TRUMP ADMINISTRATION RELEASES CLEAN POWER PLAN REPLACEMENT PROPOSAL

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Advancing President Trump's campaign promise to end the "war on coal," on August 21, 2018, the U.S. Environmental Protection Agency ("EPA") proposed a new rule to replace the Obama administration's Clean Power Plan ("CPP"). [1] Unlike the CPP, the proposed Affordable Clean Energy Rule (the "ACE Rule") does not set numerical standards or targets for greenhouse gas ("GHG") emissions. Instead, the ACE Rule would give states flexibility to set their own standards of performance for existing coal-fired power plants. EPA asserts that the ACE Rule will eventually reduce GHG emissions to a similar extent as the CPP would have; however, according to EPA, the ACE Rule would reduce GHG emissions by 1.5% by 2030, compared to 32% by 2030 under the CPP. Interested parties will have 60 days from the date of publication in the Federal Register to comment on the ACE Rule.

BACKGROUND OF THE CPP

Finalized in 2015, the CPP was the keystone to the Obama administration's initiative to reduce GHGs and address climate change and provided leverage to encourage other nations to make emissions reductions commitments under the Paris Climate Accord. The controversial suite of regulations was promulgated under Section 111(d) [2] of the Clean Air Act ("CAA"), which governs existing electric generating units ("EGUs"). The CPP set a goal of a 32% reduction in carbon emissions from 2005 levels by 2030, achieved through the establishment of reduction levels for each state based on the application of best system of emission reduction ("BSER")." The CAA requires performance standards for existing sources to reflect BSER for the pollutant and category being regulated. [3] The Obama administration's broad interpretation of BSER was the heart of the CPP: It coerced EGUs to achieve emission reductions through "outside the fence-line" actions, such as switching to cleaner energy sources like renewable energy or natural gas.

The CPP was challenged immediately upon publication and in February 2016, the U.S. Supreme Court issued an unprecedented stay of the rule while the legal challenge made its way through the courts. For a more detailed overview of the CPP, see "EPA's Clean Power Plan: Structure, Implications for the Grid, and Next Steps." In October 2017, the Trump administration's EPA proposed to repeal the CPP [4] and issued an Advance Notice of Proposed Rulemaking to replace the CPP in December 2017. [5]

WHAT IS THE ACE RULE AND HOW IS IT DIFFERENT FROM THE CPP?

Unlike the CPP, the ACE Rule does not set any emission standards. Instead, the ACE Rule gives each state the

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flexibility to set its own "standards of performance" for existing coal-fired EGUs. Under the ACE Rule, states will have the flexibility to design a plan that works for their particular circumstances and existing EGUs.

The ACE Rule represents a significant divergence from the GHG reductions envisioned under the CPP. Still, EPA asserts that the ACE Rule offers emission reductions comparable to the CPP: "[W]hen states have fully implemented" the ACE Rule, GHG emissions could be reduced 33% to 34% below 2005 levels. [6] However, EPA offers no time frame or deadline by which states must fully implement the ACE Rule. Considering that EPA estimates the ACE Rule will reduce emissions by 0.7% to 1.5% by 2030, reductions of 33% to 34% would likely take more than a century.

EPA proposes to adopt a much more narrow definition of BSER under the ACE Rule. EPA proposes to read Section 111(d) and BSER

> as being limited to emission reduction measures that can be applied to or at an individual stationary source. That is, such measures must be based on a physical or operational change to a building, structure, facility or installation at that source rather than measures the source's owner or operator can implement at another location. [7]

The ACE Rule's BSER definition takes an "inside the fence-line" approach [8] and proposes to define BSER for existing coal-fired power plants as on-site efficiency improvements, also known as heat-rate improvements ("HRIs"). EPA's interpretation of Section 111(d) and proposed BSER definition means that coal-fired EGUs will be focused on improving their own efficiency rather than shifting to cleaner energy sources.

The ACE Rule also provides a list of the most impactful HRIs (the "candidate technologies") for states to consider when establishing standards of performance for coal-fired EGUs. Candidate technologies include: neural network/intelligent soot blowers; boiler feed pumps; air heat and duct leakage control; variable frequency drives; blade path upgrade (steam turbine); redesign/replace economizer; and improved operating and maintenance practices. Lastly, the ACE Rule would revise CAA § 111(d) regulations governing how and when states develop and submit their state plans.

