



TO: The NTAA Executive Committee and NTAA Member Tribes
FROM: Pilar Thomas, NTAA Policy Advisory Committee
DATE: July 24, 2019
RE: **Summary of Recent EPA Rulemaking Related to Greenhouse Gas Emissions**

This memo summarizes the recent final rulemaking actions taken by the EPA related to greenhouse gas emissions: the repeal of the Clean Power Plan (CPP); the promulgation of a final rule for the Affordable Clean Energy Plan (ACE); and amendments to the Section 111(d) regulations.

Background

In 2015, the Environmental Protection Agency (EPA) promulgated a final rule regulating greenhouse gas emissions from existing electric generation units (EGUs). This rule was commonly known as the Clean Power Plan (CPP). The CPP was immediately challenged in federal court, with the U.S. Supreme Court eventually agreeing to a stay in implementing the CPP while the legal challenges proceeded.

In 2017, the EPA – pursuant to President Trump’s executive order related to energy development – issued a draft rule to repeal the CPP. Shortly thereafter, the EPA issued a draft rule to replace the CPP, called the Affordable Clean Energy Plan (ACE). Both times, the NTAA submitted comments to the EPA, as did several other Tribes.

The EPA has now issued three final rules (all in one rulemaking action) related to the regulation of greenhouse gas emissions from EGUs. On July 8, the EPA published these final rules in the federal register. The rules will go into effect on September 6, 2019. Interested and effected parties will have until that date - 60 days - to appeal the rule(s). Several stakeholders and states have already indicated they will appeal the rules.

Final Rule: Repeal of the Clean Power Plan

The EPA has repealed the CPP in whole. The primary bases for this wholesale repeal are as follows:

- The EPA has “reinterpreted” its authority to determine the “best system of emission reduction” (BSER). Under the CPP, the BSER was based on three building blocks. However, now the EPA interprets the law to only authorize BSER “within the fence line” – that is, the BSER must be able to be implemented at the specific source, and cannot be implemented across multiple sources or different sources.

- Even though one of the CPP building blocks for emissions reduction was heat rate improvement (which is the sole BSER for the ACE), the EPA claims that the HRI requirements under the CPP cannot stand on its own because they were developed in conjunction with the unallowable other building blocks.
- The EPA has reinterpreted its authority to establish “standards of performance” or emission rates under Section 111(d). Instead, the EPA now claims the Clean Air Act requires the states to set standards of performance. Thus, the EPA did not have the authority to establish emission rates under the CPP.

Final Rule: The Affordable Clean Energy Plan

The EPA has promulgated the ACE Final Rule with almost no substantial changes to the proposed rule, despite the thousands of comments received on the proposed rule. The EPA did make one change based on comments: it decided to provide guidance on the “degree of emission limitations achievable” through the application of the selected BSER technologies.

Key elements of the ACE:

- Applies only to coal-fired EGUs that use steam turbines, with a nameplate capacity greater than 25 MW.
- Re-orders the roles of the EPA, states, and industry:
 - EPA establishes BSER and “degree of emissions limitations achievable”;
 - States establish state plans, including standards of performance, for each EGU based on the application of the BSER technologies
 - Industry complies with state plans, using BSER or other compliance options.
- Finalizes that heat rate improvement, combined with operations and maintenance practices, is the BSER. Further, the technologies eligible for implementation are limited to technologies that the EPA has deemed are adequately demonstrated, reasonable in cost, and capable of deployment on a national basis.
 - Excludes carbon capture and sequestration (CCS), natural gas co-firing, natural gas repowering, biomass co-firing, reduced operations from BSER, averaging, and trading. However, does allow for CCS and natural gas co-firing as compliance options.
- Identifies “degree of emission limitations achievable” for each candidate BSER technology, and establishes ranges of improvement for each technology. These ranges will be used to evaluate the standards of performance established by the states for each EGU.
- States must develop state plans that establish standards of performance for each EGU (although can establish a uniform standard across multiple EGUs or across the whole state). These standards have to be supported by the state’s analysis of the application of the BSER technologies. Further, these standards can (should) be informed by remaining useful life and other factors specific to the source.
 - The EPA appears to have reversed their legal position in this rule that they may not have to approve a state plan that is more stringent than the EPA’s “degree of emission limitations achievable.” The EPA distinguishes case law as not applicable to Section 111(d), and thus is reserving the ability to change their position in a future state plan approval process.

Final Rule: Implementing Regulations

The key aspects of the amendments to the current Section 111 implementing regulations are related to aligning the state plan procedures of Section 110 and Section 111 (as the EPA claims is required under the 1990 Amendments to the CAA). These amendments center on changing the timeframes for developing, submitting, and approving state plans. Timeframes are now:

- States have 3 years to submit a state plan
- EPA has 1 year to review and approve a state plan
- If EPA does not approve a state's plan, EPA has an additional 2 years to implement a FIP
- Industry will have 2 years (after state plan approved) to comply unless state plan allows for enforceable increments of progress for EGU(s).

Consequently, it could take up to 8 years for implementation to occur.

Other Observations and Comments

- The EPA states that there are no direct impacts on Tribes, but they conducted two tribal consultation sessions and one webinar. For any Tribes that have affected EGUs on tribal lands, the EPA will conduct individual consultation (presumably directly related to a FIP).
 - 7 Tribes and 2 intertribal organizations filed comments
- The EPA states that it is unlikely to have disproportionate adverse health and environmental effects on minority, low-income, vulnerable, or indigenous communities.
- The EPA has admitted that it does not know how much GHG emission reductions will result from the BSER selected. The ranges of emission limitations are between .1 and 2.9 percent (this is considerably lower than the 4-6% HRI required under the CPP).
- The EPA has not, and will not, require calculations of the health-based and welfare-based pollutants impacted by the regulation. This is because the ACE emissions guidance is based almost solely on economic considerations, and not based on achieving actual emissions reductions.

Options – Appeal or Petition for Reconsideration

Tribes have two options at this point: either appeal the rule or petition for reconsideration. For a party to petition for reconsideration, the rule has to directly apply to that party. Here, this rule only directly applies to two Tribes: Navajo Nation and the Ute Tribe in Utah.

To appeal (which has to be submitted by September 6, 2019), a Tribe has to have submitted comments and can only appeal an issue that the Tribe raised in its comments.

NTAA's Policy Response Kit on the ACE can be found here:

<https://www7.nau.edu/itep/main/ntaa/PolicyResponseKits/ACE/>

More Information on NTAA can be found here: www.ntaatribalair.org