tribes and to include other federal agencies such as the Department of Energy, to discuss and address the prospective issues of transporting and/or storing nuclear waste on or near Tribal lands.

Further, the NTAA communicated its concern about the Proposed Rule’s promotion of biomass-derived fuels as renewable energy. EPA’s Scientific Advisory Board finds that biomass fuels are not carbon neutral and can, in fact, be more carbon-intensive than coal. As such the

NTAA recommended that a cap be placed on the amount of biomass burning allowable in a state's implementation plan, at least until EPA updates its draft accounting framework regarding biomass-derived fuels, that should help determine the net atmospheric contribution of CO₂ related to the growth, harvest, and use of these fuels.

b. **Final Rule Outcome.** The Final Rule does not include existing and under-construction nuclear power plants for Building Block #3. However, states can still use energy generation from under-construction nuclear facilities, new nuclear units, and capacity upgrades to help individual EGUs meet their emission rate or mass-based targets.

Further, Building Block #3 does not include biomass as part of renewable energy generation. However, states may use "qualified biomass" as a means of meeting their CO₂ reduction requirements (*e.g.*, biomass feedstock demonstrated as a means to control increases of CO₂ levels in the atmosphere).

4. **Building Block #4.** Reduce EGU energy with demand-side energy efficiency that reduces the amount of energy generation required (*e.g.*, reduce demand for electricity through building codes, state appliance standards).

a. **NTAA Comments.** The NTAA supported implementation of Building Block #4.

b. **Final Rule Outcome.** The Final Rule does not include Building Block #4. However, EPA anticipates that demand-side energy efficiency will be a significant component of state plans under the Final Rule, particularly through the proposed Clean Energy Incentive Program (CEIP) which will grant emission rate credits to states that develop energy efficiency projects for low-income communities.

Multistate Plans

In the Proposed Rule, EPA encouraged the use of multistate plans in which states would work together to achieve their respective CO₂ emission reductions. In fact, the Proposed Rule indicated that EPA organized, encouraged, and attended meetings to discuss multistate planning efforts. The rationale for these meetings was that, because the power sector is interconnected and electricity generated at power plants crosses state lines, states, utilities, and ratepayers might benefit from states working together to address the requirements of the rulemaking implementation.

1. **NTAA Comments.** The NTAA communicated its concern that no Indian Tribes were invited by EPA to participate in the above meetings, finding that Tribes can be treated as states under Section 301(d) of the Clean Air Act. As such, Tribes can develop and implement a plan under the Proposed Rule and should have the option of including the EGUs located in its areas of Indian Country in a multi-jurisdictional plan with one or more states.

Further, the NTAA questioned why, in EPA's promotion of a multistate planning approach under the Proposed Rule, it did not recommend using regional planning organizations (RPOs) for

this effort. RPOs have an established framework and governance and a proven track record of using their combined technical, policy, and legal resources and expertise to address air quality issues effectively on a local, regional, and national level. As such, the NTAA recommended that EPA provide sufficient funding to and work closely with the existing RPOs to help implement the Proposed Rule.

2. **Final Rule Outcomes.** The Final Rule does not address NTAA's comments or recommendation.

Renewable Energy Portfolio Standards

The Proposed Rule indicated that for many states, their renewable portfolio standards allow energy generated by qualifying renewable energy sources in other states to count toward meeting such renewable portfolio standards.

1. **NTAA Comments.** The NTAA recommended that Indian Tribes be given the same opportunity as states to sell renewable energy generated on their lands to help neighboring states meet their CO₂ emission reduction requirements while the Tribes could use the money from such sales to reinvest into their own economies. The NTAA was unaware of any discussions about this potential opportunity at the multistate planning meetings identified above, or individually between a Tribe and EPA. As such, the NTAA recommended that EPA engage Tribes in a discussion about this opportunity and how it might fit under the Proposed Rule.

2. **Final Rule Outcome.** The Final Rule provides for a Clean Energy Incentive Program (CEIP) by which renewable energy and demand-side energy efficiency projects on Tribal lands could qualify for early action rate credits or allowances (e.g., valuable commodities) that generate megawatt hours (MWh) or reduce end-use energy demand during 2020 and/or 2021 so long as the projects benefit states that have submitted final state plans and such plans include participation in the CEIP.

State and Multistate Cap-and Trade Programs

The Proposed Rule indicated that some EGUs could reduce emissions at lower costs than others, and industry should be allowed to determine through market mechanisms which EGUs to control and which to leave uncontrolled, and which EGUs to potentially operate more and which to potentially operate less. This type of scenario would exist under cap-and-trade programs. States involved in cap-and-trade programs would likely include the availability of allowances for EGUs. Allowances permit an individual EGU to emit pollutants at a specified level. If an individual EGU was unable to meet its emissions budget, it would be able to purchase allowances on the open market in order to allow the EGU to emit at historic or even higher emission levels. Essentially, the individual EGU could buy its way out of compliance by acquiring more allowances.

