

CLIENT ALERT

EPA Repeals Obama Administration's Power Plant CO₂ Regulations and Issues Narrower Replacement Rule

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On June 19, 2019, EPA signed the final Affordable Clean Energy (ACE) Rule, addressing the emission of carbon dioxide and other greenhouse gases (GHGs) from coal-fired power plants. The ACE Rule both repeals and replaces the Obama administration's Clean Power Plan (CPP), which had also addressed GHG emissions from power plants, but went much further than the ACE Rule in several important ways. In the ACE Rule, EPA disavows many aspects of the CPP, finding them to be beyond EPA's statutory authority under the Clean Air Act (CAA or "Act"). The ACE Rule sets forth a much more limited view of EPA's authority to require emission reductions from existing sources in a regulated source category. If accepted by the courts, EPA's arguments in support of the ACE Rule could have profound implications not only for power plant GHG regulation but also for other types of sources and pollutants.

"Best System of Emission Reduction" Limited to "Inside-the-Fenceline" Measures by Plain Language of the Act

The most significant difference between the CPP and the ACE Rule is EPA's determination in the latter rule that the plain language of section 111 of the Act limits the statutorily-mandated "best system of emission reduction" (BSER) to those emission-reduction measures that can be implemented *at the source itself* through "continuous" systems of emission reduction.

What does this mean? First, it means that measures designed to achieve reductions *elsewhere* (and that give the regulated source credit for those emission reductions) cannot play any part in the BSER. Only those measures that actually achieve emission reductions *at the source itself* qualify. Thus, the generation-shifting measures that were the core of the CPP are out under the ACE Rule. In other words, EPA cannot require existing sources to obtain emission reductions by shifting generation from coal-fired to lower-emitting natural gas-fired sources of generation, or by shifting generation from fossil fuel-fired sources to renewables such as wind and solar.

Second, it means that emission reduction measures that are based on reduced utilization or shuttering of a coal-fire source, and that are thus not "continuous" systems of emission reduction, cannot be a part of BSER either. Rather, BSER is limited to technological and operational measures that will continuously reduce CO₂ emissions from the individual source. Heat-rate improvement projects undertaken at the individual plant—that is, projects that reduce on a continuous basis the amount of fuel required to produce a unit of electric power—are the prime example of a permissible BSER element that is both "inside the fenceline" of the unit and "continuous" in terms of its effects. Operator training on how to efficiently operate the unit is also a permissible BSER element under EPA's new formulation. Averaging emissions over time at a source, or across emission units within a facility, are out.

Challengers to the ACE Rule—and there will be many, including states and environmental groups—will surely argue that EPA's about-face on this issue since the CPP was promulgated is not well-reasoned, and that EPA is incorrect to now claim that it is *prohibited* by the text of the Act from taking a more expansive approach to defining the "best system of emissions reduction."

EPA and supporters will argue, on the other hand, that federal agencies are permitted to revise their views, so long as they adequately explain them in their final decision documents.

The Final ACE Rule Limits Compliance Flexibilities

Many commenters on the proposed ACE Rule, including many utilities and utility trade associations, urged EPA to allow significant compliance flexibilities so long as the overall emission reduction goals of any final ACE Rule were met. Thus, commenters urged EPA to allow compliance with an individual source's state-set standard of performance through a variety of non-BSER (*i.e.*, non-heat-rate) measures, such as:

- Reduced utilization of coal-fired or fossil fuel-fired units in favor of lower-emitting or zero-emission sources of electricity.
- Averaging emissions at a unit over time.
- Averaging emissions across emission sources at a single facility.
- Averaging emissions across sources owned or operated by a single entity.
- Trading emission reduction credits among independently-owned sources within a state or nationwide.

EPA rejected all of these as compliance options, determining that each runs counter to the fundamental precept of the ACE Rule—that emission reductions must be achieved “inside the fenceline” of an individual unit through measures that achieve reductions on a continuous basis. However, while some measures—such as natural gas co-firing and installation of carbon capture and sequestration (CCS) technology—were ruled out as BSER elements due to concerns about redefining the source or unreasonable cost, EPA did not rule them out as compliance measures. Each of those measures is implementable at the individual unit, and each achieves emission reductions on a continuous basis. Thus, their approval as compliance measures is consistent with the legal theory underlying the final ACE Rule.

