The Affordable Clean Energy (ACE) Rule

The Latest "Trump" Card

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THE AFFORDABLE CLEAN ENERGY (ACE) FINAL RULE

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This week, the Trump Administration Environmental Protection Agency (EPA) finalized the Affordable Clean Energy (ACE) Rule, which is the replacement to the prior administration's Clean Power Plan (CPP), which was the first rule seeking to regulate carbon dioxide emissions from power plants under Section 111(d) of the Federal Clean Air Act (FCAA). The rule's name begs the use of playing card idioms, and this commentary will not disappoint. Besides, one should be obliged to do everything possible to make a discussion of complex environmental regulatory issues more entertaining.

THE DEMISE OF THE ILLEGAL CLEAN POWER PLAN: The House of Cards

For eight years, the prior administration "stacked the deck" against fossil fuels with a series of environmental regulations that departed from decades of legal precedent, exaggerated risks, inflated benefits, and illegally shifted power from the states to the federal government. While the CPP's abuses were shrouded in complexity and an unprecedented public relations blitz by the prior administration, it was easily the high water mark of federal government overreach in the energy policy arena.

While it is difficult to rank which legal failing of the CPP was the most egregious, it is widely agreed that the most obvious legal flaw of the rule was its unprecedented grab of energy policymaking authority through the redefinition of one phrase in the Clean Air Act: Best System of Emission Reduction (BSER).

Breaking from explicit statutory text and 45 years of regulatory and judicial precedent, the Obama EPA redefined the word “system” to mean the entire electricity grid, such that it could derive a mandatory emission standard based not on what was achievable inside the fence of a facility, but instead on its own assumptions of what could be built elsewhere in the bulk power system to offset a facility’s emissions.

This “outside the fence” approach, while acceptable under the FCAA as a method of flexible compliance with an emission standard, has never been accepted as a means to derive a mandatory compliance standard. Because the Obama EPA made its own assumptions about the power grid in deriving the emission standard, they were able to impose their policy preferences about what type of electric generation could and should be built in the grid (primarily renewables) and made it impossible for traditional fossil fuel-fired plants (coal and simple-cycle natural gas) to meet the standard they derived without a massive transfer of wealth from fossil energy owners to renewable developers.

The legal failings of the CPP and the well-documented irreparable harm that it would have inflicted on the energy sector led to a Supreme Court decision to stay the rule (i.e., prevent it from becoming effective while the rule was being reviewed by the courts). This type of Supreme Court intervention in the regulatory context has never occurred in U.S. history, which speaks volumes about how much the Obama EPA “overplayed their hand.”

The legal precedent in question in the CPP was a serious concern – not just to coal-fired power plants, but to other types of power and energy production. So, it wasn’t just coal miners cheering when the Supreme Court “called the Obama EPA’s bluff.” To the uninformed observer, it appeared that natural gas would be a “winner” under the rule, but there were two poison pills in the CPP rule that most failed to catch: (1) the preamble to the final CPP made it clear that the trading regimes likely to result from the CPP would not be allowed to encourage new natural gas plants because they were “inconsistent with the long-term need to continue reducing CO2 emissions” and (2) the newly expansive definition of BSER would have paved the way for aggressive GHG emission regulations on the oil and gas industry — both upstream and down — because the oil and gas pipeline system would have been considered just as much a “system” as the electric grid – which was how the CPP rationalized requiring reductions “outside the fence” of power plants.

In fact, on the heels of the CPP, the Obama EPA did, in fact, threaten regulation of oil and gas production facilities by "following suit" with an expansive interpretation of its powers under Section 111 (b) and (d) of the Clean Air Act. Thankfully, the Supreme Court did not allow the Obama EPA's attempted expansion of their regulatory authority to come into effect for power plants and the Trump EPA's now-final repeal of the CPP has "dealt" it the final blow. Expect to see something similar soon regarding the Obama EPA's regulation of methane from oil and gas operations under Section 111.

