

Welcome to “Environmental Insights”

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So Long Clean Power Plan, Hello Affordable Clean Energy Rule!

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CPP: The Big Climate Rule That Never Fully Was



- The Clean Power Plan (CPP), finalized by the United States Environmental Protection Agency (EPA) on 8-3-15, and published in the Federal Register on 10-23-15, was the premiere component of President Obama’s Climate Action Plan.
 - EPA’s 2009 Endangerment Finding predicated the CPP.
- The stated goal of the CPP was to cut carbon pollution from existing power plants.
- EPA heralded the CPP as the first-ever national standards to address carbon pollution from electric-generating units.
- The EPA explicitly stated in its rollout of the CPP that “**climate change is one of the greatest environmental and public health challenges we face.**”
 - The EPA fact sheet called out the critical importance of taking immediate action.

CPP: The Big Climate Rule That Never Fully Was (cont'd)

- The CPP relied on generation shifting to lower-emitting sources of electricity through the grid system.
 - Natural gas
 - Renewables
- According to the EPA fact sheet, the CPP would have reduced carbon pollution from the power sector by 32 percent below 2005 levels.
- Supporters lauded the CPP's scope and breadth and endorsed its interpretation of the industry sector encompassing the entire grid system, not just facility boundaries.
- CPP's opponents claimed the rule exceeded the scope of EPA's statutory authority of the Clean Air Act, and that the rule could only lawfully mandate changes to a facility within its fenceline.

CPP: Goal Setting

- The CPP cited Section 111(d) of the Clean Air Act as its underlying authority to regulate the fossil fuel industry and created “building blocks” to establish the Best System of Emissions Reduction, or BSER, for electric generating units in reducing carbon dioxide (CO₂)
- It set individual state targets- in mass and rate formats- for CO₂ reduction.
- The CPP established aggressive timelines for compliance.
 - Final plan submission by 9-16-16; or
 - Extension request by 9-16-16 with final plan by 9-6-18.

Goal-Setting Calculations

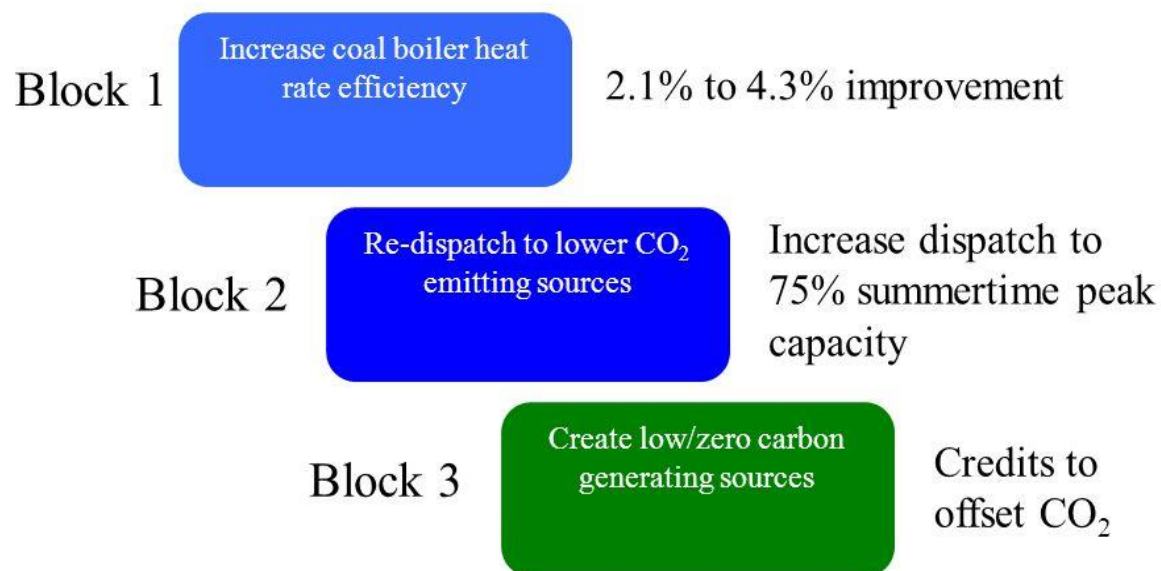
BSER used to determine emission performance rates is based on three building blocks:

1. Improved Efficiency at Coal-Fired EGUs
2. Shifting Generation from Coal-Fired to Natural Gas-Fired EGUs
3. Shifting Generation to Zero-Emitting Renewables

*Graphic above taken from ADEQ slide presentation on CPP.

