



## **Deregulation on Demand**

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### **Trump EPA Panders to Polluters in Dismantling Clean Power Plan**

**By James Goodwin**

**Research support from the Environmental Law Clinic at the University of Maryland Francis King Carey School of Law**

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# Deregulation on Demand: Trump EPA Panders to Polluters in Dismantling Clean Power Plan

## Introduction

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Corporate capture of regulatory agencies like the Environmental Protection Agency (EPA) has progressed to a dizzying degree of brazenness during the Donald Trump administration, helping to power the president's dangerous assault on public safeguards. This paper seeks to document this phenomenon empirically by examining the extent of the influence that corporate polluters enjoyed over the Trump EPA's development of its Affordable Clean Energy (ACE) rule.

Specifically, our research compares the public comments that a sample of relevant national trade associations submitted regarding how greenhouse gas emissions from existing fossil-fueled power plants should be regulated to the provisions contained in the final ACE rule, seeking to answer a fundamental question: Just how much of industry's wish list did the Trump administration deliver? Researchers identified a total of 23 unique substantive requests, or "asks," in the trade associations' public comments and concluded that the Trump EPA incorporated 79 percent of them into its final ACE rule. This high percentage is evidence of how unduly attentive the Trump EPA is to the very industries it is supposed to be regulating, while ignoring the legitimate interests of the public it is supposed to be protecting. When agencies become overly influenced by the industries they regulate, they risk undermining their credibility and the legitimacy of the policies they create. Structural reforms at the EPA, including measures aimed at limiting conflicts of interest among agency leadership, should be adopted to address the root causes of the problem of corporate capture.

## The Trump Doctrine of Corporate Corruption

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Under President Donald Trump, the threat to the integrity and legitimacy of our democratic institutions has never been greater. His frequent verbal assaults on the judiciary and his nose-thumbing at congressional oversight have been widely reported and condemned, but his administration's efforts to undercut the regulatory system and the web of safeguards it supports and enforces may well have a greater impact on Americans' daily lives. We focus in this paper on just one of the constellation of public interest agencies charged with translating protective statutes into concrete and enforceable standards – the Environmental Protection Agency (EPA), and on

just one regulatory initiative – the Trump EPA’s repeal of the Obama administration’s Clean Power Plan and promulgation of its own, far less protective Affordable Clean Energy (ACE) rule. In a subsequent report, we will examine industry influence over a broader range of Trump anti-safeguard initiatives, including measures that would undermine critical protections designed to keep our air safe to breathe, our drinking water free of contaminants, and our communities free of toxic chemicals.

While the Trump administration did not invent the problem of capture by regulated industries, the influence that corporate special interests have come to enjoy over federal agencies during Trump’s tenure is unprecedented in U.S. history. An overwhelming number of lobbyists and executives now hold leadership positions in the very agencies charged with supervising their former industries, supposedly on behalf of the public interest.<sup>1</sup> One of Trump’s first official acts was to issue a pair of executive orders that effectively made it his administration’s official regulatory policy for the protector agencies to ask “how high?” when the industries they oversee told them to jump. One order required agencies to devote their resources to carrying out an aggressive assault on existing safeguards, regardless of the harms to public health, safety, and the environment that would result, while the other put corporate interests at the helm of this assault by explicitly inviting them to send Trump’s agencies “hit lists” of existing safeguards they wanted to see repealed or weakened.<sup>2</sup>

Unsurprisingly, the Trump EPA has been particularly aggressive in rolling back safeguards opposed by corporate polluters, including rules to limit greenhouse gas emissions from power plants and automobiles, protect fragile wetlands and upland water sources, and ensure safe storage of toxic coal ash waste.<sup>3</sup> The Trump rollbacks would add to the already healthy bottom lines of these large corporations, by allowing them to avoid the cost of cleaning up their own mess. Instead, they would transfer those costs to working families – costs that would ultimately be measured in preventable deaths, increased cancer rates, lost school days, and degradation of our cherished environmental heritage. Such costs, of course, would be disproportionately borne by those who can least afford them, including the poor and people of color. While it would be impossible to capture the full scope of these harms with numbers, one study from a pair of Harvard researchers was able to generate a “conservative estimate” of 80,000 premature deaths per decade and respiratory problems for more than 1 million people.<sup>4</sup>

## **A Climate Policy Only Fossil Fuel Interests Could Love**

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There have been previous examinations of the extent of corporate regulatory capture that has taken place during the Trump administration. For example, a 2019 study from Public Citizen found that the Trump

administration had acted on 85 percent of the National Association of Manufacturers' (NAM) requests to initiate discrete deregulatory actions over the course of its first two years in office.<sup>5</sup> Results from these studies show the extent to which corporate interests are driving the agenda of the Trump assault on our safeguards.