THE LONG-AWAITED REPLACEMENT OF THE CPP: The ACE in the Hole

The final ACE Rule is the centerpiece of the Trump Administration's regulatory reform agenda. Despite attempts by political opponents and the media to characterize this regulatory reform as "deregulation" that abrogates EPA's environmental protection responsibilities, this and other reforms have been very measured and focused on keeping EPA in its lane of using technology to reduce pollution, not pursuing anti-fossil fuel ideology through energy policymaking untethered to statute and in conflict with the Constitution.

A RETURN TO LEGALITY: Playing by the Rules

The ACE Rule brings EPA's regulation under Section 111 of the FCAA back to the statutory text and long-standing precedent by establishing a process of deriving compliance standards from technologies that can be deployed "inside the fence" of facilities. The rule does this by setting out "heat rate improvement (HRI)" technologies applied at each power plant as the "Best System of Emission Reduction (BSER)." It ruled out fuel switching and biomass co-firing as violating EPA's longstanding principle of not "redefining the source." That is to say that EPA is staying true to its past practice of evaluating pollution control technologies specific to the type of fuel and power generation technology in use at each site.

This return to the an "inside-the-fence" approach returns EPA back to the approach that made American environmental regulation great to begin with – controlling pollution with technology, not ideology. It is through the development

and deployment of technology, once commercially demonstrated, that the United States has cleaned its air and water while remaining globally competitive. The prior administration tried to preach that the CPP followed that model, but the stark truth is that it destroyed that model by illegally expanding EPA's authority so it could impose its policy preferences and pick winners and losers.

A RETURN TO COOPERATIVE FEDERALISM: The (State) House Wins

Perhaps the greatest legal failing of the CPP was the manner in which it shifted power from the states to the federal government, in direct conflict with the cooperative federalism compromise that is built into the FCAA and most federal environmental statutes. Even more impressive than this attempted power grab was the prior administration's PR campaign claiming that the CPP was a "model of cooperative federalism" because states' had "flexibility" to fashion how they went about meeting the federally mandated emission budgets. The flaw in this claim, of course, was that state budgets were set at unreasonably low levels such that states were functionally forced to implement the assumptions EPA made when they derived the budgets to begin with. For many states, EPA assumed things that were completely unrealistic, including the construction of unprecedented levels of renewable energy.

This approach – to mandate budgets based on unrealistic assumptions and then claiming that states can "flexibly" comply – was appropriately coined "coercive federalism" by many observers. As one state environmental agency official appropriately pointed out, EPA was treating states more like pawns than partners. Nobody put it better than Harvard Law Professor Lawrence Tribe when he observed about the CPP (and I paraphrase), "When a robber says, 'your money or your life,' it is neither legal nor flexible just because he says you can pay with cash, credit, or Bitcoin." Professor Tribe later summed up the entire legal issue aptly when he stated that "burning the Constitution should not be our national energy policy."

The ACE Rule reinstates cooperative federalism by allowing each state to develop source-specific emission limitations based on the BSER candidate technologies set out by EPA. States are also given flexibility to develop methods for demonstrating compliance and approving alternative compliance strategies. In addition to repealing the CPP and promulgating a replacement rule in the ACE Rule, EPA also

finalized a set of revisions to its implementing regulations for Section 111 of the FCAA that strikes a much more "cooperative federalism" balance in the 111(d) context. This set of reforms will deliver benefits to power plants and other source categories for years to come.