CPP: Building Blocks

Clean Power Plan (CPP) Building Blocks— Final Regulation



National average of 32% reduction in 2005 CO₂ net emission intensity (lbs/MWh) by 2030

2

*Graphic above taken from EPA slide on CPP.

CPP: Arkansas Snapshot

Arkansas at a Glance

- Under a rate-based plan, Arkansas would be required to reduce carbon dioxide emissions intensity (lb/MWh) from 54 affected EGUs at 19 power plants by 36% from 2012 rates.
- Under a mass-based plan, Arkansas would be required to reduce carbon dioxide emissions (tons) from affected EGUs by 24% (or 23% if new sources are included) from 2012 emissions.

Plan Type Options		Interim Goal	Final Goal
Emission Standards Applied to Individual EGUs	Fossil Steam	1534 lb/MWh	1305 lb/MWh
	NGCC	832 lb/MWh	771 lb/MWh
Statewide Rate-Based Goal		1304 lb/MWh	1130 lb/MWh
Mass-Based Goal		33,683,258 tons	30,322,632 tons
Mass Goal with New Source Complement		34,094,572 tons	30,685,529 tons

ADEQ
ARKANSAS

*Graphic above taken from ADEQ slide presentation on CPP.

CPP: Unprecedented And Short-lived

- Heavily briefed and litigated.
 - A total of 27 states joined in challenging the CPP, lead by West Virginia.
 - The Arkansas Attorney General supported the challenge to the CPP.
- **UNPRECEDENTED: Stayed by the Supreme Court on 2-9-16 during active litigation in the D.C. Circuit.**
- The D.C. Circuit Court of Appeals heard arguments *en banc* re: the legality of CPP on 9-27-16 but never issued a ruling. Why?
 - 2016 Presidential Election
 - 3-28-17: Executive Order 13783 (suspend, revise, or rescind CPP).
 - 6-1-17: U.S. withdrew from the Paris Agreement.
- Current status?
 - See slide 37.
 - Spoiler alert: the D.C. Circuit Court of Appeals dismissed the CPP appeal as moot.

ACE Is Here

- The Affordable Clean Energy (ACE) rule was proposed by EPA Administrator Scott Pruitt on 8-21-18.
- Final ACE rule signed by EPA Administrator Andrew Wheeler on 6-19-19.
- Concurrent with the issuance of the ACE rule, EPA repealed the CPP.
- The ACE rule **repealed, replaced, and revised** existing carbon dioxide rules:
 - (i) repealed the CPP;
 - (ii) replaced the CPP with ACE; and
 - (iii) revised the EPA's rules implementing the Clean Air Act for 111(d).
- ACE was published in the Federal Register on 7-8-19 and took effect on 9-6-19.



ACE vs CPP

Comparing the CPP & ACE

CPP
<ul style="list-style-type: none">• Power plant efficiency & generation shifting-based guidelines• Standards:<ul style="list-style-type: none">• Rate (lb/MWh) or mass (tons)• Statewide goals• Variety of compliance options:<ul style="list-style-type: none">• Inter- or intra-state trading• Energy efficiency• Biomass

ACE
<ul style="list-style-type: none">• Power plant efficiency-based guidelines• Standards:<ul style="list-style-type: none">• Rate (lb/MWh)• Unit-specific• Unit-level compliance

CPP Repeal

Repeal of Clean Power Plan (CPP)

