

# EPA Proposes Rule to Replace Obama-era Clean Power Plan

---

August 2018

**Authors:** [Seth Kershner](#), [Evan Goldenberg](#), [Laura Mulry](#)

The United States Environmental Protection Agency (“EPA”) recently released its Affordable Clean Energy Rule (the “ACE”) to replace EPA’s Clean Power Plan (the “CPP”) and regulate greenhouse gas (“GHG”) emissions from existing power plants. The ACE establishes guidelines for states to address GHG emissions that focus on efficiency improvements “inside-the-fence” of existing coal power plants. Unlike the CPP, which required federally determined GHG emissions reductions across the power grid, the ACE does not include minimum requirements for GHG emissions reductions. The CPP was the Obama Administration’s 2015 climate change rule limiting GHG emissions from existing power plants.

EPA’s 2009 “endangerment finding” requires EPA to regulate GHG emissions as they are determined to pose a threat to public health. In March 2017, President Trump signed an executive order that required review of the CPP. In October 2017, EPA proposed repeal of the CPP on the grounds that it exceeded EPA’s authority by regulating “outside-the-fence” of individual emissions sources. See our related alert [here](#). The CPP was never implemented due to legal challenges by industry, trade groups and states, and it has been stayed by the Supreme Court pending resolution of legal challenges. The ACE, which was released on August 21, 2018, is similarly expected to be subject to litigation. Legal opposition to the ACE has already been announced by a coalition of states and local governments, including New York State, and is expected from a number of environmental groups. Some legal challenges to the ACE are expected to claim that the ACE does not sufficiently protect public health.

Both the ACE and the CPP were proposed pursuant to Section 111(d) of the Clean Air Act, which gives EPA authority to require states to establish standards for certain pollutants, like the GHG carbon dioxide (“CO<sub>2</sub>”), that reflect emissions limits achievable through the “best system of emission reduction” (“BSER”), taking into account costs of achieving such reductions and health and environmental impacts.

Under the ACE, EPA is proposing to define BSER from existing coal-fired electric generating units (“EGUs”) as heat-rate efficiency improvements (i.e., reducing the amount of CO<sub>2</sub> emitted per unit of electricity generated) based on a range of specific technologies to be employed “inside-the fence” of an EGU, or at individual coal-fired plants. The CPP, on the other hand, determined BSER not only through inside-the-fence measures at individual plants, such as heat-rate improvements, but also through “outside-the fence” measures on a system-wide, rather than a source-specific, level. This outside-the-fence approach under the CPP allowed the substitution of coal-fired generation with generation from lower-emitting or zero-emitting plants (including natural gas-fired power plants), emissions trading among plants, and emissions reduction credits.

Under the ACE, states can set standards based on unit-specific considerations and/or the characteristics of EGU subcategories. The ACE does not identify BSER for integrated gasification combined cycle units or gas-fired stationary combustion turbines (including natural gas-fired power plants).

---

Instead of applying a sector-wide percentage improvement (i.e., a set numerical reduction requirement) as in the CPP, the ACE lays out technologies and practices that could improve heat rate at individual plants, and then directs states to set a standard of performance (i.e., emission rate) for each affected EGU by evaluating, among other factors, these technologies. The heat rate improvement technologies in the ACE are neural network (computer model) control devices, intelligent sootblowers, boiler feed pumps, air heater and duct leakage control, variable frequency drives, redesign or replacement of economizers, and improved operating practices. EPA did not include carbon capture and storage and alternative fuel (biomass or natural gas) co-firing as part of BSER.

States have leeway under the ACE with respect to enforcement and timing requirements, both with the implementation of the states' required plans and the regulation of the EGUs. States must submit their plans with standards for CO<sub>2</sub> to EPA within three (3) years, and EPA then has a year to review such plans. EPA has an additional two (2) years to draft federal plans for any state plans that EPA does not approve; the ACE could take up to six (6) years to be implemented at the state level; a much longer implementation plan than was envisioned under the CPP. Overall, the leeway given to states may result in differing standards from state to state and from unit to unit within a state.

EPA's ACE also proposes revisions to the Clean Air Act New Source Review ("NSR") permitting program for EGUs to avoid triggering of NSR permitting requirements from heat-rate energy efficiency improvement projects undertaken by existing coal plants. NSR requires that major modifications to an existing plant require a permit prior to construction. EPA is proposing to amend the NSR regulations to consider the hourly emissions from a plant planning heat-rate improvement projects rather than annual emissions when considering whether a modification triggers NSR. However, the use of the hourly emissions measurement could allow plants that undertake energy efficiency improvement projects to actually emit more non-CO<sub>2</sub> pollutants.

EPA will take comment on the ACE proposal for sixty (60) days after publication in the Federal Register and will hold a public hearing. More information can be found [here](#).

White & Case LLP  
1221 Avenue of the Americas  
New York, New York 10020-1095  
United States

T +1 212 819 8200

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.