NO TRADING OR OTHER "OUTSIDE THE FENCE" COMPLIANCE: Not Overplaying our Hand

Something that was not certain when the proposed ACE Rule was released last summer but is certain now is that EPA is not taking any legal chances when it comes to the "outside the fence" methods of compliance that states can accept from power plant owners. As discussed above, although there is no precedent for deriving emission standards based on "outside the fence" assumptions. There is a long history of EPA allowing the use of flexible trading programs, offsets, and "netting" as a method of complying with a standard. EPA was very clear on this issue in the final rule when it stated that it had determined "that: neither (1) averaging across designated facilities located at a single plant; nor (2) averaging or trading between designated facilities located at different plants are permissible measures for a state to employ in establishing standards of performance…" EPA's stated rationale for this decision is tied to the statutory text and, while it may have authority to allow trading generally, ACE's focus on individual electric generating units (EGUs) "precludes the Agency from attempting to change the basic unit from an EGU to a combination of EGUs for purposes of ACE implementation." With regard to trading between regulated facilities, EPA further reasons that such a program "is inconsistent with CAA section 111 because those options would not necessarily require any emission reductions from designated facilities and may not actually reflect application of the BSER." Further, EPA notes that "[b]ecause state plans must establish standards of performance—which by definition 'reflects ... the application of the best system of emission reduction'—implementation and enforcement of such standards should be based on improving the emissions performance of sources to which a standard of performance applies."

The real-world implication of this decision is twofold: (1) it will make the rule more legally durable and (2) it will preclude power plant owners from being tempted to prematurely retire units, fuel switch, and/or replace coal- and gas-

fired generation with renewables as a method of complying with ACE.

NEW SOURCE REVIEW PURSUED THROUGH PARALLEL RULEMAKING: Playing Their Cards Right

One of the most important reforms proposed in the ACE Rule related to one of the most absurd legal constructs of the FCAA: the New Source Review (NSR) Program. NSR is the program which, if triggered, exposes existing facilities to a regulatory process that most often results in the imposition of expensive emission control/retrofit requirements that, in many cases, would be so infeasible that closure of the facility is the most likely outcome. The idea behind NSR is that facilities that are undergoing significant changes warrant the imposition of state-of-the-art emission control requirements. The problem is that ambiguous statutory language has given rise to historic agency practice and judicial opinions that significantly restrict efficiency-related changes to a facility – resulting in the current, absurd situation where many efficiency-improvement projects are not implemented at existing facilities to avoid the risk of triggering NSR. Given that efficiency is critical to both market competitiveness and environmental protection, NSR effectively handicaps power plants across the country, especially coal-fired units, and hinders the ability of each power plant to reduce its emissions through higher efficiency.

In the ACE proposal, EPA clarified that efficiency-related projects will not necessarily trigger NSR even if they result in greater dispatch of the facility and, thus, greater total annual emissions, so long as hourly emission rates do not increase because those day-to-day emission rates are the best reflection of their efficiency and environmental performance. Bills pending in Congress would effect this same reform, which could prove essential if a reviewing court views such reforms as needing a statutory, rather than regulatory, fix.

The final ACE Rule preamble notes that "[t]his notice does not include any final action concerning the New Source Review (NSR) reforms the EPA proposed in conjunction with the ACE proposal; the EPA intends to take final action on the proposed NSR reforms in a separate final action at a later date." EPA reports to have adjusted its modeling to account for lower expected heat rate improvements without NSR reform and higher HRI with NSR reform. EPA also notes that if NSR reforms are not completed, it is likely to affect a state's consideration of "candidate

technologies." In particular, blade path upgrades and economizer redesign/replacement are reportedly most susceptible to triggering existing NSR rules. Thus, EPA notes that applicability of NSR to these two technologies may make them "less appropriate for application to a particular source or sources than the EPA anticipated would be when it proposed the ACE Rule."

Even though it has been broken out into a parallel rulemaking to avoid exposing the entire ACE Rule to legal uncertainty that may stem from the NSR reform, the NSR reform is essential to the workability of the ACE Rule because the only economically viable inside-the-fence controls are efficiency improvements that enable plants to produce less carbon dioxide per each unit of energy they produce. The ability to accomplish such projects without triggering NSR and exposing a unit in the way described already above will be critical to the long-term viability of power plants subject to the ACE Rule.

ACE IS JUST THE FIRST STEP: More Cards to be Played

So, EPA's return to the rule of law and cooperative federalism with the final ACE Rule is a step in the right direction, but there are important parallel proceedings that need to be pursued to be confident that EPA has fully returned to its proper role as environmental regulator, as opposed to energy policy maker. Otherwise, the Administration will only "come within an ace of" successful regulatory reform.

