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Climate Change Scorecard: Affordable Clean Energy Rule Versus Clean Power Plan

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Special to the Legal

Just weeks ago, the Trump administration proposed its long-awaited answer to the Obama-era Clean Power Plan (CPP). The CPP was the first federal endeavor to regulate greenhouse gas emissions (GHGs) from existing fossil-fuel fired power plants following the U.S. Supreme Court's decision in *Massachusetts v. EPA* (2007) that carbon dioxide and other GHGs are air pollutants under the Clean Air Act (CAA) and, therefore, can be regulated by the Environmental Protection Agency (EPA). But the CPP's fate was marred from the start, with the rule's detractors immediately rushing to challenge the rule in federal court, and the Supreme Court ultimately deciding in early 2016 to halt implementation of the rule pending the outcome of the litigation in the lower court.

At the same time, then-candidate Donald Trump was already touting his plans to repeal the CPP and replace it with a solution that more thoroughly considered the coal industry's needs. Then shortly after taking office, President Trump issued an executive order to roll back Obama's climate change initiatives, focusing on the CPP.



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Jumping ahead to August 2018, the EPA has now released its proposal for replacing the CPP. The proposed rule is known as the Affordable Clean Energy (ACE) rule (83 Fed. Reg. 44,746 (Aug. 31, 2018)). But does the ACE rule deliver the sharp turn away from the CPP that the Trump administration promised? This article takes a closer look at the ACE rule and how it stacks up against the CPP.

SCOPE OF AUTHORITY GRANTED TO STATES

Like the CPP, the ACE rule would establish guidelines for states to develop state

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implementation plans (SIPs) to reduce carbon emissions from existing fossil-fuel fired power plants. But unlike the CPP, the ACE rule does not prescribe any presumptive standards of performance and, instead, allows the states to determine, on a case-by-case basis, the standards that can be achieved through the best system of emissions reductions (BSER) under CAA Section 111(d). Furthermore, where the CPP interpreted BSER as extending to “beyond the fence line” emissions reduction practices, such as replacing coal-fired plants with renewables and switching to natural gas, the ACE rule reads Section 111(d) more narrowly, limiting emissions

reduction measures to on-site “heat rate improvements” (HRI).

The proposed rule identifies a menu of candidate HRI technologies that states can choose from in developing their SIPs. These candidate technologies include so-called intelligent sootblowers, boiler feed pumps, air heater and duct leakage controls, and variable frequency drives, among others. The ACE rule would also allow states to consider the “cost, suitability and potential improvement” that each technology would bring to an individual plant. As part of this evaluation, states can weigh a plant’s age and remaining useful life, two important factors that were not permitted to be considered under the CPP. The ACE rule would even allow states to apply to exempt certain affected sources from performance standards altogether.

Notwithstanding the ACE rule’s distinct approach to interpreting the breadth of Section 111(d), the EPA is not proposing through the new rule to undercut the EPA’s prior determination that the agency has the authority to regulate GHGs under the CAA.

EXPECTED EMISSIONS REDUCTIONS

GHG emissions are expected to be higher under the ACE rule as compared to the CPP, with the ACE rule projected to result in a 3 percent increase in carbon dioxide emissions by 2035. But compared with a scenario where the CPP is never implemented at all, carbon dioxide emissions would be reduced under the ACE rule by up to 1.5 percent. Similar relative increases and decreases would also apply to emissions of sulfur dioxide, nitrogen oxides and mercury. Unlike the CPP, however, the ACE rule does not establish a timeline for the projected emissions reductions.

TIMING

As compared to the CPP, the ACE rule would significantly extend the length of the

rulemaking process at every stage. States would have three years to submit SIPs after the ACE rule is finalized. The EPA would then have 12 months to take action on the proposed SIPs. If a state’s SIP is deemed to be insufficient, the EPA would have an additional two years to implement a federal plan as an acceptable substitute. By contrast, the CPP afforded nine, four and six months, respectively, for the same three implementation steps. The ACE rule also gives states the authority to implement flexible compliance schedules in individual cases.

EMISSIONS TRADING OPPORTUNITIES

In consideration of the ACE rule’s individual facility approach, it is unclear whether emissions trading would be allowed under the ACE rule. To that end, the proposed rule seeks comment on whether to allow emissions trading, but analysts opine that it would be difficult for the EPA to argue that the CAA limits BSER to individual plant improvements while simultaneously supporting the allowance of emissions trading across plants, companies, and states.

IMPLICATIONS BEYOND CARBON REDUCTIONS

Perhaps one of the most critical elements of the ACE rule is the proposed change to the New Source Review (NSR) preconstruction permitting program. If finalized, the ACE rule would allow coal-fired plants to apply either an annual- or hourly based emissions accounting method when evaluating whether a proposed project triggers NSR. According to the EPA, such change will result in fewer sources triggering major source NSR requirements, thereby facilitating the process of installing the HRI upgrades contemplated by the rule. But critics of the proposal argue that such increased permitting flexibility could allow plants to add new technologies while skirting new pollution control requirements that

would otherwise apply. Either way, in light of the multiple NSR reform initiatives the EPA is pursuing outside the climate-change context, the instant regulatory proposal may signal similar forthcoming revisions to NSR regulations affecting other industry sectors.

WHAT’S NEXT?

The EPA is accepting comments on the proposed ACE rule through Oct. 30. The EPA is requesting comment on approximately 75 specific aspects of the proposed rule. If finalized and ultimately implemented, affected source owners will need to satisfy whatever emissions standards their state deems appropriate for their facilities. But practically speaking, the ACE rule might not have any meaningful impact on day-to-day operations, as many power-generating facilities have already determined to reduce carbon emissions for financial or environmental reasons. Indeed, even if the ACE rule does create the cost breaks promised to coal-fired plants by the new administration, the industry may still opt to forgo available facility upgrades in favor of taking advantage of the low-cost of natural gas or investing in other sources of renewable energy. •

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