

EPA's Clean Energy Proposal: 6 Key Points

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On Aug. 21, 2018, the Trump administration released its proposed Affordable Clean Energy rule to replace the Obama administration's Clean Power Plan. Both rules would regulate carbon dioxide emissions from existing electric generating units, or EGUs, pursuant to Section 111(d) of the Clean Air Act. The ACE proposal includes three elements:

- Replacing the CPP with new emission guidelines for CO₂ emissions from EGUs;
- Revisions to implementing regulations to guide the Environmental Protection Agency and states on this and future Section 111(d) rulemakings; and
- Revisions to the New Source Review, or NSR, rules for power plants.

Here are six key points stakeholders should know about the EPA's proposed ACE rule.

Get Ready for State- and Unit-Specific Carbon Regulation

Whereas the CPP was based on federally determined emission rates for EGU categories, the ACE proposal calls for each state to establish its own standards of performance for affected EGUs. Instead of setting a presumptive numeric emission limit, the EPA's proposed guidelines identify a list of candidate heat rate improvement measures (including technologies and operational changes), which the EPA has identified as the Best System of Emission Reduction, or BSER, for CO₂ emissions.

As proposed, this BSER would only apply to coal-fired EGUs that are not integrated gasification combined cycle units; it would not apply to any gas-fired units. The ACE rule calls on each state to set CO₂ standards of performance, based on the state's determination as to what each covered unit in its territory can achieve by applying candidate measures from the EPA's BSER list.

States can set standards based on unit-specific considerations and/or the characteristics of EGU subcategories they identify. The ACE rule also gives states the authority to design "custom compliance



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schedules” for affected EGUs or EGU subcategories, with latitude to consider unit-specific factors. Each state will develop an implementation plan that includes the standards, compliance timelines and implementation and enforcement provisions. States must submit the plans to the EPA for approval within three years of the final EPA rule.

Because the ACE rule provides states with significant leeway with respect to both stringency and timing, the regulated community can anticipate substantial variation from state to state and from unit to unit within any given state. These differences may affect rates and/or markets, as well as pollutant emission levels. Power companies — especially those managing multiple units within a state and/or multi-state portfolios — will need to plan for sustained engagement in state administrative proceedings to ensure their interests are appropriately represented.

Greater Flexibility in Some Areas, New Constraints in Others

The ACE proposal would provide states with significant flexibility to account for state- or unit-specific considerations, reflecting the EPA’s current interpretation of Section 111(d)’s division of roles and responsibilities between the EPA and the states. Consistent with the text of Section 111(d), the ACE proposal would allow states to “take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”

The proposal would revise an existing regulatory variance provision to eliminate any distinction between health-based and welfare-based pollutants — and to establish the threshold demonstration states would need to make to support a less stringent standard or timeline for a specific unit or category:

- Unreasonable cost of control resulting from plant age, location or basic process design;
- Physical impossibility of installing necessary control equipment;
- Other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable.

The proposal would also give states considerable discretion in developing compliance schedules. While the proposal contemplates that state plans will require compliance “as expeditiously as practicable,” it assumes that a compliance schedule may be up to 24 months from the date of state plan submittal. And states may allow for compliance extending beyond that 24 months if the unit meets one of the variance factors above, and if the state plan includes “legally enforceable increments of progress to achieve compliance.”

From a practical perspective, given that the ACE rule requires submission of state plans within three years of a final rule, this means that sources may have compliance deadlines of up to five years after the final rule (i.e., 2024 or later). These deadlines may extend even longer if states adopt legally enforceable increments of progress for the source, or if a state fails to submit an acceptable plan, such that the EPA must develop a federal plan.

Despite the ACE proposal’s considerable flexibility, regulated sources may face new compliance constraints. While states may allow compliance with the standard of performance through a measure that is not on the EPA’s BSER candidate list, the EPA would require that any such measure be applied, and its emissions impacts be measurable, at the source itself. And unlike the CPP, which permitted averaging, banking and trading of compliance instruments (i.e., emission reduction credits or

allowances) between units, the EPA is proposing only to allow emissions averaging among affected EGUs within a single facility.

The EPA's position is that averaging and trading across affected sources or between affected and nonaffected sources is inconsistent with its interpretation of BSER as limited to measures taken at and by the affected source. In addition, the EPA's proposal contemplates that the state-adopted standard of performance would be an emission rate — not a mass-based standard.

These aspects of the proposal make it unlikely that states that have adopted a greenhouse gas emissions trading program — such as the Regional Greenhouse Gas Initiative or California's program — could use compliance with that program as a standard under the ACE rule. The practical implication is that, in many instances, individual units may have to make investments to comply with the ACE rule.

New Source Review Changes Go Beyond GHGs

As important as, or more important than, the proposed CO₂ emission guidelines described above, is the EPA's simultaneous proposal to change New Source Review rules for power plants. NSR requires facility owner/operators to get a permit, including stringent pollution control requirements, before building a new major facility or making "major modifications" to existing facilities.

Determining whether an upgrade constitutes a major modification requiring an NSR permit turns, in large part, on whether the change results in a "significant increase" and a "significant net increase" in regulated pollutant emissions. Under current NSR rules, this determination is based on changes in annual emissions.

Critics argue that this deters efficiency upgrades, which can allow plants to run more (albeit at a lower hourly emission rate), thus increasing annual emissions and triggering NSR. This is a special concern under the EPA's proposal, which would require efficiency upgrades to coal-fired power plants.

