

EPA Finalizes ACE Rule

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On July 8, 2019, the U.S. Environmental Protection Agency (EPA) published a notice in the *Federal Register* finalizing three discrete rulemaking actions. First, EPA repealed the Clean Power Plan (CPP) promulgated by the Obama Administration on the grounds that the CPP exceeded EPA's rulemaking authority. Second, EPA finalized the American Clean Energy (ACE) rule, which established emission guidelines for greenhouse gas emissions from existing coal-fired electric utility generating units (EGUs). Third, EPA finalized regulations for state plans implementing emission guidelines under Clean Air Act (CAA) section 111(d). Notably, the agency did not finalize proposed changes to the CAA's new source review regulations. It intends instead to finalize those revisions later as part of a separate rulemaking.

Under CAA section 111(d), EPA must promulgate regulations to enable states to regulate "any existing source" of pollutants "to which a standard of performance would apply if [it] . . . were a new source." These regulations must establish a standard of performance based on the best system of emissions reduction (BSER) available for a particular source category. In the ACE rule, EPA selected heat-rate improvement as the BSER for greenhouse gas emissions from existing coal-fired EGUs. The agency also concluded that no BSER existed for other types of EGUs, such as natural-gas-fired utility boilers or fossil fuel-fired stationary combustion turbines, because EPA concluded that it lacks sufficient information to determine a BSER for other types of EGUs. Thus, the emission guidelines in ACE only apply to existing coal-fired EGUs. EPA suggested that, if appropriate, it will address greenhouse gas emissions from other types of EGUs in the future.

By relying on the states for implementation, ACE represents a purposeful turn toward cooperative federalism. While EPA selected heat-rate improvements as the BSER for existing coal-fired EGUs, states are responsible for applying the BSER to individual sources. In other words, the BSER technologies selected by the EPA set a range of feasible emission reductions for a covered source. States then set a performance standard within that range. States can deviate from the emission reductions achievable through implementing BSER based on source-specific factors. These factors include existing efficiency improvements and the EGU's remaining useful life, among others. ACE thus acknowledges a substantial role for states in implementing ACE, allowing them to tailor the regulation's requirements to the particular situation of covered sources within its borders.

States are not the only actors afforded flexibility to comply with ACE. Sources regulated by the rule also have several options when it comes to compliance. Performance standards established by states express an allowable emission

rate for a particular source (e.g., pounds of CO₂ per MWh). To ensure operations do not exceed that allowable emission rate, sources can adopt heat-rate improvements, non-BSER emission controls, or a combination of the two.

But enhanced state and source flexibility is only one of the changes made to implementing CAA section 111 regulations. ACE also adjusts the timing and approval processes for state plans implementing the BSER. States now have three years from the promulgation of emission guidelines to apply standards of performance to covered sources and to submit those standards for EPA approval. EPA then has six months to approve the plan or to find it incomplete. Finally, EPA also promulgated new “completeness criteria,” which assesses whether a state plan “includes the minimum elements for EPA to act on the submission.” These criteria include eight administrative requirements and six technical elements. Once EPA concludes that a state plan meets these criteria, the agency will act on the plan through notice and comment rulemaking.

EPA’s rulemakings become effective on September 6, 2019. The rulemakings are already subject to litigation, including challenges by the American Lung Association and the American Public Health Association. Further lawsuits from environmental groups and states are expected to be filed in the coming weeks.

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