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Up in the Air: The Affordable Clean Energy Rule Faces Litigation Challenges and Resulting Regulatory Uncertainty

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On July 8, 2019, the U.S. Environmental Protection Agency ("EPA") finalized new greenhouse gas emissions rules for existing power plants under the Clean Air Act. With this latest step, the EPA has now repealed and replaced the Obama-era Clean Power Plan ("CPP") with the Affordable Clean Energy ("ACE") rule; however, regulatory uncertainty remains. On the same day that the EPA finalized ACE, the American Lung Association and the American Public Health Association filed a challenge to the rules in the U.S. Court of Appeals for the District of Columbia.¹ Since then, 22 states, the District of Columbia and six municipalities led by the state of New York lodged a challenge to the rules in the D.C. Circuit, followed closely by a third challenge brought by environmental groups.² Numerous industry groups and power providers are seeking to intervene in the litigation in support of the ACE rule. The EPA has asked the court to expedite review of the challenges in the hope of achieving a resolution in the D.C. Circuit by summer of 2020.

These newly finalized EPA rules mark a significant milestone in the Trump administration's efforts to unwind the [Obama-era Climate Action Plan](#) and implement the changes announced in [Executive Order 13783](#), which aimed to reduce regulatory requirements on domestic energy development.

Affordable Clean Energy ("ACE") Rules

ACE consists of three simultaneous rulemakings: (i) repealing the CPP, (ii) replacing the CPP with ACE, and (iii) revising the EPA's rules implementing the Clean Air Act.

Repealing the CPP

The first rule repeals the CPP, likely rendering moot any pending litigation challenging it. A number of states and industry litigants had initially challenged the CPP in the D.C. Circuit as an exercise of administrative authority that reached beyond the EPA's authority under the Clean Air Act ("CAA"). Those parties recently moved to dismiss their challenges, a move with which the EPA concurred.³ However, another group of litigants, largely composed of the states, municipalities and nonprofit groups that support the CPP, have opposed the dismissal. The D.C. Circuit has yet to rule on the pending motions. Because the CPP never came into effect as a result of a stay issued by the Supreme Court,⁴ the dismissal of the litigation – and the repeal itself – is expected to have little practical effect on regulated entities in the near term.

Replacing the CPP

Second, the EPA replaced the CPP with the ACE rule, which redefines the greenhouse gas emissions requirements imposed on power plants. These new requirements follow from the agency's policy to regulate emissions from existing sources in a more limited manner.

The ACE rule outlines the separate roles of the EPA and the states in regulating emissions under the Clean Air Act: the EPA's role is to determine the Best System of Emission Reduction ("BSER") and the achievable levels of emission reductions through application of the BSER, and the states' role is to apply the BSER to establish unit-specific standards of performance.

In the prior CPP, the EPA set a CO₂ emission rate for power plants and allowed the states to determine the best way to achieve the set levels. In contrast, under the ACE rule, the EPA did not set a limit on emissions, and instead concluded that specific heat rate improvement measures are the BSER for coal-fired electric generating units ("EGUs") (other EGUs, such as natural gas combined cycle EGUs, have inherently lower emissions rates and are excluded from the ACE rule). The rule promotes the employment of a broad range of heat rate improvement technologies and techniques such that EGUs will generate electricity more efficiently with less carbon intensity, and provides a list of improvements for states to evaluate in order to develop a plan, including unit-specific standards for regulated sources in the state.

The EPA concluded that the following heat rate improvement candidate technologies are the most impactful and will be considered by the states because of their broad applicability:

- Neural Network/Intelligent Sootblowers
- Boiler Feed Pumps
- Air Heater and Duct Leakage Control
- Variable Frequency Drives
- Blade Path Upgrade (Steam Turbine)
- Redesign/Replace Economizer
- Improved Operating and Maintenance (O&M) Practices

The states will establish a standard of performance at the unit level by considering which of the candidate technologies are most appropriate to each existing source, taking into consideration source-specific factors, including the remaining useful life of the source. The states will have three years to submit plans to the EPA that establish the standards of performance and explain how the state applied the BSER to each source – and how the state took other factors into consideration – in setting the standards.

