EPA Proposes ACE Rule; MATS Overhaul

by William H. Haak, Attorney and Consultant, Haak Law LLC

In late August, the U.S. Environmental Protection Agency (EPA) announced two new efforts to relax or replace Obama-era air pollution regulations that targeted emissions of greenhouse gases (GHGs), mercury, and air toxics from coal-fired power plants. The history of the rules in question, EPA’s current plans, and the agency’s likelihood for success are discussed below.

Affordable Clean Energy Rule Announced as Replacement for Clean Power Plan

On August 21, 2018, EPA revealed that it was proposing a rule to address GHG emissions from coal-fired electric utility generating units and power plants. The Affordable Clean Energy (ACE) rule is the long-awaited replacement for the Obama-era Clean Power Plan (CPP). The Obama EPA put the CPP in place in 2015 as an affirmation of a commitment (at the time) on the part of the United States to aggressively address GHG emissions prior to its entry into the Paris Agreement within the United Nations Framework Convention on Climate Change.

The CPP never took effect due to court challenges brought by 27 states, 24 trade groups, and 37 rural electric cooperatives. The CPP was stayed by the U.S. Supreme Court in early 2016, pending the resolution of this litigation. The outcome of the November 2016 presidential election left it highly unlikely that the CPP would ever be implemented as enacted. President Trump’s subsequent withdrawal of the United States from the Paris Agreement in 2017 removed any remaining doubt as to the CPP’s ultimate fate. The only lingering question was how—or if—the CPP would be replaced?

EPA’s ACE proposal reflects a dramatically different approach to addressing GHG emissions from the utility sector. Mirroring statements by the White House with respect to EPA’s newly assigned role in spurring the national economy, the ACE emphasizes empowering states to adopt individualized approaches (with certain loosely-imposed EPA restrictions) to reducing GHG emissions, while simultaneously promoting economic growth and job creation. This decentralization would allow states with a large number of coal mines and/or
coal-fired power plants to tailor their regulations to reflect the reality of their respective economies. By potentially reducing the cost of compliance for coal-fired plants, states could also control the retail cost of electricity within certain service areas.

From a cost-benefit standpoint, EPA estimates (broadly) that the ACE could result in US$3 billion to US$6.5 billion in net benefits (including avoided compliance costs) compared to the CPP. In terms of both GHG emissions and the emissions of criteria pollutants such as sulfur dioxide and nitrogen dioxide, EPA’s analysis acknowledges that the ACE will result in increased emissions versus what would have been realized under the CPP. EPA seemingly dismisses the validity of this comparison, however, by assuming arguendo that the CPP would have been struck down in federal court as exceeding the agency’s authority under the U.S. Clean Air Act. The agency, therefore, focuses on the reductions that the ACE will theoretically lead to with “no CPP” as the baseline.

One thing that the ACE is almost certain to have in common with the CPP is a long and winding path to implementation. Beyond its initial notice and comment period, the ACE will surely face multiple legal challenges from both environmental groups and the usual cadre of Northeastern states that routinely sue EPA for emissions from upwind states. Opposition from Northeastern states may be especially heated given their reduced reliance on electricity generated from coal-fired plants, and their geographic position downwind of Midwestern states that are heavily reliant upon both coal mining and coal-fired power plants.

Even if the ACE survives legal challenges, the rule itself provides lengthy initial periods for states to develop compliance plans (three years), for EPA to review state plan submittals (one year), and for the agency to implement a federal implementation plan (FIP) in the face of a deficient state plan (two years). This timeline means that—even absent legal challenges—the ACE may not see implementation in many states until 2023 or later.

Lost in much of the early analysis of the ACE in its context as a replacement for the CPP is the fact that EPA is also proposing a new applicability test for determining whether a physical change or change in the method of operation of an electric generating unit is a “modification” under federal New Source Review (NSR). The proposal seeks to refocus the analysis on whether any change would result in an increase in hourly emissions (vs. the current NSR focus on emissions on a ton-per-year basis). The proposed approach would comport NSR with the way that EPA has historically defined “modification” for New Source Performance Standard purposes, and result in an administrative reversal of the Supreme Court’s decision in Environmental Defense v. Duke Energy Corp., 549 U.S. 561 (2007).

**EPA Announces Review of the Mercury and Air Toxics Standards Rule**

EPA also announced in late August that the agency had prepared a draft proposal concerning reconsideration of the 2012 Mercury and Air Toxics Standards (MATS) rule. MATS is an Obama-era regulation aimed at reducing emissions of mercury and air toxics, including arsenic, chromium, and nickel, from coal-fired power plants. Like many other Obama-era regulations directed toward power plants, MATS had been the subject of protracted litigation—culminating in a 2015 Supreme Court decision that left the MATS rule in place, but directed EPA to reconsider the rule specifically with respect to the cost of compliance with the rule for impacted electric generating utilities.

The agency’s announcement of a draft proposal pertaining to MATS left it unclear (at the time of this writing) whether the regulation would be overhauled, replaced in its entirety, or simply rescinded. Given the Trump Administration’s concerted efforts to reinvigorate the coal industry through environmental deregulation, each of these options is equally likely. EPA indicates that the draft proposal will question both whether MATS is “appropriate and necessary” and whether the emissions control technology-based standards set by MATS are proper.

A cost-benefit analysis conducted by EPA at the time MATS was promulgated in 2012 found that the health benefits of the rule outweighed compliance costs 9 to 1 (with estimated compliance costs nearing US$10 billion per year). It is unclear what a revised cost-benefit analysis might show if one were to be conducted today. This is especially true in light of the fact that the vast majority of coal-fired plants have already completed the capital investments necessary to comply with MATS. An undoing or relaxation of MATS would in no way allow coal-fired plants to recoup their earlier capital expenditures—although it may enable regulated entities to reduce or avoid ongoing expenses related to compliance. Given this, it would appear that an updated cost-benefit analysis might weigh heavily in favor of keeping the standards established by MATS in place in order to reap ongoing health benefits at no substantial incremental cost of compliance.

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William H. Haak is an environment, health, and safety attorney and consultant, with over 24 years of experience. E-mail: whh@haaklawllc.com.