Much has been written and speculated about whether the agency will revisit the "Endangerment Finding" issued in the context of the 2009 Motor Vehicle "Tailpipe Rule." While the ever-evolving data and scientific evidence warrants such a review, the more immediate review that EPA should commence is the specific query of whether carbon dioxide from power plants significantly contributes to influence global climate sufficiently to satisfy Section 111(b) of the FCAA.

Section 111(b)(1)(A) establishes an explicit test for whether a specific pollutant can be regulated within a specific source category. For reference, that section states:

> The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which

> may reasonably be anticipated to endanger public health or welfare. (Emphasis added)

It should be noted that the 2009 Tailpipe Rule Endangerment Finding was governed by a less stringent standard under Section 202 of the FCAA, which is in large part identical to Section 111(b)(1)(A) except the notable absence of the word "significantly" from the Section 202 Standard. This difference in statutory text is important given how much harder it is to meet the test when a source category is required to "significantly" contribute rather than just "cause or contribute" to endangerment. Because this provision guides what must be done by EPA when promulgating standards for new or modified sources under Section 111(b), the most appropriate docket for this assessment will be the EPA's ongoing rule making to repeal and replace the 111(b) Rule governing new/modified sources (a.k.a. The "Carbon Pollution Standard (CPS)"). Because a valid 111(b) rule is a statutory prerequisite for a 111(d) rule to stand, EPA made clear in the preamble to the final ACE Rule that its finalization necessarily relies upon the existing 111(b) standard but noted that is in the process of revising that standard.

Nothing EPA is finalizing in the final ACE Rule precludes them from pursuing, in the 111(b) or another rulemaking, the 111(b)(1)(A) assessment of whether the amount of pollutant carbon dioxide from this source category can be reasonably considered to "significantly contribute" to endangerment. The preamble to the ACE Rule recites the views of prior administrations who have concluded that they did not need to conduct a new, pollutant-specific finding for any source category so long as a general finding for other pollutants was issued for the source category when it was originally listed for regulation under Section 111. Applied to carbon dioxide from power plants, this historic statutory interpretation would conclude that, because power plants were previously listed under Section 111, no additional endangerment finding is necessary. Of course, that argument effectively grants vast authority to EPA to regulate new pollutants from an already-listed source category, even if those pollutants, like carbon dioxide, were not even contemplated in the original endangerment finding.

This inferred expansion of regulatory authority has not yet been tested in court and few commenters have focused on it during the CPP/ACE debate. However, the second-largest environmental protection agency in the world, the Texas Commission on Environmental Quality (TCEQ), has commented about it throughout the Obama

EPA 111(b) and (d) rule proceedings and in both the ACE docket and the pending 111(b) docket. This issue was also the subject of a letter submitted last April to EPA by the Texas Governor, Lieutenant Governor, and Attorney General as a comment on EPA's proposal to repeal the CPP. The letter sets out a persuasive analysis of the statutory text and articulates how and why the FCAA demands that EPA conduct this pollutant- and source category-specific assessment before it finally decides to move forward with regulation of carbon dioxide at new, modified, or existing power plants.

The Texas officials point out that, since emissions standards under the FCAA are set on a pollutant-by-pollutant basis within source categories, it follows that the endangerment consideration must also be on a pollutant-specific basis before it can be regulated within a source category. The TCEQ has long argued that GHGs are well mixed in the global atmosphere, the effect of GHG emissions on the climate cannot be traced back to specific geographic emission points, and EPA has never provided convincing evidence that U.S. power plant emissions significantly contribute to global GHG concentrations or temperature change, even if IPCC-assumed climate linkages are assumed to be scientifically valid.

Despite the misconception of many that a "non-significant contribution" finding would constitute "climate change denial," the Texas officials have pointed out that this finding can be made without having to tackle the climate change debate. They explain how, using the same calculation methodology deployed by the Obama EPA in the 2009 endangerment finding, it can be demonstrated that eliminating would effect less than a 0.4% reduction in global CO2 concentration (2.06 PPM of the 500 PPM projected 2050 global concentration of CO2). This corresponds to a reduction in global temperature of 0.021 degrees Fahrenheit, which would mitigate sea level rise by less than 1/50th of an inch.