1. **NTAA Comments.** The NTAA communicated its concern that cap-and-trade programs could cause local impacts or hotspots by which the owners of multiple EGUs could decide to increase the CO₂ emissions at some of their EGUs at the expense of reducing emissions at their other EGUs, particularly those emitting CO₂ at significantly high levels. Under such

circumstances, the EGUs could potentially emit at historic or even higher levels which, in turn, would cause the co-pollutants of such EGUs to remain the same or increase to the detriment of local populations such as Indian Tribes. As such, the NTAA made the following recommendations regarding any cap-and-trade programs included under an EPA-approved state implementation plan:

a. Restrict allowance allocations and offsets for individual EGUs having the worst health impacts on nearby communities due to their co-pollutants; and

b. Integrate controls into the state implementation plan approval process that insures emission reductions from EGUs, particularly those of co-pollutants, are actually happening near Tribal lands.

2. Final Rule Outcomes. The Final Rule does not address NTAA's recommendations directly. However, the Final Rule provides for the following with respect to potential impacts of state implementation plans, regardless of whether they involve cap-and-trade programs:

a. EPA will conduct its own assessment during implementation of the Final Rule to determine whether the implementation of state plans developed pursuant to the rule and other air quality rules are reducing emissions and improving air quality in all areas or whether there are localized air quality impacts that need to be addressed under CAA authorities.

b. EPA recommends that states conduct evaluations of their own implementation plans to determine the impacts of such plans on overburdened communities. To support this effort, EPA will provide states (and local communities) with resources that they can use to assess options for plan development and implementation that consider localized impacts; and training on how to develop and carry out these evaluations.

Unlike NTAA's recommendations for proactively addressing potential localized impacts, the Final Rule does not require nor does it provide guidance on how localized impacts must or should be addressed if such impacts are identified.

National Cap-and-Trade Program

The Proposed Rule sought comment on development of a model rule for an interstate emissions credit trading program.

1. NTAA Comments. The NTAA recommended establishment of a Tribal set-aside as part of an interstate emissions credit trading program, modeled after a similar set-aside that grew out of the Western Regional Air Partnership (WRAP) and its involvement with regional haze issues in and around Class I Air Sheds in the West. The Tribal set-aside, established through the WRAP, grew out of multiple discussions among the WRAP's partners and participants where issues of equity and economic development kept coming up during conversations with respect to Indian Tribes that had hardly contributed to visibility impairment in the West, but whose environment and health had been adversely affected by neighboring jurisdictions with sources

emitting significant SO₂ amounts. The Tribal set-aside established through the WRAP was “intended to help ensure equitable treatment for tribal economies and prevent barriers to economic development.”

2. **Final Rule Outcomes.** The Final Rule does not address NTAA’s recommendation.

Environmental Justice

In the Proposed Rule, EPA indicated that it could not predict with accuracy how CO₂ emissions from specific EGUs would change as an outcome of the Proposed Rule due to state-led implementation and therefore could not determine where there would be disproportionately high and adverse human health or environmental effects on minority, low income, or Indigenous populations due to the rule.

1. **NTAA Comments.** The NTAA anticipated that each state would focus on the building block or blocks most important to its existing circumstance. For example, some states would likely focus on Building Block #3 by raising their renewable portfolio standards and still other states might focus on a combination of the building blocks, all to comply with the CO₂ emissions to which they would be limited under the Proposed Rule. The NTAA, by extension, assumed that EPA could not determine the effects of building block measures used by states, in isolation and in combination with others, on Indian Tribes. However, the NTAA understood, as critical, the effect of individual EGUs on Tribes as well as the building blocks used under state programs. As such, the NTAA recommended that EPA conduct a thorough environmental justice analysis of the Proposed Rule to determine its impacts to nearby Tribes and make it a required part of the planning process for state implementation plans.

2. **Final Rule Outcomes.** The Final Rule provides for an environmental justice analysis of the Final Rule that is not a required part of the planning process for state implementation plans, and does not go far enough to include all Indian Tribes potentially impacted by the rule. Specifically, EPA has conducted a proximity analysis that summarizes the following demographic data of communities located within a 3-mile radius of each affected EGU: Minority; Low Income; Linguistically Isolated; Less than a High School Education; Under Age 5; and Over Age 64. Absent from this list of indicators is an indicator that identifies the ethnicity of communities. As such, the NTAA is unable to determine how many Tribes or Tribal communities, if any, are located within the 3-mile radius of these EGUs. However, it is likely that most Tribes and Tribal communities lie well beyond such an area, meaning that they are not covered under the proximity analysis, even though the Final Rule acknowledges that the impacts of both potential increases and decreases in EGU emissions can be felt many miles away.

