

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 849 Legislative Ratification/Department of Environmental Protection

SPONSOR(S): Energy & Utilities Subcommittee and Wood

TIED BILLS: None. **IDEN./SIM. BILLS:** SB 1076

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|-----------------|---------|--|
| 1) Energy & Utilities Subcommittee | 8 Y, 4 N, As CS | Keating | Keating |
| 2) Rulemaking Oversight & Repeal Subcommittee | | | |
| 3) Regulatory Affairs Committee | | | |

SUMMARY ANALYSIS

On June 18, 2014, the U.S. Environmental Protection Agency (EPA), pursuant to section 111(d) of the federal Clean Air Act (CAA), published a proposed rule to address greenhouse gas emissions from existing power plants (the "Clean Power Plan"). In its proposed rule, the EPA proposes state-specific, rate-based goals for carbon emissions from existing plants and guidelines for states to follow in developing plans to achieve the goals. The EPA is currently processing public comments on the proposed rule and plans to issue a final rule this summer (2015).

Under the proposed Clean Power Plan, each state, by June 30, 2016, must submit to the EPA a plan to implement the guidelines set forth in the rule. Under the proposed rule, a state may request a one year extension if it needs additional time to submit a complete plan. To obtain an extension, the state must submit an initial plan by June 30, 2016, that contains certain required components. The initial state plan must also document the reasons the state needs more time, such as the state's required schedule for legislative approval and administrative rulemaking, and include commitments to concrete steps that will ensure that the state will submit a complete plan by June 30, 2017. A state may request an extension through June 30, 2018, if it is working with other states to develop a multi-state plan. As with other components of the proposed rule, the proposed timelines for the development of state plans are subject to change in the final rule.

The bill provides that, before submitting a state plan to the EPA pursuant to section 111(d) of the CAA, DEP must submit the plan to the Legislature for ratification in the manner specified in Florida law for rules with adverse impact or regulatory costs. The bill also requires legislative ratification for any other legally binding action of the executive branch of the state which relates to implementation of EPA rules or regulations under section 111(d) of the CAA.

If obtaining legislative ratification would prevent DEP from submitting a state plan to the EPA in a timely manner, the bill provides that DEP may submit an initial state plan that meets the EPA's minimum requirements. In this circumstance, DEP must submit the initial state plan to the Legislature at least 30 days before submitting it to the EPA. As part of its submittal to the EPA, DEP must request an extension of time to file a ratified state plan and include a statement noting that the initial state plan has not been ratified.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

EPA Proposed Clean Power Plan

The U.S. Environmental Protection Agency (EPA) regulates air emissions from stationary and mobile sources under the authority of the Clean Air Act (CAA).¹ Under section 109 of the CAA, the EPA must set National Ambient Air Quality Standards (NAAQS) for air pollutants deemed hazardous to the public health or welfare.² The EPA has set NAAQS for six common pollutants referred to as “criteria pollutants”: ozone, particulate matter, carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead.³ Section 110 of the CAA requires each state to adopt a plan (state implementation plan or SIP) that provides for enforcement of the NAAQS.⁴ In addition, Section 112 of the CAA authorizes the EPA to set emission standards for sources of specified pollutants referred to as “hazardous air pollutants.”⁵

Section 111(b) of the CAA authorizes the EPA to establish standards of performance for a *new or modified* stationary source of air pollution that “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁶ Standards of performance are set by category of stationary sources, and each category is set by the EPA.⁷ The standard for each category must be based on “the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] determines has been adequately demonstrated.”⁸

When the EPA establishes standards of performance for a new or modified source under section 111(b) of the CAA, each state must develop a plan for enforcing the standards for such new sources located in the state.⁹ Further, section 111(d) of the CAA mandates that the EPA prescribe regulations requiring each state to establish standards of performance for any *existing* source to which the EPA standards would apply if it were a new source, provided that the pollutant at issue is not already regulated as a criteria pollutant or a hazardous air pollutant.¹⁰ Standards for existing sources are set through a process that includes the establishment of federal guidelines followed by the development of state plans to meet the federal guidelines.¹¹ To reflect technology differences between new and existing sources, the standards established by states for existing sources may be less stringent than those established by the EPA for new sources.¹² Further, the state may take into account, among other factors, the remaining useful life of the existing source to which the standard applies.¹³ State standards

¹ U.S. Environmental Protection Agency, Summary of the Clean Air Act, available at <http://www2.epa.gov/laws-regulations/summary-clean-air-act> (last accessed March 10, 2015).

² 42 U.S.C. § 7409.

³ U.S. Environmental Protection Agency, Clean Air Act Requirements and History, available at <http://www.epa.gov/air/caa/requirements.html> (last accessed March 10, 2015).

