

Affordable Clean Energy Rule/Clean Air Act: D.C. Circuit Court of Appeals Vacates and Remands EPA ACE Rule

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On January 19, 2021, the U.S. Court of Appeals for the District of Columbia struck down the Affordable Clean Energy ("ACE") rule.

The Court issued a 185-page opinion (download [here](#)) within which it ultimately determined that the Environmental Protection Agency ("EPA") did not act lawfully when it adopted the 2019 ACE rule.

The ACE rule has been vacated and remanded to EPA.

EPA finalized the ACE rule in June of 2019. Along with the issuance of the ACE rule, EPA repealed the Clean Power Plan ("CPP"). The CPP was issued by EPA in 2015 but in an unprecedented move was stayed by the United States Supreme Court before it could go into effect.

Before ACE, there was the CPP. The CPP was the premiere component of President Obama's Climate Action Plan. 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 CPP fact sheet called out the critical importance of taking immediate action.

The CPP relied on generation shifting to lower-emitting sources of electricity, including natural gas-fired power stations and wind farms and solar arrays, through the grid system.

According to the EPA, the CPP would have reduced carbon pollution from the power sector by 32 percent below 2005 levels. It set individual state targets- in mass and rate formats- for CO2 reduction and established aggressive timelines for compliance.

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.

The CPP was heavily briefed and litigated. A total of 27 states joined in challenging the CPP, led by West Virginia.

The CPP was stayed by the United States Supreme Court on February 9, 2016 during active litigation in the D.C. Circuit.

The D.C. Circuit Court of Appeals heard arguments *en banc* regarding the legality of CPP on September 27, 2016 but never issued a ruling. Shortly after the oral arguments on the CPP, the 2016 U.S. Presidential election took place. President Trump was elected and in short order issued Executive Order 13783 to suspend, revise, or rescind the CPP. On June 1, 2017, President Trump withdrew the U.S. from the Paris Climate Agreement.

A little over a year later, the ACE rule was proposed by EPA Administrator Scott Pruitt on August 21, 2018. The final ACE rule signed by EPA Administrator Andrew Wheeler on June 19, 2019. The ACE rule was published in the Federal Register on July 8, 2019 and took effect on September 6, 2019.

The ACE rule was an “inside the fenceline” rule, meaning it called for states to implement measures using EPA-identified candidate technologies inside the fenceline of affected sources to improve efficiency. The ACE rule took credit for carbon dioxide reductions already being realized and on the books at power plants around the country. Although EPA highlighted these reductions in the preamble to the ACE rule, it did not mandate carbon reduction goals for coal-fired facilities or for states in which these facilities were located.

Rather, EPA took a targeted approach within its ACE rule wherein it established a menu of candidate technologies, representing the best system of emission reductions, from which a subject facility could choose to increase its efficiency and improve its heat rate capacity.

EPA described the ACE rule as having several components, which included:

- Determination of the best system of emission reduction for greenhouse gas emissions from coal-fired power plants
- A list of candidate technologies states can use when developing their plans
- New implementing regulations for emission guidelines under Section 111(d) of the Clean Air Act

Arguments in favor of the ACE rule included:

- States retained authority to make key decisions
- Flexibility
- Remaining useful life considerations were permitted
- Improved regulatory processes

Opponents’ arguments included:

- A low bar was set for emission reductions
- No numerical standards or targets for greenhouse gas reductions
- States had wide latitude to establish their own performance targets
- United States citizens would incur a net cost
- Major changes to permitting rules could lead to additional increase in emission

Ultimately, the challengers to the ACE rule prevailed. The United States D.C. Circuit Court of Appeals determined that “because the ACE [r]ule rests squarely on the erroneous legal premise that the statutory text expressly foreclosed consideration of measures other than those that apply at and to the individual source, we conclude that the EPA fundamentally ‘has misconceived the law,’ such that its conclusion ‘may not stand.’”

The timing of the Court’s decision to vacate and remand the ACE rule aligns with the inauguration of President-Elect Joe Biden. President-Elect Biden has already announced that one of his key focusses will be on climate change. He has nominated key figures to lead the charge in addressing climate change in his administration, including the appointment of a first ever Climate Czar in his Cabinet.

All eyes will be on the President-Elect and his EPA as they are given a clean slate on how to address carbon dioxide emissions from power plants. The pendulum has swung widely between the last two presidential administrations.