Tribal Consultation

Even though EPA may have consulted with Indian Tribes regarding the Proposed Rule, EPA asserted that the rule did “not have tribal implications as specified in Executive Order 13175.” The rationale for EPA’s finding was that the Proposed Rule “would not impose substantial direct

compliance costs on tribal governments that have affected EGUs located in their area of Indian country.”

1. **NTAA Comments.** The NTAA disagreed with this assertion by EPA, finding that Executive Order (EO) 13175 is not limited to federal actions with financial impacts to Tribes. Specifically, section 1(a) of EO 13175 defines “policies that have tribal implications” as:

[R]egulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The definition makes no reference to direct compliance costs on Tribal governments, although such costs are one of many implications that a federal agency action could have on Indian Tribes.

The NTAA found that the Proposed Rule had implications to Indian Tribes such as those relating to multistate plans, environmental justice, and treaty rights. As such, the NTAA indicated that EO 13175 required EPA to develop an accountability process to ensure “meaningful and timely input by development of regulatory policies that have tribal implications.”

2. **Final Rule Outcomes.** EPA provides that the Final Rule “has tribal implications” although such implications do not extend to substantial direct compliance costs on federally recognized Tribal governments nor preempt Tribal law. Indian Tribes are not required to develop implementation plans under the Final Rule and none of the affected EGUs are owned or operated by Tribes.

EPA acknowledges that, in consultation with Indian Tribes, such Tribes raised concerns about a number of implications to their communities, including impacts on jobs and revenue; cost of water covered under treaty to their communities as a result of increased costs to EGUs that provide energy to transport water to the Tribes; and impacts of climate change on their communities, resources, ways of life and hunting, and treaty rights (such impacts raised by the NTAA in its comment letter to EPA).

The Final Rule indicates that EPA’s Tribal Consultation Official certifies the requirements of EO 13175 have been met in a meaningful and timely manner, and has included a copy of the certification in the docket for the Final Rule. However, the NTAA does not know how EPA responded to specific concerns raised by Indian Tribes during consultation.

Conclusion

The Final Rule addresses NTAA’s comments wholly, partially, or not at all, depending on the issue.

The Final Rule addresses NTAA’s comments regarding some very important issues such as Tribal consultation and renewable energy portfolio standards. EPA agrees clearly in the Final

Rule that the rule does have Tribal implications, something with which EPA did not put forward in the Proposed Rule. Further, the Final Rule gives Indian Tribes opportunities, through the CEIP, to develop renewable energy and demand-side energy efficiency projects on Tribal lands that can benefit states in meeting their emission targets, while at the same time, providing financial incentives for Tribes to do so in the form of emission reduction credits (ERCs) and allowances. Finally, Building Block #3 does not include nuclear energy and biomass as low- or zero-emitting carbon sources, sources about which the NTAA expressed concerns.

Further, the Final Rule addressed some of the NTAA's comments, but not to the full extent that NTAA requested. The Final Rule does not require an environmental justice analysis as a required part of the planning process for state implementation plans, but it does include a proximity analysis that summarizes the demographic data of communities within a 3-mile radius of each affected EGUs, which can be used for environmental justice purposes if an affected EGU is found to have impacts on such communities. Building Block #2 also does not address fracking, but EPA has proposed a separate rule that addresses NTAA's concerns regarding methane.

Finally, the Final Rule is silent on other issues raised in comments by the NTAA such as multistate plans and a national cap-and-trade program. The Final Rule does not promote the use of RPOs for the development and implementation of multistate plans, nor are RPOs even discussed. Further, the Final Rule fails to provide a Tribal set-aside of any kind for Tribes as the NTAA recommended under a national cap-and-trade program. In addition, the Final Rule adopts, under Building Block #1, a lower heat rate improvement rate than the 10% recommended by the NTAA; and eliminates Building Block #4.

Please Note:

This White Paper is not an official NTAA comment on EPA's proposed Federal Plan or Clean Energy Incentive Program but is instead intended to provide supplemental information for Tribal communities on the Final Clean Power Plan.

This NTAA White Paper was prepared by NTAA Policy Advisory Committee member Bob Gruenig. Mr. Gruenig has worked closely with Indian tribes since 2000, having been first employed by the Indian Country Environmental Justice Clinic at Vermont Law School.

For more information on the National Tribal Air Association's policy work on the Clean Power Plan and other air quality issues, please visit www.tribalairquality.org or www.ntaatribalair.org.