NEW SOURCE REVIEW REVISIONS

The ACE Rule also revises EPA's New Source Review ("NSR") program. Older EGUs have generally been avoiding emissions control upgrades and efficiency improvements to avoid the risk of triggering NSR review, which can be costly and time consuming. The ACE Rule EPA proposes to revise the NSR program so that EGUs that do implement efficiency measures do not trigger NSR review:

> EPA is also proposing a new preliminary applicability test for determining whether a physical or operational change made to an EGU may be a "major modification" triggering New Source Review. EPA is proposing revisions to the NSR permitting program to give states the option to adopt an hourly emissions increase test for such projects. Under this approach, only projects that increase a plant's hourly rate of

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> pollutant emissions would need to undergo a full NSR analysis. This proposal would ensure that coal-fired power plants can appropriately and efficiently reduce their CO2 emissions without undue burden or disruption. [9]

Proponents of the proposed rule argue that this allows older plants to comply with the state-developed standards of performance by undergoing upgrades without the burden of NSR review and thereby avoiding shutdown in advance of the end of their expected useful life. Opponents of the ACE Rule argue that this creates a loophole allowing aging coal-fired facilities to avoid NSR because it allows a source to undertake an operational change that increases hourly emissions but not annual emissions (and vice versa).

ACE RULE CHALLENGES

The ACE Rule is already facing an uphill battle. Senator Ed Markey (D-MA) and his Democratic colleagues have pledged to use the Congressional Review Act ("CRA") [10] to kill the ACE Rule once it is finalized, although President Trump would have veto power over such a CRA resolution. Unsurprisingly, Democratic states attorneys general and certain environmental nongovernmental organizations have pledged to challenge the ACE Rule in court, but they will have to wait until the rule is final to file suit under the Administrative Procedure Act.

The ACE Rule will also face tough legal scrutiny. The U.S. Supreme Court has previously held that CO2 is a pollutant, [11] and during the Obama administration, EPA issued an "endangerment finding" after determining that GHG emissions endanger public health and welfare. Courts may be hesitant to find that the ACE Rule — which ostensibly would reduce GHG emissions by 1.5% by 2030 — satisfies the endangerment finding and protects public health.

CONCLUSION

The ACE Rule is subject to a 60-day comment period. We will continue to monitor the ACE Rule and provide updated analysis of the Trump administration's actions and industry responses.

The full proposed rulemaking can be viewed here.

Notes:

[1] EPA Notice regarding Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations, Revisions to New Source Review Program (Aug. 20, 2018), https://www.epa.gov/sites/production/files/2018-08/documents/frn-ace-proposal_8.20.2018.pdf (last visited Aug. 22, 2018, 10:53 AM) ("EPA Notice").

[2] 42 U.S.C. § 7411(d).

[3] *Id.*

[4] Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 FR 48035 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. Part 60), https://www.gpo.gov/fdsys/pkg/FR-2017-10-16/pdf/2017-22349.pdf.

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[5] State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 82 Fed. Reg. 61507 (advanced notice of proposed rulemaking Dec. 28, 2017) (to be codified at 40 C.F.R. Part 60), https://www.gpo.gov/fdsys/pkg/FR-2017-12-28/pdf/2017-27793.pdf.
[6] *See, e.g.,* News Release, EPA Proposes Affordable Clean Energy (ACE) Rule, Environmental Protection Agency (Aug. 21, 2018), https://www.epa.gov/newsreleases/epa-proposes-affordable-clean-energy-ace-rule (last visited Aug. 22, 2018, 1:42 PM); *see also*, Fact Sheet: Proposed Affordable Clean Energy Rule –- Comparison of ACE and CPP, Environmental Protection Agency, https://www.epa.gov/sites/production/files/2018-08/documents/ace-cpp_side_by_side.pdf (last visited Aug. 22, 2018, 1:35 PM) ("The ACE Rule continues downward CO2 trend, pushing power sector CO2 emissions to around 34% below 2005 levels (similar to CPP).").
[7] EPA Notice, *supra* n.1 at 24–25 (emphasis added).
[8] The "inside the fence line" interpretation is not new; EPA has taken this approach when evaluating emissions from stationary sources under CAA § 111.
[9] Fact Sheet: Proposed Affordable Clean Energy Rule – Overview, Environmental Protection Agency, https://www.epa.gov/sites/production/files/2018-08/documents/ace_overview_0.pdf (last visited Aug. 22, 2018, 10:30 PM).
[10] The CRA requires agencies issuing a "major rule" to delay the effective date by 60 days and submit the rule for review by Congress. Under the CRA, Congress may pass a joint resolution of disapproval that, if signed by the president, deems the rule to not have had any effect at any time. Because the president retains the right to veto such a resolution, the CRA has rarely been successful for rescinding regulations.
[11] *Massachusetts v. EPA*, 549 U.S. 497 (2007).

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