- ▶ Legal rationale for repeal:
 - ▶ CPP exceeded EPA's authority under Clean Air Act by dictating generation shifting as part of best system of emission reduction (BSER) determination
 - CPP Building Blocks 2 and 3 employed measures designed to shift balance of power generation across grid (*i.e.*, coal vs. gas vs. renewables)
 - ▶ BSER must be limited to measures that can be applied to and at an individual source (Building Block 1)
- ▶ The CPP was never put into effect due to Supreme Court intervention

Background

- ▶ CPP repeal proposal published October 16, 2017
 - ▶ EPA received 1.3 million public comments
 - ▶ EPA held 1 public hearing and 3 listening sessions

CPP Repeal (cont'd)

- According to the ACE rule preamble, “the EPA is precluded from basing BSER on strategies like generation shifting and corresponding emissions offsets because these types of systems cannot be put into use at the regulated building, structure, facility, or installation.”

“Implementation” v. “Application”

- EPA asserts in the CPP repeal, that the CPP was “impermissibly based on ‘implementation’ rather than ‘application’ of the BSER.”
- EPA continues that because “CPP is premised on **‘implementation** of the BSER by a source’s **owner** or **operator**’ and not **‘application** of the [BSER]’ to an individual **source**, the rule contravenes the plain language of Clean Air Act section 111(a)(1) and must be repealed. (Emphasis added).”
 - EPA further contends that the conflict between the terms “implement” and “apply” “is compounded by the conflation of the source and its owner, concepts EPA says are separately defined in the Clean Air Act.

ACE Background

ACE Background

- ▶ ACE is an emission guideline promulgated under CAA section 111(d)
- ▶ Emission guidelines are a less common type of regulation; rely on cooperative federalism to achieve emission reductions
- ▶ Roles can be summarized by a three-step process:
 1. EPA identifies BSER
 2. States establish standards of performance for designated facilities within jurisdiction – standards consistent with emission limitation achievable by application of BSER – and will submit plans to EPA for approval
 3. Affected sources comply with standards of performance (set by states) using most appropriate technologies or techniques (sources do not have to apply BSER technologies to comply with standards)

Background

- ▶ ACE proposal published August 30, 2018
 - ▶ EPA received more than 500,000 public comments
 - ▶ EPA held 1 public hearing

Designated Facilities

ACE Designated Facilities

- ▶ Designated facilities are coal-fired electric utility steam generating units (EGUs) with nameplate capacity greater than 25 MW-net and commenced construction on or before January 8, 2014
- ▶ States in contiguous U.S. are affected by this subpart
 - ▶ States are required to submit a plan or negative declaration to regulate designated facilities by July 8, 2022 (within three years of publication)
- ▶ EPA still evaluating information and data for other fossil fuel-fired EGUs

Arkansas Subject Unit Identification

7
units
at 5
power
plants

Flint Creek

Independence 1

Independence 2

John W. Turk

Plum Point

White Bluff 1

White Bluff 2

ARKANSAS
ENERGY & ENVIRONMENT

*Graphic above taken from DEQ slide presentation on ACE.

SWEPSCO Flint Creek



- Located a mile west of Gentry, in Benton County
- Began operations in 1978
- 528 MW coal-fired facility

Entergy Independence Units 1 and 2



- Located near Newark, in Independence County
- Began operations in 1983 and 1984
- 1,678 MW coal-fired facility

SWEPSCO Turk



- Located near Fulton, in Hempstead County
- Began operations in 2012
- 600 MW coal-fired facility

Plum Point



- Located near Osceola, in Mississippi County
- Began operations in 2010
- 665 MW coal-fired facility

Entergy White Bluff Units 1 and 2



- Located near Redfield, in Jefferson County
- Began operations in 1980 and 1981
- 1,659 MW coal-fired facility