The purpose of this study is to dig a little deeper into the phenomenon of industry capture in the Trump administration and examine the extent to which corporate interests influenced the actual substance of these deregulatory efforts, in this case the Clean Power Plan rollback. In other words, whereas past studies, such as the Public Citizen report, have looked at the degree to which industry is dictating the *agenda* for the Trump administration's rollbacks, this study examines the more complicated question of whether and to what extent these corporate interests are influencing the *content* of the provisions contained in the administration's weaker replacement rule for the Clean Power Plan.

## The Trump Attack on the Obama Clean Power Plan

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The EPA's 2019 Affordable Clean Energy (ACE) rule addressed, albeit superficially, greenhouse gas emissions from existing fossil-fueled power plants using the authority granted to the EPA by Section 111(d) of the Clean Air Act. Through this rulemaking, the Trump administration repealed the Obama administration's 2015 Clean Power Plan and replaced it with a significantly weaker emissions reduction program.

The difference between the two rules primarily turned on each administration's divergent interpretation of what constituted a "best system of emissions reduction" (BSER), as that term is used under Section 111(d). Interpreting BSER broadly, the Obama administration program would have required states to adopt their own implementation plans aimed at meeting specified emissions reductions goals that were tailored to their unique circumstances. The final Clean Power Plan laid out three "building blocks" that states could employ in designing their implementation plans: (1) reducing the carbon intensity of individual power plants' generation through heat rate improvements; (2) reducing emissions from the most carbon-intensive power plants by substituting generation with that from less carbon-intensive power plants; and (3) reducing emissions by substituting carbon-intensive generation with low-carbon or zero-carbon generation. The practical effect of this design is that it would have enabled states considerable flexibility to achieve meaningful reductions in greenhouse gas emissions from the power sector located within their borders at a reasonable cost.

In contrast, the Trump administration's ACE rule relies on an interpretation of BSER that is so narrow that it effectively deprives the term of practical



meaning. The ACE rule only recognizes modest source-specific heat rate improvements as permissible. And because the rule grants states considerable flexibility in implementing this standard, it could conceivably – and paradoxically – lead to actual increases in greenhouse gas emissions from fossil-fueled power plants as compared to no rule at all.<sup>6</sup>

When first proposed in 2014, the Obama EPA's Clean Power Plan was met with fierce opposition from industry. A wide variety of business groups – especially those industries related to fossil fuel development and use – submitted comments on the 2014 proposal that criticized its legal basis and suggested alternative designs. The Obama EPA considered and rejected many of these criticisms in working toward a final rule. An unprecedented stay from the U.S. Supreme Court in 2016 prevented the rule from taking effect while legal challenges against it worked their way through the federal courts. As a result, a legal challenge to the still-unimplemented Clean Power Plan remained pending before the U.S. Court of Appeals for the D.C. Circuit when the Trump administration took office in early 2017. President Trump, who had made opposition to environmental and other regulations a major theme of his campaign, wasted little time securing from the D.C. Circuit an abeyance in the litigation while his EPA worked on a replacement that would become the ACE rule.

The Trump EPA formally began work on the ACE rule with a 2017 advance notice of proposed rulemaking (ANPRM), which broadly sought public feedback on whether and how it should regulate greenhouse gas emissions from existing fossil-fueled power plants. Again, a wide variety of business groups responded to this request, offering their ideas for what a weaker replacement rule should look like (as opposed to an outright repeal).

## **The Affordable Clean Energy Rule: Just What Corporate Polluters Ordered?**

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The two public comment periods – for the 2014 Obama proposal and the 2017 Trump ANPRM, respectively – provide a unique opportunity to empirically test the extent of corporate capture that has prevailed during the Trump administration. In response to both comment opportunities, industry groups offered detailed feedback on what the EPA's regulation of greenhouse gas emissions from fossil-fueled power plants should look like. Our researchers, a group of student attorneys from the Environmental Law Clinic at the University of Maryland Francis King Carey School of Law, drew on a representative sample of these industry comments in order to document the frequency with which the discrete requests, or "asks," they contained were eventually reflected in the final ACE rule. A higher percentage of such asks being adopted is suggestive of a Trump EPA that has been captured by corporate interests.

