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Legal Sidebar

EPA Replaces the Clean Power Plan with the Affordable Clean Energy Rule

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On July 8, 2019, the U.S. Environmental Protection Agency (EPA) published its final Affordable Clean Energy (ACE) Rule to regulate greenhouse gas (GHG) emissions from certain existing coal-fired electric utility generating units (EGUs) at power plants. The ACE Rule replaces the Obama Administration's Clean Power Plan (CPP), which EPA repealed in a separate rulemaking on the same day. EPA also finalized new implementing regulations for the ACE Rule and future emission guidelines issued under the Clean Air Act (CAA) Section 111(d). These three rulemakings are to take effect on September 6, 2019.

The contrast between the CPP and the ACE Rule highlights a change in how EPA interprets its authority and discretion under CAA Section 111. In the CPP, EPA interpreted the "best system of emission reduction" (BSER) expansively to include on- and off-site emission reduction measures that would reduce overall emissions from the power sector. In contrast, the CPP repeal and the ACE Rule adopt a narrower interpretation of EPA's authority under Section 111 and limit the BSER to a set of on-site energy efficiency measures that can be applied to individual EGUs at power plants. This Sidebar explores the legal bases for the repeal of the CPP and adoption of the ACE Rule and potential legal challenges to these rulemakings. See this CRS Insight for additional information about the ACE Rule.

Legal Authority to Regulate EGU GHG 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 EGUs, Section 111(b) requires EPA to establish "standards of performance" for new and modified sources (known as NSPSs) within the listed 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 [BSER]."

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After issuing NSPSs under 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* EGUs under Section 111(b) and emission guidelines for *existing* EGUs (the CPP) under Section 111(d). EPA has since proposed to revise or replace both of these standards. In 2018, the agency proposed to revise the NSPSs for new or modified EGUs and repeal and replace the CPP. The July 8, 2019, rulemakings finalize the repeal of the CPP and replace it with the ACE Rule. EPA intends to take a separate final action on related CAA permitting reforms it proposed in 2018.

EPA's Legal Basis for the CPP Repeal and Its Reinterpretation of the "Best System of Emission Reduction" (BSER)

Much of the legal debate on the repeal of the CPP and the final ACE Rule centers on how EPA interprets its authority under Section 111 to determine the BSER for existing EGUs. CAA Section 111(a) requires standards of performance to reflect the emissions reductions achievable through "application" of the BSER. As explained in prior agency and court interpretations of Section 111(a), EPA identifies and evaluates the "adequately demonstrated" "system[s] of emission reduction" for a particular source category to determine which is the "best" and sets emission standards based on the BSER, "taking into account" "cost . . . nonair quality health and environmental impact and energy requirements."

In the CPP, EPA took an expansive view of its Section 111 authority to identify the BSER. EPA determined that the BSER was a combination of *on- and off-site* emission reduction measures that applied to the entire source category. EPA reasoned that the "system" in the BSER reflected the "overall source category," taking into account the "unique characteristics of CO_2 [carbon dioxide] pollution and the unique, interconnected and interdependent manner in which affected EGUs and other generating sources operate within the electricity sector." EPA based the CPP 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.

In the CPP repeal, EPA now argues for a more narrow reading of its authority to determine the BSER under Section 111. EPA asserts that the "application" of the BSER as referenced in CAA Section 111(a) "unambiguously limits the BSER to those systems" that can be "applied" or "put into operation at a building, structure, facility, or installation." In other words, EPA contends that the CAA does not authorize the agency to select as the BSER measures that apply to the source category as a whole or to entities entirely outside the regulated source category. For the ACE Rule, EPA limited its analysis to *on-site* emission reduction measures that could be applied directly to the unit. It finalized its proposed determination that the BSER is on-site heat rate improvements (HRI) (i.e., energy efficiency measures) and best operating and maintenance practices that reduce the CO_2 emissions that a coal-fired EGU releases per unit of electricity it generates.

During the rulemaking process for the CPP repeal and the ACE Rule, EPA's interpretation of its authority under Section 111 has evolved. Previously in its proposed repeal of the CPP, EPA acknowledged multiple possible "readings" of the scope of its Section 111 authority, but in its repeal, the agency takes a more definitive stance and claims its revised and final interpretation is the "only permissible reading" that EPA must limit the BSER to source-specific measures. EPA reasons that the CPP "beyond-the-source" approach "ignored or misinterpreted" the plain text of the CAA that "clearly precluded the unsupportable reading" of Section 111 used in the CPP to choose emission reduction measures that are not directly applied to the regulated EGU.

EPA also points to the "explicit statutory link" between the CAA's Prevention of Significant Deterioration (PSD) permitting program and Section 111 standards to support its interpretation that the BSER must be source-specific. Under CAA Section 165, PSD permits are based only on source- or facility-specific emission control technologies, and Section 111 emission standards derived from the BSER act as a "floor" (minimum) for emission limits in PSD permits. EPA contends that if Section 111 emission standards are the "floor" for PSD permits (which are source-specific), EPA must base the BSER (and the emission standards established by applying the BSER) only on what is achievable at an individual source. 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 observed 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 and therefore found the two programs and standard-setting processes distinguishable.

Because the CPP BSER was based, in part, on "beyond-the-source" measures, EPA asserts in the ACE Rule that the CPP "significantly exceeded" its authority after reconsidering the relevant statutory text, structure, and purpose of CAA Section 111. Therefore, EPA repeals the CPP and limits the BSER in the ACE Rule to emission reduction measures that can be applied only at individual EGUs.