ACE BSER

ACE BSER

- ▶ Consistent with legal rationale to repeal CPP, EPA may only consider systems of emission reduction that can be applied at and to a designated facility and that lead to continuous emission reductions
- ▶ For ACE, EPA determined BSER for existing coal-fired EGUs to be heat rate improvements (HRI, also referred to as efficiency improvements)
- ▶ EPA evaluated other systems of reductions but did not include them as part of BSER:
 - ▶ Natural gas repowering
 - ▶ Natural gas co-firing and refueling
 - ▶ Biomass co-firing
 - ▶ Carbon capture and storage

ACE Guidelines

ACE Guidelines

- Efficiency Gains (heat rate improvement) from:
 - 6 candidate technologies
 - Neural network/intelligent sootblower
 - Rebuild/replace boiler feed pumps
 - Air heater and duct leakage control
 - Variable frequency drives
 - Steam turbine blade path upgrades
 - Redesign/replace economizer
 - Best operating and maintenance practices



*Graphic above taken from DEQ slide presentation on ACE.

Will ACE Reduce CO2 Emissions?

- EPA's ACE rule CO2 emissions trend Fact Sheet asserts that "compared to a no-CPP baseline, the ACE rule will reduce carbon dioxide (CO2) emissions in 2030 by about 11 million short tons".
- EPA goes on to state that "ACE, combined with emission reductions **expected from industry trends**, will reduce CO2 emissions from the electric sector by as much as 35 percent below 2005 levels in 2030. (Emphasis added)."
 - Without CPP ever going into effect.
 - ACE will "continue this trend".
- Specter of "rebound effect".

States, Go Forth (But On Your Own?)

- No EPA ACE rule guidance on implementation.
- No presumptively acceptable standards of performance.
- No model rule.
 - According to EPA Administrator Anne Idsal, this was done because in the past, model rules have created a presumption that can be very difficult to deviate from.
- Early state action?
- Arkansas is primed to move forward with plan preparation and development.
 - Early action required a waiver from the Arkansas State Assembly's Legislative Council.
 - The Arkansas Division of Environmental Quality (DEQ) received this waiver on 9-20-19.

States Plan Requirements

Requirements for State Plans

- Unit-specific evaluation of candidate technologies/practices
- Adopt standards, monitoring, recordkeeping, and reporting requirements
- Project future operating characteristics of each unit through 2035
- Submit plan for EPA approval/enforceability by July 8, 2022

Evaluating the Factors

- Feasibility of each technology/practice at the unit
- Recent, independent installation of candidate technologies
- Interactions that reduce efficiency gains from candidate technologies
- Variable emission performance
- Remaining useful life of unit
- Unreasonable cost resulting from plant age, location, or design

Remaining Useful Life

- EPA repeatedly references in the ACE materials that a state might consider the remaining useful life of a designated facility with a retirement date in the **near future** by a number of ways in the standard setting process.
 - What is “near future”?
 - One outcome could be “business as usual”.
- Adjusting retirement date: EPA states, “[i]n the event a source’s circumstances change so that this retirement data is no longer feasible, states generally have the authority and ability to revise their states plans.”
 - What about “permanent and enforceable”?

Reliability Safety Valve?

- The ACE rule does not impose (allow?) generating shifting as BSER.
 - Why? Outside the fenceline.
- The CPP contemplated shifting generation from coal to gas-fired facilities and the introduction of renewable sources of energy.
 - In response to comments received during proposed CPP comment period, a reliability safety valve measure was included in the final rule.
- Not applicable because of limited scope of ACE.
- HOWEVER...

Substantial Variability Creates Uncertainty

- The ACE rule allows states wide latitude with respect to individual plans.
- This leeway will lead to substantial variation.
 - State to state.
 - Unit to unit.
- These varying state decisions may affects rates; may affect markets.
- With no backstop, power companies will be hard-pressed to engage in long term planning, especially those companies with assets in a number of states and markets.

Compliance Pathways

- BSER measures, plus:
 - Natural gas co-firing.
 - Carbon capture and sequestration.
- Not allowed:
 - Mass standards.
 - Mass averaging/trading.
 - Rate averaging/trading.
 - Intra-facility trading (“bubbling”).
 - Biomass co-firing.
 - Reduced utilization.
 - Generation shifting.

