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EPA Finalizes Affordable Clean Energy Rule

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Special to the Legal

On June 19, the Trump administration's Environmental Protection Agency (EPA) finalized its Affordable Clean Energy rule (ACE rule), intending to put the final nail in the coffin of Obama-era attempts to reduce greenhouse gas (GHG) emissions. The new ACE rule affords states a considerable degree of flexibility in determining how to reduce GHG emissions from electric generating facilities. Significantly, the ACE rule is expressly intended to allow coal-fired power plants to continue to operate subject only to unit-specific technological improvements. The rule has attracted a great deal of attention from a variety of interested parties, including activists, lawmakers, scientists, and the regulated community.

BACKGROUND

In 2015, the Obama administration released a sweeping reform of carbon-based emissions standards, commonly known as the Clean Power Plan (CPP). The CPP sought to combat GHG emissions by heavily regulating existing coal-fired power plants, while simultaneously incentivizing energy production from lower GHG emitting sources, including natural gas and renewable power generation.

The CPP prompted multiple legal challenges. Most notably, appellants



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contended that EPA did not have authority under the Clean Air Act (CAA) to establish a regulatory scheme predicated on statewide carbon budgets. This legal analysis is based on traditional CAA regulation, pursuant to which emissions are regulated at the individual facility level. The CPP ultimately never took effect because it was stayed by the U.S. Supreme Court in February 2016, pending the outcome of the litigation.

On the campaign trail later that year, then-candidate Donald Trump promised to revitalize coal states by eliminating the CPP if he was elected president. After taking office, Trump followed through on that promise when he issued an executive order to dismantle the CPP in March 2017.

In recognition of the agency's 2009 endangerment finding (that GHGs endanger the public health and welfare), EPA proposed the ACE rule to regulate GHGs in the place of the CPP. The ACE rule was proposed in August 2018 and engendered significant controversy—

“The politically charged nature of GHG regulation significantly contributes to ongoing uncertainty regarding the future of this regulatory program.”

EPA received more than 500,000 public comments in response to the proposed rule.

In promulgating the ACE rule, the EPA announced that unlike the CPP, the ACE rule represents the proper exercise of agency authority under the CAA. More specifically, the Trump EPA asserted that “EPA rules issued under Section 111 of the Clean Air Act were [traditionally] based on measures that could be applied to, for, and at a particular facility, also referred to as ‘inside the fence line’ measures.” The argument follows, therefore, that the CPP overreached because it attempted to regulate outside of the fence line. In a press release regarding the rule's finalization, EPA Administrator Andrew Wheeler said, “Unlike the

Clean Power Plan, ACE adheres to the Clean Air Act and gives states the regulatory certainty they need to continue to reduce emissions and provide a dependable, diverse supply of electricity that all Americans can afford.”

THE ACE RULE—HOW IS IT DIFFERENT?

The ACE rule gives states primary authority to regulate GHGs from coal-fired energy generating units, and establishes heat rate improvement as the best system of emissions reduction (BSER). What this means is that each state can develop its own plan for GHG emissions reductions as long as the plan incorporates the BSER of heat rate improvements drawn from a list of several “candidate technologies.”

EPA considers “technical feasibility, cost, non-air quality health and environmental impacts, and energy requirements” to determine the BSER. The six candidate technologies listed in the ACE rule are as follows: neural network/intelligent sootblowers, boiler feed pumps, air heater and duct leakage control, variable frequency drives, blade path upgrade, and a redesign/replacement of the economizer. The EPA has listed the degree of emission limitation “achievable through application of the BSER as ranges of expected improvement and costs.” It will then be each state’s responsibility to establish unit-specific standards to reflect the BSER. States are allowed to consider “the remaining useful life” of each source as it makes its determinations. Unlike the CPP, the ACE rule does not require emissions reductions across the sector as a whole.

MIXED RESPONSE

Supporters of the ACE rule contend that the regulation achieves the appropriate balance by allowing existing coal-fired plants to remain in service subject to a commitment to efficiency upgrades. By keeping plants open, the argument goes,

coal-dependent jobs are preserved, and states will face less of an economic impact. In a statement to the New York Times, a spokesman for the United Mine Workers of America said that the ACE rule “is going to reduce emissions while not immediately putting an end to our industry.”

The preservation of coal jobs, however, is viewed as shortsighted by those opposed to the ACE rule. Detractors say that the ACE rule diminishes the authority of the CAA, and gives too much power to the states—power, they say, that will not be used to reduce GHG emissions. A blog post by the Natural Resources Defense Council calls the ACE rule a “do-nothing dirty power plan,” that will have “likely negative impacts” on human health and the environment.

Others argue that it might not matter whether coal-fired power plants are regulated heavily or not. Industry experts note that many larger utilities have already started transitioning to cleaner fuel sources as a response to market forces. The CEO of Dominion Energy noted that the company will “stay on its path” toward cleaner energy-generation; many other energy leaders report similar intentions. Contrary to the contention that reliance on market forces may achieve requisite reductions in GHG emissions, a study by the International Energy Agency established that energy-related carbon emissions rose by 3.1% in the United States in 2018.

FUTURE IMPLICATIONS

Practically speaking, individual sources will likely not face ACE-based regulatory standards for multiple years (possibly until 2024 in some cases). First, each state has been given three years to submit to EPA the state’s ACE rule-based amendment to its state implementation plan. Second, after the state plan has been approved, the state has the discretion to grant compliance timelines of up to two additional years to individual facilities. In some cases, facilities can take

even longer to comply, as long as the source can demonstrate “legally enforceable increments of progress.”

The politically charged nature of GHG regulation significantly contributes to ongoing uncertainty regarding the future of this regulatory program. Just as the 2016 election results significantly affected the regulatory landscape, upcoming elections will factor heavily in defining the manner in which GHG emissions are regulated in the United States. If President Trump remains in office, and the courts support his administration’s view of limited agency authority under the CAA, it will be difficult for future administrations to engage in systemic, national-level reform. If someone else wins the presidential election in 2020 and legal challenges to the ACE rule are successful, the regulatory landscape will likely shift once again.

As a final note, the proposed ACE rule contained proposed changes to the CAA’s controversial New Source Review (NSR) program, but those changes were not included in the final ACE rule. The EPA has stated that it expects to pursue new rulemaking on that topic soon. However, the recent departure of Assistant Administrator William Wehrum, a strong proponent of NSR reform, may slow or even stifle this regulatory effort. ●

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