



Is the Clean Power Plan Gone?

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Likely not. While most EPA observers are focused on repeal of the prior administration's Clean Power Plan (CPP) rule limiting CO₂ emissions from power plants, there is less focus on the CPP replacement rule EPA is presently drafting. At this point, the CPP replacement rule is moving on a parallel path with the CPP repeal rule.

The CPP replacement rule process started in December of last year when EPA issued an Advanced Notice of Proposed Rulemaking (ANPR) seeking input on what to include in a proposed rule. The comment period on the ANPR closed at the end of February. EPA is committed to issuing a proposed rule soon and to finishing the rulemaking by the end of the year. Presumably, the CPP repeal rule also will be finalized by the end of the year. Many see advantages to minimizing any gap between CPP repeal and replacement.

There is consensus among EPA, industry and states in favor of a CPP replacement rule. However, those in industry providing input on that rule are finding that making rules is much harder than attacking them. EPA, industry and states also agree that the Clean Air Act requires that states have the primary role in setting CO₂ standards. The open question is how much guidance EPA needs to provide to states. It is likely that the CPP replacement rule will adopt an approach where:

- EPA provides guidance to states on how to analyze potential CO₂ reductions and a procedure for states to follow.
- States submit their plans to EPA to implement the rule.
- States apply the plans to set standards for utility boilers.
- The state process will be different from state to state.

Industry comments on the ANPR favor two basic approaches. The first is focused on looking at the operating history of each unit and using the past CO₂ emissions performance to set standards going forward. The second approach is to analyze potential efficiency improvement projects and practices. EPA would outline the CO₂ reducing projects and practices that are potentially feasible and effective. States would then establish a process where units demonstrate that these efficiency measures have been or will be implemented.

As this process unfolds, it is important to consider that implementing a CPP replacement rule will require a great deal of effort by EPA and the states. It is unclear whether states will be able to do what is being asked of them. Will EPA try and minimize the burden on the states by providing more than just guidance? Of course, if or when the CPP replacement rule goes final, the litigation battle before the U.S. Court of Appeals for the D.C. Circuit will begin. Is it realistic to think that a final enforceable CPP replacement rule will be in place by the end of 2020? Likely not.

80 Fed. Reg. 64662 (Oct. 23, 2015); 82 Fed. Reg. 48,035 (October 17, 2017) (Proposed Rule); 82 Fed. Reg. 61507 (Dec. 28, 2017) (Advanced Notice of Proposed Rulemaking)

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