The *Chevron* Doctrine

- The *Chevron* doctrine is tied to the 1984 *Chevron U.S.A., Inc. v Natural Resources Defense Council* case.
- It tees up a two-step test for whether the courts should defer to agencies' interpretations of federal statute.
- Under *Chevron*, a court will defer to an agency's interpretation of an ambiguous provision in a statute that it administers, if the agency's interpretation is reasonable.

Chevron Doctrine continued

- Step 1: When evaluating an agency's interpretation of statute, a court will first investigate whether Congress has spoken **directly** to the precise question at issue.
- Step 2: If the court finds there is not a definitive statement from Congress and the statute is ambiguous, it will assess whether the agency's interpretation of the statute is **reasonable**.
- Under Step 2, the agency does not need to show that its interpretation is the best of the options in order to prevail.
- Rather, an agency must act according to its discretion and expertise when a statute is ambiguous.

Chevron Step 1

- In the case of ACE, EPA is using a *Chevron* Step 1 justification.
- Instead of explaining why the ACE rule is a reasonable interpretation of Clean Air Act section 111, EPA is arguing that its version of the rule is the only way the Clean Air Act can be interpreted.
- Risk: higher legal bar with severe consequences if unsuccessful.
- Advantage: a much more permanent result that would tie the hands of any future administration wanting to redo a CO2 reduction rule.

EPA's Bold/Risky Legal Stance

- EPA has taken a narrow interpretation of its authority under section 111 of the Clean Air Act.
- The Agency's position is that section 111 allows only one method of defining BSER, and that is what can be added on or implemented at the facility (inside-the-fenceline) rather than measures such as generation shifting or emissions trading (outside-the-fenceline).
- This strategy is in contrast to one in which the EPA could have argued that ACE rule is the **most reasonable** option, rather than the **only** option.
- EPA explicitly states in ACE, “[B]y making clear that the ‘application’ of BSER must be to the source, **Congress spoke directly in *Chevron* step one terms to the question of whether the BSER may contain measures other than those that can be put into operation at a particular source: it may not.** (Emphasis added).”

ACE Litigation: And They're Off!

- Numerous administrative Petitions for Reconsideration have been filed with EPA on issues that were not subject to comment and on the issue of limiting states to measures that are not more stringent than the federal rule in their carbon dioxide mitigation plans.
- First to file!
 - The American Lung Association and American Public Health Association, represented by the Clean Air Task Force, were the first groups to file a challenge to the ACE rule in the DC Circuit Court of Appeals.
 - Filed on the first day a Petition for Review could be filed (7-8-19).
 - Scope of issues on appeal: narrow interpretation of 111(d), determination of Best System of Emissions Reduction (BSER), and restriction on compliance measures.

ACE Killed The CPP

- On 7-15-19, state and industry CPP opponents filed a motion in the D.C. Circuit to dismiss the CPP litigation in the case of *West Virginia, et al. v. EPA, et al.*
 - Arkansas Attorney General signed on.
- The CPP litigation had been held in abeyance since shortly after 2016 election.
- On 7-17-19, EPA filed with the D.C. Circuit court in support of state and industry CPP opponents seeking to dismiss CPP litigation.
- Despite opposition, the D.C. Circuit dismissed the CPP litigation on 9-18-19.
- Thus, the CPP is no more.

ACE Litigation Timeline: The Train Has Left The Station

- On 8-13-19, the NY AG, 21 other state AGs, and several large cities and counties challenged the ACE rule.
 - Unlawful and punishes states with existing GHG programs, including market-based trading programs, like the Regional Greenhouse Gas Initiative (RGGI).
- On 8-14-19, ten environmental groups, including the Center for Biological Diversity, the Clean Air Council, Sierra Club, the Environmental Defense Fund and the Natural Resources Defense Council, filed their challenge to the ACE rule.
 - Arguments largely mirrored those of state coalition opposing ACE rule.