Distinct Roles for EPA and the States in the ACE Rule

The ACE Rule and CPP also differ in their legal interpretations of the states' role in setting emission standards. Section 111(d) delineates specific statutory roles for EPA and the states, requiring the EPA to establish "a procedure" (i.e., emission guidelines) "under which each State shall submit to the [EPA] Administrator a plan which . . . establishes standards of performance for any existing source." In the ACE Rule, EPA explains that Section 111(d) requires the agency to identify the BSER and the degree of emission limitation achievable by applying the BSER. In EPA's view, Section 111(d) explicitly requires states, not EPA, to establish emission standards reflecting the application of the BSER for each existing source by considering source-specific factors. Therefore, EPA declines to set an emission standard that presumptively reflects application of the BSER in the ACE Rule.

The ACE Rule requires states to set GHG emission standards, based on the ACE Rule BSER. In the ACE Rule, EPA identifies the BSER as six "candidate" HRI technologies and best operating and maintenance practices and specifies a "range" of expected emissions reductions associated with each of the technologies. For each regulated EGU, the states must (1) evaluate the applicability of all "candidate" HRI technologies and best operating and maintenance practices, (2) determine which candidate technologies or practices are appropriate, and (3) establish CO_2 standards based on the emission reductions that the technology could achieve at the unit. States must submit to EPA for approval plans detailing how the state (1) applied BSER to each source in setting the standards, and (2) will implement and enforce such standards.

This interpretation of the federal and state roles in standard setting and state implementation differs from the CPP. For the CPP, EPA used the BSER to set national CO_2 emission standards of performance for both fossil-fuel steam units (which are mostly coal units) and natural gas combined cycle units. Based on these national standards, EPA established state-specific emission reduction goals. Under this approach, states had discretion on how to meet those goals when developing their implementation plans (e.g., setting unit-specific emission standards or establishing a state or regional cap-and-trade program), but did not have discretion to set their state emission reduction goals or alter the national standards.

The ACE Rule and the CPP also diverge in their interpretation of the Section 111(d) provision that allows states to consider the "remaining useful life of an existing source" and "other factors" when "applying" a standard of performance to a particular source. EPA, in the ACE Rule, interprets this provision to allow states to consider these factors when "establishing" emission standards, including the costs of implementing HRI and technical feasibility. EPA acknowledges that consideration of such factors could

result in source-specific emission standards "that reflect a value of HRI that falls outside" the emission reduction ranges that EPA identified for each technology. The CPP, in contrast, only allowed states to consider these factors when determining how to apply the national emission standards to existing EGUs, and prohibited states from making "adjustments" to the mandatory statewide emission reduction goals based on these source-specific factors.

Legal Challenges to EPA's Interpretation of CAA Section 111(d)

Under CAA Section 307(d), a court may reverse an agency action that the court finds to be, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." Many of the legal issues raised in the litigation challenging the CPP, including the scope of EPA's authority and its interpretation of the BSER, may also be central to legal challenges to the repeal of the CPP and implementation of the ACE Rule. 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. In contrast, supporters of the CPP argued that EPA has discretion under Section 111(d) to consider all inside- and outside-the-fenceline measures to reduce emissions from existing EGUs. Stakeholders may argue that EPA's narrow interpretation of Section 111 in the ACE Rule and CPP repeal is arbitrary and capricious.

Furthermore, the court would review whether EPA adequately justified its changed legal interpretation of Section 111. EPA contends that it has discretion to change its interpretation of its legal authority so long as it provides a "reasonable explanation" for the change. An agency rule that implements a policy change by amending or repealing an existing rule is generally subject to the often deferential arbitrary and capricious judicial review. However, the Supreme Court has held that when "serious reliance interests are at stake," an agency must present a "more reasoned explanation" for "why it deemed it necessary to overrule its previous position." As a result, EPA's justification for overruling its previous legal interpretation of Section 111 may face additional scrutiny if stakeholders can show "serious reliance" on the CPP and its legal interpretations.

Next Steps

Under CAA Section 307(b), stakeholders may file a petition for review of the final CPP repeal or the final ACE Rule with the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) by September 6, 2019. On July 8, 2019, the American Lung Association and the American Public Health Association filed a petition for review in the D.C. Circuit. Several states, including New York and California, have announced their intent to challenge the ACE Rule and the CPP repeal. Other stakeholders and states, who opposed and challenged the CPP in court in 2015, will likely support EPA's new legal interpretation of CAA Section 111 and its inside-the-fenceline approach. The litigation challenging the CPP, which the court paused during EPA's review of the CPP, is essentially moot now that EPA has finalized its repeal of the CPP. Petitioners of the CPP repeal or ACE Rule may also ask the court to stay (i.e., pause) the rulemakings, similar to the petitioners' request to stay the implementation and enforcement of the CPP.

A court decision on the repeal of the CPP and the ACE Rule could set a precedent on the scope of EPA's authority to determine which emission reduction measures it may consider for EGUs and to set future Section 111(d) emission guidelines for other existing industrial sources of pollution. Further, a judicial decision upholding the states' role in setting emission standards on a case-by-case application of the BSER could have significant legal implications. Some states are concerned that the lack of uniform, national emission standards in the ACE Rule could increase their litigation risks, as stakeholders may challenge the standards the state sets for each EGU.

Congress could consider proposing legislation that would clarify the scope of EPA's authority under CAA Section 111 and the definition of the BSER, or it could consider participating in litigation. Congress took

an active interest in the fate of the CPP since it was proposed in 2014 and subsequently challenged in court. For instance, Members of Congress filed amici curiae briefs on both sides of the CPP litigation. A brief opposing the CPP argued, among other things, that EPA "usurped the role of Congress" through the CPP's "expansive regulatory requirements." A brief in support of the CPP argued, among other things, that Congress conferred "broad authority" on EPA, and that the CPP is "consistent with the text, structure, and history" of the CAA.