Rather than conduct a comprehensive review of all industry comments, which would have been an overwhelming task, we focused instead on the comments from seven leading national industry trade associations: American Coal Council (ACC); American Coalition for Clean Coal Electricity (ACCCE); American Petroleum Institute (API); National Association of Manufacturers (NAM); National Mining Association (NMA); U.S. Chamber of Commerce; and Utility Air Regulatory Group (UARG). We focused on national trade associations to ensure our analysis focused on more generalized feedback on the rule, rather than on the more parochial concerns that the associations' individual members might raise in their own comments. In addition, this choice also reflects the reality that national trade associations have increasingly overtaken individual companies as the major players from the business community in the rulemaking process. We chose these particular seven trade associations because they had been among the most publicly active in their advocacy against the Clean Power Plan and in favor of the ACE rule, through such means as op-eds and congressional testimony.

We carefully reviewed each of the trade association's comments on the 2014 Obama proposal and the 2017 Trump ANPRM, where available. (Not all seven of the trade associations covered in this study participated in both public comment opportunities. For example, the ACC submitted comments on the 2014 Obama proposal, but did not submit comments on the 2017 Trump ANPRM.) As part of this review, we identified all of the substantive requests, or "asks," that were made, which we distinguished from more general technical comments. We then reviewed the final ACE rule to determine whether each particular ask was formally adopted, partially adopted, rejected, or completely unaddressed by the Trump EPA. Based on this analysis, we were able to determine the total percentage of industry asks that were fully adopted in the final ACE rule, providing us with a yardstick for measuring the extent of industry influence over the Trump's regulatory decision-making.

To ensure the robustness of our results, we took a conservative approach to our analysis. First, we did not count toward the final percentage any asks that were only partially adopted in the final rule. Second, to avoid misleading duplication, we only counted an ask that was adopted once, even if the particular ask had been made more than once – either by the same trade association (*i.e.*, in their separate comments on the 2014 Obama proposal and the 2017 Trump ANPRM) or by more than one trade association.

**Based on this analysis, we found that the seven trade associations made a total of 23 unique substantive asks. The final ACE rule adopted 79 percent of these asks.**

To be sure, there is nothing wrong in the abstract with the EPA and other agencies basing their decision-making on the public feedback they receive.



After all, the purpose of the comment process is to provide interested stakeholders with a meaningful opportunity to shape agency decision-making. It is this avenue of meaningful public participation in policymaking that helps to imbue the process and its results with a critical element of democratic accountability and legitimacy.

The problem is one of degree, however. If an agency is only attentive to one set of stakeholders – in this case corporate polluters – while systematically disregarding the concerns of the broader public interest, then this poses a threat to the accountability and legitimacy of the regulatory system, as well. For example, in their comments on the proposed ACE rule, various environmental groups urged the Trump EPA to adopt a broader definition of BSER, noting that according to the agency’s own analysis, the narrow definition employed in the ACE rule would achieve little practical reduction in existing power plants’ greenhouse gas emissions. They contended that this narrow construction of BSER was inconsistent with the Clean Air Act, which among other things requires the EPA to consider such factors as the quantity of emissions reductions and the severity of the pollution problem at issue when applying the BSER standard.<sup>7</sup> This was one of the many solid critiques of the ACE rule that the Trump EPA disregarded in working toward a final rule, and a reviewing court could very well use them as the basis for striking the rule down.

No law – least of all the Clean Air Act – charges the government with doing the bidding of politically powerful interests. Instead, the EPA, like all agencies, must be accountable to and fairly balance the interests of all affected stakeholders according to the dictates of the laws they implement. If the EPA creates the appearance, if not the reality, that it will only seriously consider the concerns of the corporate polluters it is charged with regulating, and not those of the broader public, this can prove just as corrosive to its credibility and the legitimacy of the policies it adopts.

