



EPA Proposes the Affordable Clean Energy Rule to Replace the Clean Power Plan

Linda Tsang

Legislative Attorney

September 26, 2018

On August 31, 2018, the U.S. Environmental Protection Agency (EPA) published its [proposed Affordable Clean Energy \(ACE\) Rule](#) to regulate greenhouse gas (GHG) emissions from existing coal-fired power plants. The ACE Rule would replace the Obama Administration’s [Clean Power Plan \(CPP\)](#), which EPA proposed to [repeal](#) in October 2017. The CPP has not gone into effect because the Supreme Court in 2016 [stayed](#) implementation of the rule.

The [proposed ACE Rule](#) would allow states to establish GHG emission standards using “best system of emission reduction” (BSER) measures that are limited to on-site heat-rate improvements for existing coal-fired power plants. Under the proposed ACE Rule, EPA would provide states with a list of “candidate technologies” for use at individual power plants to set emission standards. In contrast, under the more expansive CPP approach, EPA considered emission reduction measures that could be used on-site at individual power plants and off-site to establish national emission standards and state-wide emission reduction targets. This Sidebar explores the legal basis for the proposed ACE Rule and discusses EPA’s authority to consider various emission reduction options for existing power plants under the Clean Air Act (CAA). (A [companion Sidebar](#) discusses the proposal’s new applicability test for [New Source Review](#) permitting requirements under the CAA.)

Legal Authority to Regulate Power Plant Emissions

CAA [Section 111](#) directs EPA to list categories of stationary sources that cause or contribute significantly to “air pollution which may reasonably be anticipated to endanger public health or welfare.” Once EPA lists a source category such as fossil fuel-fired power plants (also known as electric generating units), [Section 111\(b\)](#) requires EPA to establish “standards of performance” for new and modified sources (known as NSPSs) within a listed source category. Under [Section 111\(a\)](#), a “standard of performance” is defined as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction.” After issuing NSPSs under

Congressional Research Service

7-5700

www.crs.gov

LSB10198

Section 111(b) for *new or modified* sources in that category, EPA establishes “emission guidelines” for states to set a “standard of performance” for *existing* sources under Section 111(d). Once EPA has set emission guidelines for existing sources, the CAA requires states to develop implementation plans that establish standards of performance for existing sources in their jurisdiction.

In 2015, EPA finalized both [NSPSs for new or modified power plants](#) under Section 111(b) and emission guidelines for *existing* power plants (the CPP) under Section 111(d). The [NSPSs for new or modified power plants](#) is currently in effect (and under [review](#)). The CPP has not gone into effect because the Supreme Court in 2016 [stayed](#) implementation of the rule until the lawsuit challenging its [legality](#) is resolved. In October 2017, based on a change in the Agency’s interpretation of Section 111, EPA proposed to [repeal](#) the CPP on the grounds that it is beyond EPA’s statutory authority. EPA now proposes to replace the CPP with the ACE Rule. Much of the legal debate on the CPP and the proposed ACE Rule centers on EPA’s interpretation of the BSER for existing power plants.

Changes to the “Best System of Emission Reduction”

In the ACE Rule, EPA proposes to define the BSER for GHG emissions from existing coal-fired power plants as on-site, heat-rate improvements at coal-fired units that reduce the amount of carbon dioxide (CO₂) that the power plant releases per unit of electricity it generates. In comparison, for the CPP, EPA based the BSER for existing coal-fired and natural gas units on [three “building blocks”](#): (1) improving the heat rate at coal-fired units, (2) shifting generation to lower-emitting natural gas units, and (3) shifting generation from fossil fuel units to renewable energy generation. For the CPP, the Agency then used the BSER to set national CO₂ emission standards of performance for both fossil-fuel steam units (which are mostly coal units) and natural gas combined cycle units. Based on these NSPSs, EPA established state-specific emission reduction targets.

In contrast, the proposed ACE Rule does not set national CO₂ emission standards, address natural gas units, or require states to meet specific emissions targets. Instead, states would set emissions standards for coal-based units based only on a list of “candidate technologies” that reflect EPA’s BSER determination. States would determine which technologies are appropriate for each existing coal-fired power plant and establish CO₂ standards based on the emission reductions that the technology can achieve.