Just as impressive as the .4% number is the fact that, using an IPCC model and EIA data to calculate the projected impact to global concentrations if all U.S. power plant carbon dioxide emissions were scaled down to zero, the impact to global concentrations would be a mere.7% — hardly a "significant contribution" standard for the EPA to apply. % reduction. So, whether you look at the coal fleet or the entire fleet, U.S. power plants are far from a "significant contributor" to global CO2 concentrations.

This insignificant role of U.S. power plant CO2 emissions to global concentrations moving forward is a function of how much more the developing world will be contributing to global carbon concentrations by 2050 relative to an ever more efficient U.S. power plant fleet.

Although the final ACE Rule does not address this issue, there is a clear indication in the preamble to the proposed 111(b) rule for EGUs that EPA is considering the issue closely and holding the option open to revisit it in the context of the replacement 111(b) rule (or other rulemaking) in the future.

It is important to remember that this debate about statutory text is not just relevant to power plants. As noted above, the Obama EPA was in the process of pursuing GHG regulations governing oil and gas facilities (e.g., the Methane Rule) and had committed itself by consent decree to pursuing a refinery rule under Section 111 as well. With this looming risk outstanding for other source categories, the manner in which the current administration navigates carbon dioxide rules for power plants is directly relevant to other important sectors of the U.S economy. Those sectors stand to gain significant protection from a "non-significant contribution" finding for power plants, if it were to be issued.

First, because the power sector is the largest domestic emitter of greenhouse gases, if it is found that the power sector does not meet the "significantly contribute" standard found in section 111(b)(1)(A), it is almost certain that no other source category's emissions will meet that threshold. Second, other source categories may not be nearly as sanguine about the prospects of being regulated for GHGs under 111(b) and (d) as the power sector simply because the ACE Rule stayed "inside the fence." That is to say that power plants may be better positioned to comply with inside-the-fence BSER whereas other source categories might still endure significant burdens from such a regulatory approach.

To name a few, there could be costly controls imposed at oil and gas fracturing operations, optical imaging at gas gathering/boosting stations, electric engine mandates at gas processing plants, forced retrofitting of storage facilities, as well as a host of other oil and gas controls, including vapor recovery units, vapor combustors, and flares; and/or leak detection and repair requirements. Similarly, refineries could find an inside the fence rule will cause significantly more cost than

would be expected at a power plant because the complexity and sheer number of potentially targeted sources at those facilities vastly exceeds what you find at a power plant.

What this all means is that non-EGU source categories could gain significant protection and regulatory certainty from a regulatory reform strategy that ultimately includes a limitation of EPA's regulation of GHGs based on the materiality of a source category's emissions to the global pool under the section 111 significant contribution standard. There is a very good chance that EPA's replacement Methane Rule anticipated to be released later this summer may take this issue up much more squarely.

WHY CLIMATE CATASTROPHIST COMPLAINTS ABOUT ACE ARE JUST SILLY: Calling a Spade a Spade

The opponents of the ACE Rule can't seem to make up their minds – on the one hand, they claim climate and public health catastrophe will ensue and, on the other hand, many environmentalists and renewable energy advocates claim that the market is already doing what the CPP was going to do. Which is it? Actually, it is neither.

The CPP Did not Move the Climate Needle, and Nor will ACE

To begin with, claims that ACE will result in climate catastrophe are easily exposed as contrary to the facts without even debating the very questionable claim they also make trying to link every weather problem to fossil fuel-driven climate change. As noted above, even if all U.S. power plant carbon dioxide emissions were scaled down to zero, it would only reduce the global concentration by 0.7%. Not exactly moving the needle. And, remember, this is even before you debate whether global climate science is "settled." Do those who now claim that the U.S. must eliminate all of its power plant carbon emissions to avoid climate catastrophe really believe that a 0.7% impact on global concentrations is going to do so? So the debate is not about climate change, it's a debate about math.