## **In the Trump EPA, Corporate Polluters Have Found a Receptive Audience**

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The fact that the Trump EPA was so attentive to the concerns of corporate polluters in developing its final ACE rule should not be surprising. Even within the Trump administration, where conflicts and corruption are in evidence seemingly everywhere, the EPA has always distinguished itself as one of the most thoroughly captured by the very industries that Congress has charged it with overseeing. According to White House Office of Information and Regulatory Affairs (OIRA) records, the EPA has been one of the most aggressive agencies in advancing the administration’s assault on public safeguards, accounting for 44 of the administration’s estimated 393 deregulatory actions (11 percent) since 2017.<sup>8</sup> Of course, such “savings” are

actually costs transferred, often in the form of sickness and death, to individuals and families, so that corporate polluters can make more money.

Individuals with close ties to the fossil fuel industry are well represented throughout the Trump EPA's upper echelons. Trump's first EPA administrator, Scott Pruitt, had previously served as the attorney general in Oklahoma. Pruitt gained infamy for using his official position to advance the interests of the oil and gas industry and himself. Campaign finance disclosure records reveal that the oil and gas industry was one of Pruitt's most generous contributors.<sup>9</sup> After a litany of scandals forced Pruitt to resign, he was replaced by current EPA Administrator Andrew Wheeler, who brought with him a long, close relationship with the coal industry. As a former corporate lobbyist, one of his biggest clients was Murray Energy.<sup>10</sup> Wheeler's former client there was the company's founder and former CEO, Bob Murray, who had gained notoriety as one of the most outspoken critics of environmental regulations in the United States.

Other notable EPA officials with close ties to the fossil fuel industry include former Assistant Administrator for the Air and Radiation Office William Wehrum (a former lobbyist for UARG)<sup>11</sup>, former Chief of Staff Ryan Jackson (who left the agency to take over as Senior Vice President of Government and Political Affairs at NMA)<sup>12</sup>, and former air policy advisor and current Chief of Staff Mandy Gunasekara (who worked for a climate change-denying think tank that received significant funding from fossil fuel interests)<sup>13</sup>.

## Rooting Out Corporate Capture to Prevent Future Trump EPAs

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Now that it has been finalized, the ACE rule faces an array of legal challenges from states and environmental groups in federal courts. Its odds of survival there appear dim, given the rule's myriad legal and policy shortcomings. One of the ACE rule's biggest weaknesses, as this paper indicates, is that the Trump EPA was overly attentive to the concerns of fossil fuel interests in designing the rule's provisions, making it ripe for rejection as "arbitrary and capricious" under the Administrative Procedure Act.

Even if the ACE rule is successfully halted in the courts, its development has exposed the deeper problems of corporate capture that exist at the Trump EPA. While a future, more enlightened administration may sweep out some of the more superficial aspects of this problem, structural reforms will be needed to eliminate their root causes. An important place to start would be to adopt strong conflict-of-interest safeguards to prevent future administrations from installing individuals with close financial ties to polluting industries into influential leadership positions.

# The Affordable Clean Energy Rule

Proposed Rule:  
August 2018

Current Status:  
Litigation

Final Rule:  
July 2019

## The Clean Power Plan (CPP)...

In 2013, EPA proposed guidelines for states to follow in developing greenhouse gas (GHG) emissions regulations. Under Clean Air Act Section 111(d), the rule established state-specific carbon dioxide (CO2) emissions goals and guidelines for states to develop and implement emissions reduction plans for new and existing sources based on what the EPA defined as the “best system of emissions reduction” (BSER). EPA determined BSER based on two main considerations: (1) Reducing the emissions by improving the efficiency of operations, and (2) addressing mass emissions by varying their utilization levels (i.e. energy generation/consumption). The final rule established three general BSER “building blocks”: (1) heat rate improvements; (2) fuel source switching; and (3) generation source switching.

## ...The Rollback

In 2017, EPA began working on action to repeal and replace the CPP, asserting that the Obama-era rule exceeded EPA’s authority. The final replacement rule, the Affordable Clean Energy (ACE) rule, departed from the CPP in three major respects: (1) BSER is only based on onsite, heat-rate efficiency improvement; (2) ACE rule provides states with a list of “candidate technologies” that can be used to establish standards of performance and be incorporated into their state plans; and (3) ACE adjusts regulations under CAA section 111(d) to give states more time and flexibility to develop their state plans. The proposed ACE rule included reforms to the New Source Review (NSR) permitting program – ostensibly to allow plants greater flexibility to make compliance-related efficiency upgrades – but these will be pursued in a separate rulemaking.