State Infighting*!

(*In Iowa)

- In Iowa, the attorney general (a Democrat) was denied consent by the Governor (a Republican) to join in the state-driven lawsuit challenging ACE rule.
 - The requirement to receive the Governor's consent was the product of a compromise/alliance that was formed between the two offices in the last legislative session in Iowa where legislation threatened the ability of the AG to file suit.
- Side note: Iowa is a huge producer of wind power; 2nd in nation (close to 40% of its power generation coming from wind).

ACE In Court

- On 8-18-19, EPA filed a pleading in the consolidated ACE litigation asking the court to expeditiously consider the issues.
- On 9-5-19, multiple groups representing coal, biomass and the electric utility joined the litigation challenging the ACE rule (for a number of divergent reasons):
 - The North American Coal Corp is challenging EPA's authority to regulate power sector GHGs.
 - The biomass group is expected to challenge the decision to exclude combustion of biogenic CO₂.
 - A group of "clean utilities" joined challenging the within the fenceline approach (ConEdison, Pacific Gas and Electric, Exelon, etc.).

ACE Support

- Intervenors in support of the ACE rule include:
 - National Rural Electric Cooperative Association;
 - U.S. Chamber of Commerce;
 - National Mining Association;
 - America's Power;
 - Westmoreland Mining Holdings;
 - Murray Energy*; and
 - a number of utilities.

*Murray Energy, the country's largest privately held coal miner, declared bankruptcy on 10-29-19.

States Take Sides

- On 9-9-19, the states, cities, and county governments coalition opposing ACE filed in the DC Circuit to oppose EPA's petition to quickly expedite review of the consolidated cases.
- On 9-13-19, a coalition of 20 states, led by West Virginia, 2 state Governors (Kentucky and Mississippi), and Mississippi's utility regulator asked the court to intervene in support of EPA ACE rule.
 - Including Arkansas Attorney General.
 - North Dakota previously moved to intervene.

Not So Fast!

- On 9-20-19, the environmental and health groups opposing the ACE rule filed a motion to hold the DC Court proceedings in abeyance until EPA acts on the New Source Review (NSR) reform rule.
- On NSR: EPA originally proposed to roll out revisions to its NSR regulations at the same time that it took steps to repeal and replace the CPP.
 - This strategy presented a legal vulnerability, so the agency announced that it would instead conduct a separate rulemaking to address the NSR “fix” and issued a notice of proposed rulemaking on 8-9-19.
 - The NSR rule will clarify when modifications to existing sources require compliance with the NSR permitting program.
 - This NSR “fix” is highly divisive and controversial, so stay tuned!

More September Filings

- Pump the brakes!
 - On 9-26-19, the 22 states, DC, and 8 city and county coalition opposing ACE filed a motion to hold the DC Court proceedings in abeyance for judicial economy and efficiency purposes and so EPA can finalize the NSR reform rule before the ACE litigation proceeds.
- Press pause!
 - Also on 9-26-19, the Biogenic CO2 Coalition asked the court to sever its claims and put them on hold until EPA addresses the issues raised in its petition for reconsideration regarding biomass.

On To October

- On 10-4-19, EPA responded to the requests to pause the ACE litigation in regard to the NSR issue, stating that the two rules are distinctly severable and that only two of the six candidate technologies would trigger NSR.
 - Thus, no need to slow down.
 - Please proceed expeditiously!
- On 10-7-19, the environmental groups opposing the ACE rule drilled down on the issues advancing support of the unlawfulness of the rule. These include:
 - limited and narrow consideration of BSER.
 - inaccurate baseline.
 - resolution of NSR issue.