The EPA therefore is proposing to change its NSR rules for all power plants and all pollutants to use an hourly emissions test, instead of an annual one, in determining whether a facility upgrade triggers NSR. Environmental NGOs and some states are certain to challenge any such change in court. But if upheld, this change could significantly reduce the scope of the NSR program for power plants.

Other industry sectors, including oil and gas, chemicals and manufacturing, hope to obtain similar changes to the NSR regulations that apply to them.

What the Numbers Show

The EPA has provided a top-line summary of its economic analysis of the proposal here. Below are a few important nuggets from the analysis.

Assumptions

NSR- and cost-related assumptions play a key role in determining the estimated costs and benefits from the rule. The EPA assumes power plants could achieve 4.5 percent improvements in efficiency with NSR changes, but only 2 percent without such changes.

The agency looks at costs of \$50/kW and \$100/kW for BSER measures under the 4.5 percent scenario, but only \$50/kW for the 2 percent scenario.

GHG Impacts

The proposal's estimated GHG impacts (positive or negative) are limited. The EPA estimates that the ACE rule will increase 2035 CO₂ emissions by 3 percent as compared with the CPP. If compared with just repealing the CPP, the ACE rule would reduce projected 2035 emissions by 1 percent or less.

Despite this limited impact, power sector decarbonization is expected to continue: 2030 CO₂ emissions under the replacement rule would still decline by 33-34 percent from 2005 levels, as compared with a 36 percent reduction under the CPP.

Cost Changes

The rule may result in modest cost savings or added costs, and these may be higher or lower than under the CPP.

If compared with implementation of the CPP, the rule's 2035 impacts would range from \$100 million in added annual costs, to \$600 million in annual cost savings.

If compared with no CPP, however, the rule's impacts on 2035 annual costs range from \$800 million in added costs to \$200 million in cost savings.

Coal Production

Coal production would be higher than under the CPP, but would still decline. The EPA estimates that 2035 coal production for power sector use under the rule would be 7.4 to 9.5 percent higher than under the CPP, but would be equal to or slightly lower than if the agency simply repealed the CPP.

Under the rule, by 2035, coal production for domestic power sector use would decline by roughly 30 percent from 2017 levels, and coal-fired plants would account for roughly 19 percent of total US generation (down from roughly 30 percent in 2017).

Net Benefits Estimates

The EPA's net benefits estimates depend, in large part, on whether the agency considers health effects of non-GHG pollutants.

Considering only domestic GHG effects, the EPA estimates the rule's present value impacts relative to the CPP would range from \$5.4 billion in net costs to \$3.4 billion in net benefits — depending on the scenario and discount rate.

If the EPA considers non-GHG pollutant impacts (especially health impacts of ozone and fine particulate matter), it estimates that the rule imposes net costs on a present value basis for all scenarios analyzed — ranging from \$12.8 billion to \$72 billion, depending on the scenario and discount rate.

Changes to Section 111(d) “Implementing Rules” Would Govern Future Regulations for Other Sectors

As noted above, the EPA also proposes to update the foundational implementing rules for existing source emissions guidelines under CAA Section 111(d), which were promulgated in 1975. Proposed changes include:

- Authorizing the EPA to tailor any given emission guideline to supersede the default implementing regulations.
- Changing the definition of “emission guideline” such that a guideline is not required to presumptively reflect the degree of emission limitation that the BSER can achieve. Instead, the EPA would have to provide “information” on what emission limitation could be achieved, but the decision could be left to states. Importantly, it is not entirely clear whether this proposed change would still permit the EPA to establish presumptive limitations if it chooses to do so.
- Giving states three years (instead of nine months under existing rules) to submit implementation plans after the EPA finalizes a guideline.
- Giving the EPA 18 months (instead of four) to approve or disapprove a state plan after submission. (This includes six months to determine if an application is complete, and another 12 months to approve or disapprove.)
- Giving the EPA two years (instead of six months) to finalize a federal implementation plan if a state fails to submit an approvable plan.
- Replacing the existing definition of “emission standard” with a definition of “standard of performance” reflecting the current version of the statute.
- Updating the “variance” provision, as noted in item 2 above.

These and other changes would apply prospectively, affecting any Section 111(d) guidelines the EPA may adopt in the future. This includes any future guidelines addressing GHG emissions from other sectors — such as oil and gas production, refineries, chemical plants, coal mines or other stationary source categories.

As with the EPA’s proposed changes to the NSR rules, stakeholders from virtually every sector of the economy will want to be engaged on these issues.

Notable Items Not Included in the ACE Proposal

The EPA’s proposal does not revisit or reconsider the EPA’s 2009 finding that elevated concentrations of GHGs in the atmosphere may reasonably be anticipated to endanger public health and the welfare of current and future generations. That endangerment finding served as the basis for the CPP and other GHG regulations, and remains on the books.

Also of note, the ACE rule does not revisit the EPA’s CO₂ standards for new, modified and reconstructed power plants under Section 111(b), which is a legal predicate for the ACE rule’s proposed regulation of existing power plants. Recent press reports suggest that the EPA may propose a replacement for the current Section 111(b) new source performance standards later this year.

Next Steps

The EPA is accepting public comment on the ACE proposed rule through Oct. 30, 2018. Stakeholders in the power sector, as well as other sectors affected by NSR regulations or possible future GHG regulation, should submit comments and engage with the EPA on key issues.

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