## What Happened?

One of the most common objections to the CPP from industry groups was that it exceeded EPA’s authority under the Clean Air Act. EPA cited this as the primary basis for rescinding the rule, claiming that the CPP read the BSER standard too broadly to advance its political agenda of requiring a shift from fossil-fuel-fired generation to renewable energy. In the ACE rule, EPA determined the only BSER for CO2 emissions from coal-fired electric utility generating units (EGUs) is heat rate improvement (HRI). As such, efficiency improvements were the permissible BSER retained from the CPP. Although carbon capture and sequestration were under consideration as potential options for BSER, they were not included in the final rule. ACE established new implementing regulations for section 111(d), which expressly grants states a wide degree of flexibility in establishing source-based standards. EPA stated that the ACE rule only applies to existing sources and expressed that it will pursue reforms to the NSR program in subsequent rulemakings.

Total Substantive “Asks” Adopted by Group		
Group	Obama Rule	ANPRM
<u>ACC</u>	3	N/A
<u>API</u>	3	4
<u>UARG</u>	1	7
<u>NMA</u>	6	7
<u>ACCCE</u>	2	5
<u>CoC</u>	N/A	3
<u>NAM</u>	N/A	5



Unique  
“Asks”  
Adopted in  
Final Rule

23



Percentage of  
Unique “Asks”  
Adopted in Final  
Rule

79%

# Appendix A

Key	
Suggestion adopted	✓
Suggestion rejected	✗
Suggestion partially adopted	☑
Suggestion not addressed	NA
Duplicate Comment	

CAA Clean Power Plan Proposal						
	Date ACE Rule Proposed:	Aug-18	Date ACE Rule Finalized:	Jul-19	Current Status:	Issued
Original Rule Docket ID	EPA-HQ-OAR-2013-0602, EPA-HQ-OAR-2017-0545				Final Rule Docket ID	EPA-HQ-OAR-2017-0355


Rule Overview
<p>In 2013, the Obama administration proposed emissions guidelines for states to follow in developing greenhouse gas (GHG) emissions regulations. This rule became known as the Clean Power Plan (CPP). Under Section 111(d) of the CAA, the rule would establish state-specific CO2 emissions goals and guidelines for the development and implementation of state based plans based on what the EPA defined to be the best system of emissions reduction (BSER). EPA determined BSER</p>




Trump Revision
<p>In 2017, the Trump administration proposed to repeal and replace the CPP on the basis that the Obama-era rule exceeded EPA’s legal authority. The replacement became known as the Affordable Clean Energy Rule, and it sought to establish guidelines for states to use when developing plans to limit power plant GHGs. The replacement proposal departed from the CPP in four major respects: (1) BSER is only based on site, heat-rate efficiency improvement; (2) ACE provides states with a list of “candidate</p>

based on two main considerations: (1) Reducing the emissions by improving the efficiency of operations, and (2) addressing mass emissions by varying their utilization levels (i.e. energy generation/consumption).


Initially, EPA proposed four BSER "building blocks": (1) reducing the carbon intensity of generation through heat rate improvements; (2) reducing emissions from the most carbon-intensive power plants by substituting generation with that from less carbon-intensive power plants; (3) reducing emissions by substituting carbon-intensive generation with low-carbon or zero-carbon generation; and (4) reducing emissions from by expanding the use of demand-side energy efficiency that reduces the amount of generation required. In the final rule, published in October 2015, EPA retained the first three building blocks for its BSER determination.




technologies" that can be used to establish standards of performance and be incorporated into their state plans; (3) ACE proposed reforms to the New Source Review (NSR) permitting program to further encourage efficiency improvements at existing power plants ; and (4) ACE aligns regulations under CAA section 111(d) to give states adequate time and flexibility to develop their state plans. The final ACE rule abandoned the NSR reforms in favor of pursuing them in a separate rulemaking.