A related claimed benefit of the CPP and state and national calls for "100% Renewables" is that somehow human health will be dramatically improved in the

United States. Again, the fallacy of this argument would unduly lengthen this commentary, but suffice it to say that the data clearly demonstrates that forcing all fossil energy out of the U.S. energy mix would also be “all pain, no gain.” Such policies might make renewable energy corporations happy and extreme environmentalists feel good, but toxicologists will tell you that eliminating all fossil fuels does not deliver significant human health benefits given that, with very few exceptions, we are already achieving health-based ambient air quality standards established under the Clean Air Act. For a more thorough discussion of how we have cleaned our air through technology, not ideology, and how claims of health benefits from eradicating fossil fuels ignore science, see this paper and this video* from the Life:Powered team.

The Only Markets that are Choosing Renewables Over Fossil Fuels are Manipulated & Distorted

As for those press reports claiming that the markets are doing what the CPP would have done, once again, don’t believe everything you read. American electricity markets have become so distorted with direct and indirect energy subsidies that nobody can expect those markets to tell us anything about what is or is not “competitive.” What we do know is that the CPP would have forced the premature retirement of hundreds of simple-cycle coal and natural gas plants, which would have stranded assets, inflicted devastating economic impacts on energy states and ratepayers across the country, and done very little to impact the environment. It really was “all pain, no gain.”

In the wake of the ACE Rule announcement, these interests continue to make the argument that the CPP was merely going to do by rule what the market was already doing as it relates to coal-fired power plants. This over-generalization is now being parroted in headlines about how the ACE Rule is somehow running counter to the market and “can’t save coal.” Addressing all the flaws in such spin would take an entire book, but suffice it to say that, if those who believe that markets were going to do anyway what the CPP was trying to do, why would they work so hard to develop, pass, and promote a legally tortured rule they say is not necessary? The answer is simple – without the heavy hand of government tipping the scales for renewables through subsidies, mandates, and illegal regulations like the CPP, renewables simply cannot overcome the economic hurdles they face in the marketplace. These

hurdles, of course, arise from basic physics and renewables' lack of energy density and reliability, not some conspiracy by conservatives to "keep them down."

What is disturbing is that these same advocates claiming that "the market is choosing renewables" who, not too long ago, were claiming that they were "competitive without subsidies," are now working feverishly in Congress to further extend market-distorting tax subsides they apparently cannot do without. The most fundamental question these advocates should be asking themselves is "when has the federal government ever been a central player in a successful business plan?"

Current efforts to balance the erosive impact of subsidies on resilient nuclear and coal plants are another chapter in a familiar, cautionary tale that government cannot fix markets, even those that it has broken, unless it eradicates subsidies and improves transparency so ratepayers know the true and total cost of what they are buying when they pay their electricity bills.

CONCLUSION:
Putting the Cards on the Table

So, with the final ACE Rule, the Trump EPA has reinstated the successful American approach to environmental regulation which has served as a model to the world because it focuses on technology, not ideology. Some have correctly argued that the ACE Rule does not go far enough – in terms of walking back the regulatory overreach of the prior administration on regulating GHGs under the FCAA. Yet, in the difficult struggle to fend off extreme environmental and renewable energy interests seeking to expand centralized governmental control of the energy sector, every step in the opposite direction should be applauded. Stated another way, when it comes to regulatory reform, we should avoid criticizing the good in search of the perfect.

Sure, there is much more work to be done to honor the statutory text of the Clean Air Act and properly constrain the energy policymaking power EPA could exert under the guise of regulating GHGs. The ACE Rule goes a long way toward returning the EPA to its proper regulatory role, but parallel regulatory reform proceedings will be essential to both honor the text of the FCAA and factor in the

very critical issues of materiality, proportionality, and common sense when gauging GHG regulations under the FCAA moving forward.

***Footnote:**
"The Case for Environmental Optimism" paper:
www.lifepowered.org/the-us-leads-the-world-in-clean-air

"Energy Poverty is Poverty" video:
www.lifepowered.org/combating-energy-poverty

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