⁴ 42 U.S.C. § 7410. SIPs are subject to review and approval by the EPA. The Florida Department of Environmental Protection is responsible for implementing air pollution programs in Florida that are in compliance with federal requirements.

⁵ 42 U.S.C. § 7412.

⁶ 42 U.S.C. § 7411(b)(1).

⁷ *Id.*

⁸ 42 U.S.C. § 7411(a)(1).

⁹ 42 U.S.C. § 7411(c).

¹⁰ 42 U.S.C. § 7411(d).

¹¹ U.S. Environmental Protection Agency, What EPA is Doing: Reducing carbon pollution from the power sector, available at <http://www2.epa.gov/carbon-pollution-standards/what-epa-doing> (last accessed March 10, 2015).

¹² *Id.*

¹³ 42 U.S.C. § 7411(d).

and implementation plans are subject to EPA review and approval.¹⁴ Florida law does not require legislative ratification of state plans prior to submittal to the EPA under section 111(d) of the CAA.

Under the authority granted in section 111(b) of the CAA,¹⁵ the EPA, on April 13, 2012, proposed rules setting forth performance standards for carbon emissions¹⁶ from new electric power plants.¹⁷ The adoption of performance standards for this new source triggered the development of federal guidelines and state standards under section 111(d) of the CAA for carbon emissions from existing power plants.

On June 25, 2013, President Barack Obama issued a Presidential Memorandum which recognized that the EPA had begun rulemaking for new power plants and directed the EPA to issue standards, regulations, or guidelines, as appropriate, that address carbon emissions from existing power plants pursuant to its authority under the CAA.¹⁸ The Presidential Memorandum requested that the EPA issue such guidelines for existing plants by June 1, 2014, issue final guidelines for existing plants by June 1, 2015, and require submission of state implementation plans and standards by June 30, 2016.

On June 18, 2014, the EPA published a proposed rule to address greenhouse gas emissions from existing power plants (the “Clean Power Plan”).¹⁹ In its proposed rule, the EPA proposes state-specific, rate-based goals for carbon emissions from existing plants and guidelines for states to follow in developing plans to achieve the goals. With respect to Florida, the EPA’s proposed rule requires a 38 percent reduction in carbon emissions from 2012 rates by 2030, with much of the reduction required by 2020.²⁰

The EPA invited public comment on the proposed rule. The Public Service Commission, Department of Environmental Protection, Office of Public Counsel, Department of Agriculture and Consumer Services, and the Attorney General (jointly with other state attorneys general) each submitted comments in response to the proposed rule.²¹ The EPA is currently processing these comments and all other public comments submitted on the proposed Clean Power Plan and plans to issue final rules this summer (2015) related to both new power plants and existing power plants.

Under the proposed rule, each state, by June 30, 2016, must submit to the EPA a plan to implement the guidelines set forth in the rule. The EPA intends to develop federal plans to apply to states that do not submit a state plan. Under the proposed rule, a state may request a one year extension if it needs additional time to submit a complete plan. To obtain an extension, the state must submit an initial plan by June 30, 2016, that contains certain required components. The initial state plan must also document the reasons the state needs more time and include commitments to concrete steps that will

¹⁴ *Id.*

¹⁵ In *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), the U.S. Supreme Court affirmed the EPA’s authority to regulate stationary sources of greenhouse gases (like electric power plants), so long as the EPA made an “endangerment finding” to justify the regulation.

¹⁶ According to the EPA’s website, carbon dioxide is a greenhouse gas that is naturally present in the atmosphere as part of the Earth’s carbon cycle (the natural circulation of carbon among the atmosphere, oceans, soil, plants, and animals). The main human activity that emits carbon dioxide is the combustion of fossil fuels (coal, natural gas, and oil) for energy and transportation. The combustion of fossil fuels to generate electricity is the largest single source of carbon dioxide emissions in the nation, accounting for about 38 percent of total U.S. carbon dioxide emissions and 32 percent of total U.S. greenhouse gas emissions in 2011. The type of fossil fuel used to generate electricity will emit different amounts of carbon dioxide, but to produce a given amount of electricity, burning coal will produce more carbon dioxide than oil or natural gas. See <http://www.epa.gov/climatechange/ghgemissions/gases/co2.html> (last accessed March 10, 2015).

¹⁷ Notice of Proposed Rulemaking entitled “Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units”; Docket ID No. EPA-HQ-OAR-2013-0495.

¹⁸ Memorandum to the Environmental Protection Agency from President Barak Obama, (June 25, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards> (last accessed March 10, 2015).

¹⁹ “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units”; Docket ID No. EPA-HQ-OAR-2013-0602. See <https://federalregister.gov/a/2014-13726> (last accessed March 10, 2015).