Industry Comments		Tracks with Revision?
<b>Coal Industry Groups (American Coal Council and member groups)</b>		
<p><b>Improper federal power grab.</b> States cannot expect to implement the CPP and maintain the strength of their utilities. Therefore it would be better to allow states to develop their own plans. Further, EPA is going beyond their authority under the CAA by setting standards for entire states, not just specific sources/sites.</p>		<p><b>Yes, the ACE rules gives states greater control over their reduction plans.</b> ACE recognizes, under CAA Section 111(d), that EPA’s statutory role is to determine the BSER and the degree of emission limitation achievable through application of the BSER, and that the states’ role is to develop plans that establish unit-specific standards of performance that reflect application of the BSER.</p> <ul style="list-style-type: none"> <li>•The CAA provides that states establish the standards of performance and explicitly directs EPA to allow states to consider “the remaining useful life of the source” and other source-specific factors in establishing standards of performance.</li> <li>• States will evaluate applicability to their existing sources of the six candidate technologies and improved operating and maintenance practices and take into consideration source-specific factors in establishing a standard of performance at the unit level.</li> <li>• States will submit plans to EPA that establish standards of performance and include measures that provide for the</li> </ul>




		<p>implementation and enforcement of such standards.</p> <ul style="list-style-type: none"> <li>• The plan submissions must explain how the state applied the BSER to each source – and how the state took other factors into consideration – in setting unit-specific standards. These plans are due in three years.</li> </ul>
<p><b>The CPP was an improper attempt by EPA to set energy policy.</b> The rule's concept is inappropriate, overreaching, and unworkable. EPA should withdraw it in order to protect and preserve America's economy, jobs, competitive energy marketplace, and world class electricity system – thereby protecting all American consumers.</p>		<p><b>Yes, the CPP was repealed.</b></p>
<p><b>Unduly penalizes the coal industry.</b> The CPP unnecessarily strands and shuts coal power plants and points out investments already made for emissions reduction from those plants would be wasted. This rule limits fuel choices for electric generators, which has significant implications from an economic, business, and consumer standpoint. Overall, coal is key to maintaining a robust, competitive fuels marketplace which keeps energy priced affordably for consumers, supports grid reliability and resilience, and provides energy security.</p>		<p><b>Yes, the ACE rule is designed specifically to preserve the coal industry.</b> It takes away heavy burden on industry and keeps with the theme of competitive market and affordability throughout the Affordable Clean Energy Rule.</p>
<p><b>API</b></p>		
<p><b>Improperly dictates fuel choices for power plants.</b> EPA is effectively mandating fuel and generation unit design choices for new electrical generating units (EGUs) constructed in the United States. The Clean Air Act enables EPA only to regulate pollution, not dictate fuel or design choices by industry, much less to the point of declaring coal- and petcoke-fired EGUs to be obsolete or banning new construction outright. Congress never</p>		<p><b>Yes, the ACE does not require fuel shifting.</b> The CPP departed from the EPA's traditional understanding of its authority under section 111 of the Clean Air Act and promulgated a rule in excess of its statutory authority. EPA in the CPP set standards that could only be achieved by a shift in the energy generation mix at the grid level, requiring a shift from one type of fossil-fuel-fired generation to another, and from fossil-fuel-fired generation as a whole</p>







<p>intended for the Clean Air Act to authorize EPA's extraordinary policy decisions to phase out entire sources of energy as proposed in this rulemaking.</p>		<p>towards renewable sources of energy.</p>
<p><b>BSER should be limited to source-based approaches.</b> EPA should require states to choose a source-based best system of emission reduction (BSER). In setting the stringency of its guidelines under Section 111(d), EPA and states should exclusively take into account reductions from measures deployed at reasonable cost within the fence line and under the control of distinct subcategories of directly regulated sources. The guidelines should be based on measures that can be achieved without redefining the source and should not mandate fuel or feedstock choices.</p>		<p><b>Yes, EPA is requiring states to choose a source-based BSER.</b> The Clean Air Act (CAA) limits "standards of performance" to systems that can be applied at and to a stationary source (i.e., as opposed to off-site measures that are implemented by an owner or operator, such as subsidizing lower-emitting sources) and that lead to continuous emission reductions (i.e., are not intermittent control techniques). Such systems include add-on controls and lower-emitting processes/practices/designs that can be applied to a designated facility, i.e., a building, structure, facility, or installation regulated under CAA section 111.</p>
<p><b>Problems with counting cogeneration as a reduction approach.</b> EPA should recognize that sources cogenerating steam for use at the source and also producing electricity for the grid are already combining two processes into an inherently efficient approach. EPA should change the definition of source addressed by state plans to include turbines with a baseload rating greater than 250 MMBtu/h that combusts fossil fuels for more than 10% of heat input over a 3-year period.</p>		<p><b>Yes, EPA eliminated cogeneration and fuel switching BSER building blocks.</b> Instead, the ACE rule focuses exclusively on establishing heat rate improvement (HRI) as the BSER. Section 60.5775a provides that the rule applies to sources with a heat capacity of 250 MMBtu/hr addresses opposition over other methods used in the CPP that burns coal for more than 10.0 percent of the average annual heat input during the 3 previous calendar years.</p>
<p><b>Utility Air Regulatory Groups</b></p>		
<p><b>Problems with the implementation schedule.</b> EPA should remove interim emission performance period and levels from the final rule to allow sufficient time for reliable and efficient implementation of compliance strategies. Further, for continued electric system reliability and resource adequacy, EPA should adopt an implementation timeline and approach that allows for sound resource and infrastructure planning. EPA should allow for a variety of compliance strategies to preserve reliability of the electric system.</p>		<p><b>Yes, EPA revised the implementation provisions by extending to allow for a three-year compliance period.</b> It "superseded" the CPP's compliance schedule provided under 40 CFR 60.22a, by enacting a provision (60.20) that granted State's discretion to set individual compliance schedules for individual sources.</p>