EPA’s Legal Basis for the ACE Rule’s “Best System of Emission Reduction”

In the [proposed repeal](#) of the CPP and ACE Rule, EPA proposes to limit the BSER to emission reduction measures that can be “applied to or at the individual stationary source.” In other words, EPA interprets its authority to permit regulating individual power plant emissions and to preclude measures that would be implemented outside of a power plant’s physical footprint. In the proposals, EPA distinguishes physical and operational efficiency improvements, which apply directly to an affected emission source, from “beyond-the-source” measures (commonly referred to as “outside the fenceline” measures), which may encompass shifting to lower-emitting energy sources. Because the CPP BSER was based, in part, on “beyond-the-source” measures, EPA finds in the ACE Rule that the CPP exceeds EPA’s CAA authority. Therefore, EPA proposes to limit BSER to emission reduction measures that apply only to individual power plants.

In another departure from the CPP, EPA did not establish national CO₂ emission standards in the proposed ACE Rule. In the CPP, EPA set state emission reduction targets based on a national CO₂ emission standard. In the proposed ACE Rule, EPA questions the CPP approach of applying BSER to an entire source category to set national performance standards. EPA argues in the proposed ACE Rule that Section 111(d) explicitly requires states, not EPA, to establish standards of performance for existing sources by considering source-specific factors.

EPA also relies on the CAA’s [Prevention of Significant Deterioration \(PSD\) permitting program](#) to support its changed interpretation of the BSER. EPA contends that the Section 111 standards should be

based on source-specific BSER measures in the same manner that emission limits in PSD permits are based only on source- or facility-specific emission control technologies. Because emission limits in PSD permits, at a minimum, must be as restrictive as the Section 111 emission standards, EPA reasons that the BSER should be interpreted similarly to include source-specific constraints that are applied when establishing emission limits for PSD permits. In comparison, in the CPP, EPA did not apply PSD program policies or interpretations to its BSER determination because it interpreted the PSD permitting program as distinct from Section 111(d) emission guidelines. In the CPP, EPA reasoned that the PSD permitting program applies to individual modified or new sources in contrast to Section 111(d) guidelines that apply to an entire source category.

Legal Challenges to EPA's Authority under Section 111(d)

The contrasting legal arguments underlying the CPP and the proposed ACE Rule highlight EPA's change in its interpretation of its authority and discretion under the CAA. In the CPP, EPA interpreted its discretion to define "system" in the BSER expansively to include measures that would reduce overall emissions from the power sector, while the proposed ACE Rule adopts a narrower interpretation of EPA's authority, which is limited to measures that curtail GHGs at individual power plants.

Many of the [legal issues](#) raised in the CPP litigation, including the scope of EPA's authority and its interpretation of the BSER, likely will be central to any future legal challenges to the repeal of the CPP or the ACE Rule if finalized. For example, in litigation challenging the CPP, petitioners claimed that the CPP is unlawful because Congress must issue a "[clear statement](#)" of authority for an agency action that could have potentially serious economic and political implications. Supporters of the CPP have argued that EPA has discretion under Section 111(d) to consider all [inside- and outside-the-fenceline measures](#) to reduce emissions from existing power plants.

States and environmental groups defending the CPP in the litigation are [urging](#) the U.S. Court of Appeals for the District of Columbia Circuit to rule on these legal questions that are common to both the CPP and the proposed ACE Rule. To do so, the court would have to deny EPA's [request](#) to continue the [abeyance](#) (temporary pause) of the litigation that the court initially granted in [April, 2017](#). EPA argues that continuing the abeyance until it completes its rulemaking to repeal and replace the CPP would conserve judicial resources and promote the fairness and integrity of the ongoing administrative process.

If finalized and challenged in court, the ACE Rule could set a precedent on the scope of EPA's authority to determine emission reduction measures that it may consider for power plants and future Section 111(d) emission guidelines for other existing industrial sources of pollution.

Next Steps

EPA announced that it is accepting comments on the [proposed ACE Rule](#) until October 30, 2018 and is planning to hold at least one public hearing on the proposal. Many stakeholders likely will submit comments on the proposed repeal. In 2015, the [proposed CPP](#) received more than 4.3 million public comments, the most ever for an EPA rule. Under CAA [Section 307\(d\)](#), the Agency may issue a final rule once it has considered any comments received on the proposal. Some Members of Congress may consider submitting comments on the proposed ACE Rule or [propose legislation](#) to clarify the extent of EPA's authority and discretion under Section 111(d) to determine the BSER for existing sources.