²⁰ Presentation by the Department of Environmental Protection to the Energy & Utilities Subcommittee, Florida House of Representatives, on March 4, 2015.

²¹ Presentation by the Public Service Commission to the Energy & Utilities Subcommittee, Florida House of Representatives, on March 4, 2015.

ensure that the state will submit a complete plan by June 30, 2017. The proposed rule identifies the following “approvable” justifications for seeking an extension beyond 2016: a state’s required schedule for legislative approval and administrative rulemaking; the need for multi-state coordination in the development of an individual state plan; or the process and coordination necessary to develop a multi-state plan. A state may request an extension through June 30, 2018, if it is working with other states to develop a multi-state plan.

As with other components of the proposed rule, the proposed timelines for development of state plans are subject to change in the final rule. The EPA notes in the proposed rule that its framework regulations (40 CFR 60.23) require that state plans be submitted to the EPA within nine months of promulgation of the emission guidelines, unless the EPA specifies otherwise.

As compared to other sections of the CAA, the EPA rarely has used section 111(d). Thus, there are limited precedents for how the EPA will or should implement performance standards for carbon emissions under section 111(d) of the CAA.²²

Legislative Ratification of Rules

Pursuant to s. 120.54(3)(b)1., F.S., before adoption of a rule, an agency is encouraged to prepare a statement of estimated regulatory costs of the proposed rule, as described in s. 120.541, F.S. If the proposed rule will have an adverse impact on small business or is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate in Florida within one year of implementation, the agency must prepare a statement of estimated regulatory costs of the proposed rule.

Pursuant to s. 120.541(2)(a), F.S., a statement of estimated regulatory costs must include an economic analysis showing whether the rule directly or indirectly:

- Is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of \$1 million in the aggregate within 5 years after implementation;
- Is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of \$1 million in the aggregate within 5 years after implementation; or
- Is likely to increase regulatory costs, including any transactional costs, in excess of \$1 million in the aggregate within 5 years after implementation.

If the adverse impact or regulatory costs of the rule exceed any of these criteria, the rule must be submitted to the President of the Senate and the Speaker of the House of Representatives no later than 30 days before the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.

Effect of Proposed Changes

The bill amends s. 120.541, F.S., to address legislative ratification of a state plan submitted by the Department of Environmental Protection (DEP) to the EPA pursuant to section 111(d) of the CAA, as well as ratification of any other legally binding action of the executive branch of the state which relates to implementation of EPA rules or regulations under section 111(d) of the CAA.

Specifically, the bill provides that, before submitting a state plan to the EPA pursuant to section 111(d) of the CAA, DEP must submit the plan to the Legislature for ratification in the manner specified in Florida law for rules with adverse impact or regulatory costs. Similarly, the bill requires legislative ratification for any other legally binding action of the executive branch of the state which relates to implementation of EPA rules or regulations under section 111(d) of the CAA. The bill provides that

²² Pew Center on Global Climate Change, GHG New Source Performance Standards for the Power Sector: Options for EPA and the States, at p.5, available at <http://www.c2es.org/docUploads/EPA-HQ-OAR-2011-0090-2950.1.pdf> (last accessed March 10, 2015).

such action includes, but is not limited to, executive orders of the Governor, policies or policy statements, guidance documents, and rulemaking.

If obtaining legislative ratification would prevent DEP from submitting a state plan to the EPA in a timely manner, the bill provides that DEP may submit an initial state plan that meets the EPA's minimum requirements. In this circumstance, DEP must submit the initial state plan to the Legislature at least 30 days before submitting it to the EPA. Further, as part of its submittal to the EPA, DEP must request an extension of time to file a ratified state plan and include the following statement in its initial plan:

“This initial state plan has not been ratified by the Florida Legislature pursuant to Florida law. Therefore, the Department of Environmental Protection may submit an additional filing to the United States Environmental Protection Agency pursuant to Florida law.”

B. SECTION DIRECTORY:

Section 1. Creates an unnumbered section of law relating to legislative ratification of a state plan, or any other action of the executive branch of the state, related to standards of performance for existing sources of air pollutants.

Section 2. Provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal government.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2015, the Energy & Utilities Subcommittee adopted a strike-all amendment to the bill and reported the bill favorably as a committee substitute. The strike-all amendment altered the original bill by:

- Removing a provision in the bill that exempts from legislative ratification any rules adopted to implement a legislatively ratified state plan.
- Removing references to ratification in specific, future legislative sessions.
- Extending the requirement of legislative ratification to any legally binding action of the executive branch of the state which relates to implementation of EPA rules or regulations under section 111(d) of the CAA.

This analysis addresses the committee substitute.