Revising Clean Air Act ("CAA") Rules

Third, the EPA revised its regulations implementing Section 111(d) of the CAA⁵ addressing performance standards guidelines for ongoing and future emissions of existing sources. The revisions largely address the process for states to seek EPA approval of their plans under the ACE rule. States now have three years (until 2022) to provide their plans to the EPA for review.

Although the EPA had originally planned to roll out revisions to its new source review regulations at the same time that it took steps to repeal and replace the CPP,⁶ the agency announced that it would instead conduct a separate rulemaking to address new sources and issued a notice of proposed rulemaking on August 9, 2019.⁷ The proposed rule will clarify when modifications to existing sources require compliance with the new source review permitting program. Any changes to the new source regulations that would be seen as further easing regulations may be highly controversial and prompt new challenges in court.

Looking Forward

The EPA projects that the ACE rule will decrease carbon dioxide emissions in 2030 by 11 million short tons as compared to a no-CPP baseline. The EPA's regulatory impact analysis estimates that the ACE rule could reduce the cost of compliance on affected entities by as much as \$6.4 billion. Perhaps unexpectedly, some regulated entities may see additional compliance requirements beyond what would have been imposed by the CPP because the ACE rule requires that emission reduction measures be implemented at the source itself, and precludes averaging or trading across sectors to meet a set overall emissions reduction goal.

The ongoing court battles over the CPP, its repeal, and the ACE rule will perpetuate the uncertainty around emissions limitations for coal-fired power plants. It is unclear whether the D.C. Circuit will dismiss the CPP litigation as moot while the challenge to its repeal is pending. In the initial court filings, the parties challenging the CPP repeal and the ACE rule have not yet explained the grounds for their challenges, so the specific legal basis for the pending challenges remains unclear. It is likely, however, that some aspect of the CPP repeal, the ACE rule replacement, and the revisions to the EPA's implementing regulations will each be tested in the courts. Based on the EPA's endangerment finding in 2009 that greenhouse gases constitute a threat to the public health and welfare, the EPA is obligated to regulate greenhouse gases; opponents of the ACE rule can be expected to argue that the EPA has abdicated that duty.

In addition to the challenges to the substance of the rulemakings, there will likely be litigation over the standards that apply to coal-fired power plants during the pendency of the litigation over the CPP repeal and ACE rule. In the meantime, state and local initiatives to regulate greenhouse gases over what the federal government requires are not superseded by the ACE rule. Twenty-three states located primarily in the Northeast and on the West Coast, as well as in D.C., have adopted climate change initiatives to reduce greenhouse gases. Affected sources will continue to comply with those state and local requirements.

Interested and affected parties should monitor these developments with their environmental counsel. Public companies in particular should continue to stay apprised of developments relevant to the adequacy of disclosures made to investors.

1. *Am. Lung Assoc. v. EPA*, No. 19-1140 (July 8, 2019 D.C. Circuit).↩

2. *New York v. EPA*, No. 19-1165 (Aug. 13, 2019 D.C. Circuit); *Appalachian Mountain Club v. EPA*, No. 19-1166 (Aug. 14, 2019 D.C. Circuit).↩

3. *West Virginia v. EPA*, No. 15-1363 (D.C. Circuit) (and consolidated cases).↔

4. *West Virginia v. EPA*, 126 S. Ct. 1000 (2016).↔

5. 42 U.S.C § 7411(d) (Standards of performance for existing sources; remaining useful life of source).↔

6. Emissions Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746 (Aug. 31, 2018) (to be codified at 40 C.F.R. Parts 51, 52, and 60).↔

7. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 84 Fed. Reg. 39,244 (Aug. 9, 2019) (to be codified at 40 C.F.R. Parts 51 and 52).↔

Authors

[Tyler Burgess](#)

Associate / [Washington, D.C.](#)

[Alexandra N. Farmer](#)

Partner / [Houston](#) / [Washington, D.C.](#)

[Jonathan E. Kidwell](#)

Partner / [Dallas](#) / [Washington, D.C.](#)

[Paul D. Tanaka, P.C.](#)

Partner / [San Francisco](#) / [Houston](#)

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