

New Federal Greenhouse Gas Emissions Rule for U.S. Power Sector

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On June 19, 2019, the United States Environmental Protection Agency (“EPA”) issued the Affordable Clean Energy Rule¹ (the “ACE Rule”), which replaces the Obama administration’s plan for limiting greenhouse gas (“GHG”) emissions from the power sector, known as the Clean Power Plan (the “CPP”). As discussed in our [August 2018 ACE Rule memorandum](#), the ACE Rule represents a fundamentally different approach to regulating GHG emissions as compared to the CPP. While the CPP sought to shift the nation’s electricity generation away from fossil-fuel-fired sources toward natural gas and renewables, the ACE Rule seeks to limit GHG emissions by improving the efficiency of (and thereby maintaining) existing coal-fired power plants.

Final vs. Proposed Rule:

The final ACE Rule largely follows the approach of its proposed version. As with the proposed version, the final ACE Rule seeks to limit GHG emissions from coal-fired power plants by identifying a number of measures designed to improve the efficiency of individual plants (known as heat rate improvements, or HRIs), and requires states to develop, and submit to EPA for approval, plans that establish emission reduction targets based on the application of those measures to the coal-fired power plants within their borders. States will have three years from the date of publication in the Federal Register to submit their plans to EPA. EPA will then have one year to evaluate the plans and an additional two-year period to put in place a federal plan for states that fail to submit plans or submits plans that are deemed inadequate. The timeline for the implementation of the standards will be up to the states.

The most significant change between the proposed ACE Rule and the final ACE Rule is the lack of updates to the New Source Review program (“NSR”). NSR is a Clean Air Act (the “CAA”) program that regulates new construction of and modifications to industrial facilities that are expected to emit certain air pollutants. The proposed ACE Rule sought to narrow the standard for triggering NSR such that any increases to overall emissions would not trigger a NSR review unless they also involved an increase to hourly emissions. The final ACE Rule drops this proposed change but notes that EPA intends to make reforms in the future. The final ACE Rule also provides states with greater guidance on how to use the HRI measures to set performance standards by establishing ranges of potential emission reductions for each of the measures. Additionally, the final ACE Rule is limited to coal-fired power plants. EPA had solicited comments regarding the inclusion of certain categories of natural gas-fired power plants but decided to defer any action with respect to such power plants in the future.

What’s Next:

The ACE Rule is expected to be the subject of litigation and administrative challenges. Environmental advocacy groups and many state attorneys general are expected to launch legal challenges once the ACE Rule is published. Any litigation regarding the ACE Rule will likely continue for years and address legal issues regarding the degree of deference afforded to agency rulemaking as well as the

¹ Currently available at https://www.epa.gov/sites/production/files/2019-06/documents/frn_ace_2060-at67_final_rule_20190618disc.pdf (hyperlink will no longer be available once the rule is published in the Federal Register).

interpretation of key provisions of the CAA which could potentially impact future attempts to regulate GHG emissions from the power sector pursuant to the CAA. Challengers are also expected to seek an immediate stay of the ACE Rule; however, the prospects of such request are uncertain.

Given that the initial timelines of the ACE Rule extend into the next presidential term, the fate of the ACE Rule will likely be determined by what happens in November 2020.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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