Hit From All Sides (And Support From Unlikely Allies)

- On 10-7-19, the Texas Public Policy Forum expounded upon its challenges to the ACE rule on a number of fronts, including the endangerment finding's applicability to the electric generating sector, a discussion of whether or not EPA was required to regulate under the 108 "ambient air" sections of the Clean Air Act rather than 111, and the lingering 111/112 issue. (More on that later).
- In a case of unlikely allies, also on 10-7-19, the same coalition of 22 states, DC, and 8 city and counties largely opposing the ACE rule as being too weak filed with the D.C. Circuit seeking to intervene in support of EPA's authority to regulate power sector greenhouse gases.
 - The group cites global climate change as the reason for doing so (and the fear that EPA won't adequately regulate if left to their own devices).

Speaking of Climate Change

- Does the ACE rule explicitly reference global warming or climate change as a driver for its CO2 regulation?
- Not exactly.
- BUT, the ACE rule does reference “climate impacts.”

Tit for Tat

- On 10-11-19, the environmental groups pushed back on EPA's argument against holding the consolidated ACE cases in abeyance.
 - Groups focused on the NSR "fix".
 - Claimed that the ACE rule and the NSR "fix" are interconnected.
 - According to environmental groups, the NSR rule will substantially alter how sources comply with ACE.
 - The groups also claim that the NSR rule will impact the greenhouse gas and criteria pollution impacts of ACE and its costs.
 - The argument is that the two rules are so intertwined that abeyance is merited until the NSR rule is finalized.

The Court Weighs In: Denied

- On November 22, 2019, a 3-judge panel of the D.C. Circuit denied **all requests** to change the pace of the litigation.
 - Denied EPA's request to expedite the case.
 - Denied opponents' move to hold the case in abeyance.
- The judges also denied a request to change the scope of the case.
 - Rejected a biomass coalition's request to sever and pause consideration of its specific issues addressing biogenic CO2 emissions.
- The court also urged the parties to submit a joint proposed briefing scheduled within 30 days (noted it would limit brief, as well as the word count of the briefs).

Before We Wrap Up

- Authority to regulate? Endangerment finding
- 111(b) predicate- new source must first be regulated before existing sources can be
 - EPA not planning on vacating 111(b) but rather on revising it
- 111(d) vs. 112?
 - Was a key part of the challenge to CPP, but the ACE rule avoids discussion of this issue.
 - Key state and industry opponents entered into a gentlemen's agreement not to sue based on 111(d) vs. 112 issue (although they did raise it in their comments).
 - In the Response to Comments, EPA pointed commenters to CPP preamble and Obama admin brief.
 - Competitive Enterprise Institute (CEI) is critical.

CEI Cites “Fatal Flaw”

- The CEI has weighed in on the ACE rule.
- First admits that the the ACE rule is a “massive improvement” over the CPP’s “war on coal”.
- However, claims that ACE retains one of the CPP’s “fatal flaws”.
- Clean Air Act section 111 v. 112.
- CEI states (as opponents to the CPP did) that section 111(d) excludes from its regulatory purview “any air pollutant ... emitted from a source category regulated under [Clean Air Act] section 112.”
- CEI claims that because EPA has regulated coal power plants under section 112 since 2012 and natural gas power plants since 2004, it is prohibited from regulating those sources under section 111.
- CEI takes issue with EPA relying on the preamble to the CPP and EPA’s brief in the CPP litigation in support of its position.

Remarks

- In Arkansas, planning efforts are underway.
- The DEQ began the stakeholder process on 10-24-19.
- Letters have been sent to affected facilities requesting information regarding feasibility of implementing the ACE rule's candidate measures.
- Is Arkansas positioning itself to be an early actor?
- Will it engage in traditional rulemaking, administrative orders with affected facilities, or permit modifications?
- How will CBI be treated?

Next Steps

- States have 3 years for to submit ACE rule plans to EPA.
 - Plans are due on 7-8-22.
- Once EPA receives a state plan, it has six months to determine completeness.
- EPA then has one year after its completeness determination to approve or disapprove plan.
- EPA has two years after state fails to submit plan or EPA disapproves plan to promulgate a federal plan.
 - What will a federal plan look like?
 - No federal backstop.

Questions?

For any follow-up questions or clarifications,
please contact me at:

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