EPA Determines BSER, But States Develop Unit-specific Standards of Performance After Considering “Remaining Useful Life” and Other Factors

Another major difference between EPA's approach under the ACE Rule and the CPP is that, under the CPP, EPA both determined the BSER and set specific emission reduction goals for existing units within each state. In the ACE Rule, EPA limits itself to determining the BSER. EPA sets neither national emission reduction standards nor specific emission reduction goals for the individual states. Rather, EPA instructs states to set their own goals based on the guidelines EPA provides regarding what measures comprise the “best system of emissions reduction” and therefore can be incorporated into state plans. EPA views this approach as required by principles of federalism as well as by the plain language of the Clean Air Act, which expressly states that, for existing sources, EPA must determine the BSER and the states are to set performance standards after considering the “remaining useful life” of a source, as well as other factors.

Critics of the rule have claimed—and will likely argue in litigation—that, by declining to set national standards and state goals, EPA is abdicating its responsibilities under the Clean Air Act. EPA and ACE Rule supporters will counter that EPA acted exactly as the statute contemplates by leaving standard-setting to the states. As a practical matter, EPA's decision to leave standard-setting to the individual states makes it difficult to predict what the overall emissions impact of the ACE Rule will be. EPA asserts that the ACE Rule will reduce CO₂ emissions from the electric sector by as much as 35 percent below 2005 levels by 2030, but

that projection is based on a series of assumptions and predictions about how states will implement the ACE Rule. ENGOs and others will likely argue those assumptions and predictions are overly optimistic.

EPA's Regulatory Impact Analysis

In predicting the emissions and other impacts of the ACE Rule, EPA also starts from a different baseline than many of its critics believe appropriate, comparing the impacts of the ACE Rule to the level of emissions EPA projects would have occurred absent *any* rule addressing GHG emissions from utilities. In its regulatory impact analysis, EPA specifically declines to compare the emissions impacts of the ACE Rule to the emissions impacts of the CPP, on the ground that market trends and other factors have most states on track to meet their CPP goals—and thus render the CPP irrelevant in terms of achieving emission reductions. Interestingly, though, EPA admits in the preamble to the final ACE Rule that, compared to a world in which the CPP is in effect, the ACE Rule will result in increased premature deaths, hospitalizations, and asthma attacks annually than the CPP would have. Critics of the rule will almost certainly argue that, to properly gauge whether the ACE Rule complies with Section 111 as well as the broader purpose of the Clean Air Act, EPA must squarely compare that Rule to the CPP rule it is replacing.

What's Next for the ACE Rule and the CPP?

Many utilities, states, and other stakeholders have welcomed the ACE Rule as a more reasonable and lawful approach to reducing GHG emissions from power plants. But, as noted above, it has many critics and will undoubtedly be subject to litigation for the months—and likely years—to come. That litigation will proceed initially in the D.C. Circuit, the exclusive venue for nationally applicable Clean Air Act rulemakings. That Court heard close to seven hours of argument regarding the CPP in an unprecedented *en banc* hearing during the final months of the Obama Administration—including arguments from the government that are directly at odds with many of the legal positions EPA now takes in the ACE Rule. It will be interesting to see how the D.C. Circuit approaches the ACE Rule litigation and how aggressively it questions EPA's changed approach and reasoning.

In the meantime, there is the matter of the CPP, challenges to which remain pending, fully briefed, and long-since argued before the D.C. Circuit sitting *en banc*. What happens to that rule now? According to the plain terms of the ACE Rule, the CPP has been both repealed and separately replaced, and the CPP thus no longer exists. The routine practice of the D.C. Circuit is to dismiss as moot all pending litigation over such repealed or replaced rules, and that is likely what will happen here. With that dismissal, the Supreme Court's extraordinary stay of the CPP, entered way back in February 2016, will dissolve too according to its own terms. But what happens if the D.C. Circuit later invalidates the repeal of the CPP or sets aside the ACE Rule? In that event, expect heated litigation over whether the CPP springs back to life and whether the Supreme Court's stay springs back to life with it.

Ultimately, by taking the position that the Clean Air Act not only allows, but by its plain terms requires, EPA to limit its approach to GHG emissions reduction in the way that EPA has in the ACE Rule, the Trump Administration is making a very big bet on the outcome of judicial review. If EPA wins, it would not only prevail in defending the ACE Rule, but would likely meaningfully limit future administrations' ability to take a more aggressive approach to reducing GHG emissions from the electric power sector under section 111. If, on the other hand, the court holds that EPA's repeal and replacement of the CPP is unlawful or unreasonable, EPA may find itself back where it was at the start of 2017, with the CPP back in play. True, the Supreme Court could step in to rescue the ACE Rule even if the D.C. Circuit invalidates it, but given how slowly such cases tend to proceed, whether that is even an option depends very much on what happens on Election Day 2020.

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