

Trump administration finalizes repeal and replacement rules for Clean Power Plan

June 21, 2019

On Wednesday, June 19, Environmental Protection Agency (EPA) Administrator Andrew Wheeler signed separate rules that repealed and replaced the Obama-era Clean Power Plan (CPP). Wheeler unveiled the final rules in a public ceremony at the EPA, where he was joined by other Trump administration officials, Republican lawmakers and coal industry stakeholders. The EPA's announcement is one of the most significant actions to date by the Trump administration to undo the Obama administration's climate change legacy. These final rules, however, will be challenged by Democratic states and environmental groups in litigation that could extend beyond the 2020 presidential election.

In 2015, the EPA finalized the CPP, which set standards for CO₂ emissions for existing power plants under section 111(d) of the Clean Air Act (CAA). Republican-led states, the coal industry and other stakeholders sued the Obama administration over the CPP, and in February 2016, the US Supreme Court issued an unusual stay, blocking implementation of the rule. Since taking office, President Trump has moved to undo the CPP, proposing a rule to roll-back the Obama-era plan and to replace it with a new regulation, the Affordable Clean Energy (ACE) rule.

It remains to be seen what impact the ACE will have on CO₂ emissions and the nation's electricity generation portfolio. The EPA projects that by 2030, electricity sector CO₂ emissions will be 35 percent below 2005 levels. While the EPA estimates that the ACE will reduce 11 million CO₂ short tons by 2030, the majority of the sector's emissions reductions will occur due to current market trends, such as the transition from coal to natural gas generation and the decreasing cost of renewable energy. Critics of the ACE contend that the rule could actually slow the rate of CO₂ emission reductions.

The ACE's regulatory impact analysis also found that coal generation would increase only by 0.2 percent by 2030. The rule comes as a variety of utilities have committed to closing large coal plants and transitioning to a lower carbon electricity portfolio.

In contrast to the draft ACE rule, the final rule does not contain a controversial change to the CAA's New Source Review (NSR) program. The NSR program requires that new stationary sources, and major modifications to existing sources obtain a permit prior to commencing construction. Critics of the program maintain that the costs associated with the permit process deter power plants from making efficiency upgrades. The draft ACE rule would have allowed coal-fired power plants to avoid NSR review if modifications improve maximum hourly emissions rate even if such modifications result in increased annual emissions. While the EPA did not include the NSR changes in the final ACE rule, the agency indicated that it will pursue the NSR changes in a separate rulemaking.

The EPA's June 19 action constitutes three separate rulemakings: 1) repeal of the CPP; 2) promulgation of the ACE rule; and 3) regulations governing state implementation of the ACE and future section 111(d) emission guidelines. This alert summarizes all three of these separate rulemakings.

CPP repeal

Section 111 of the CAA defines “standards of performance” as “a standard of emissions of air pollutants which reflects 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 impacts.) the Administrator determines has been adequately demonstrated.” In defining the best system of emission reduction (BSER), the CPP employed a “beyond the fence line” approach using the following building blocks: (1) improving heat rate at affected coal plants; (2) shifting generation from coal-fired plants to combined-cycle natural gas power plants; and (3) increasing generation from zero-emitting renewable energy sources, such as solar and wind.

The EPA’s final CPP rule, however, contended that the Obama-era rule exceeded the agency’s authority under the section 111. Specifically, the final rule found that section 111(d) only permits the EPA to establish emission guidelines that can be applied at a specific source, in this case an individual power plant. Thus, the final repeal rule argued that the generation-shifting set forth in the CPP’s BSER is not permitted under section 111(d). In addition, the final rule contended that the CPP’s generation-shifting also encroaches upon the Federal Energy Regulatory Commission’s authority under the Federal Power Act to regulate wholesale electricity markets and upon states’ authority to regulate retail electricity sales.

The ACE rule

Given the EPA’s conclusion that the CPP exceeded the agency’s authority under the CAA, the ACE sets forth a significantly narrower rule. The ACE, consistent with the draft rule, finds that the BSER for coal-fired power plants is efficiency improvements, or heat-rate-improvements (HRIs), at coal-fired power plants. In addition to improving operating and maintenance practices, the final rule lays out the following six candidate technologies that can be applied to or at a coal-fired power plant: 1) neural network/intelligent sootblowers; 2) boiler feed pumps; 3) air heater & duct leakage control; 4) variable frequency drives; 5) blade path upgrade; and 6) redesign/replace economizer. For each of these candidate technologies, the EPA has provided estimates on the range of achievable emissions reductions. In the final rule, the EPA reiterates its decision to not apply BSER to existing natural gas-fired power plants.

The ACE determined that the costs associated with these HRI candidate technologies are reasonable. The EPA also considered co-firing coal plants with natural gas or biomass and carbon capture technologies as BSER, but the ACE found that these options were too costly. States, which are vested with authority to issue standards of performance under the ACE, are provided significant discretion under the rule in developing standards of performance. Even though natural gas co-firing and carbon capture are excluded from BSER, states can rely on them in setting standards of performance. The ACE, however, precludes states from using trading regimes and biomass co-firing in establishing standards of performance.

In the ACE final rule, EPA clarifies that the authority under section 111(d) to promulgate a standard of performance rests with states. As such, the ACE merely provides voluntary emission guidelines and the rule sets forth a process for states developing their own standards of performance. The ACE recommends a two-step process in which a state, in setting a standards of performance, considers 1) the degree of emission limitation achievable through the application of BSER; and 2) a source’s remaining useful life and other source-specific factors.

Under section 111(d), states must submit implementation plans to EPA for review. The ACE requires that states include the following three components in their implementation plans. First, states must describe the “approach or methods used by the state to apply BSER and establish standards of performance.” Second, states must identify

coal-fired power plants that are subject to the ACE. Third, states must disclose calculations they used in applying BSER to develop standards of performance.

Section 111(d) regulations

In the final implementing regulations, the EPA attempts to align the timelines associated with the submission of a state section 111(d) plan with the process for states to submit state implementation plans for criteria pollutants under section 110 of the CAA. In particular, the EPA's final rule extends to three years, from the current nine months, the deadline for states to submit section 111(d) implementation plans, consistent with the section 110 process. The final rule extends the period for EPA to review a state's section 111(d) plan to one year from four months. If the EPA opts to issue a federal plan, it will have two years, instead of six months, to issue that plan.

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