National Mining Association		
<p><b>Improper federal power grab.</b> The CPP is an illegal attempt to impose a political agenda on the country's power system, to create what it called 'a new energy economy.' They claim that 'new energy economy' would have had dire consequences for everyday Americans who depend on affordable, reliable coal-powered electricity, forcing the premature retirement of many existing coal plants, and increasing the vulnerability of our grid to supply outages and price spikes — it is an unacceptable proposal given the negligible environmental benefits.</p>		<p><b>Yes, the ACE rules gives states greater control over their reduction plans.</b> ACE recognizes, under CAA Section 111(d), that EPA's statutory role is to determine the BSER and the degree of emission limitation achievable through application of the BSER, and that the states' role is to develop plans that establish unit-specific standards of performance that reflect application of the BSER.</p> <ul style="list-style-type: none"> <li>•The CAA provides that states establish the standards of performance and explicitly directs EPA to allow states to consider "the remaining useful life of the source" and other source-specific factors in establishing standards of performance.</li> <li>• States will evaluate applicability to their existing sources of the six candidate technologies and improved operating and maintenance practices and take into consideration source-specific factors in establishing a standard of performance at the unit level.</li> <li>• States will submit plans to EPA that establish standards of performance and include measures that provide for the implementation and enforcement of such standards.</li> <li>• The plan submissions must explain how the state applied the BSER to each source – and how the state took other factors into consideration – in setting unit-specific standards. These plans are due in three years.</li> </ul>
<p><b>EPA lacks CAA authority to determine substantive requirements.</b> Congress did not give EPA authority under Section 111(d) to set a required level of emissions performance by facilities within the regulated source category. Congress merely provided that EPA should establish a "procedure" for the submission of state plans. EPA should remove the minimum standards because they are substantive not procedural.</p>		<p><b>Yes, the ACE rule is focused on process.</b> Since the ACE provided State's flexibility in establishing their own BSER standards, the implementation regulations provide only guidelines for State standard development rather than substantive requirements. The implementing provisions promulgated at 40 CFR 60.20a-29a merely set forth procedures for submission and approval of State plans.</p>
<p><b>The CPP is preempted.</b> EPA Because coal-fired EGUs are regulated under Section 112, EPA lacks authority to, and should not, regulate them under Section 111(d).</p>		<p><b>Partially, since EPA withdrew the CPP but still allowed for some regulation.</b></p>



<p><b>The CPP seeks to regulate the electric grid in excess of EPA authority.</b> That authority rests with the states as to retail transactions and FERC as to wholesale transactions. EPA's proposed regulations intrude on both state and federal authority.</p>		<p><b>Yes, ACE eliminated grid modernization/demand side response as a BSER option.</b> Now only HRI improvements are BSER options. See 40 CFR 60.5735a2. In contrast to its traditional regulations that set performance standards based on the application of equipment and practices at the level of an individual facility, the EPA in the CPP set standards that could only be achieved by a shift in the energy generation mix at the grid level, requiring a shift from one type of fossil-fuel-fired generation to another, and from fossil-fuel-fired generation as a whole towards renewable sources of energy. The text of the CAA is inconsistent with that interpretation, and the context, structure, and legislative history confirm that the statutory interpretation underlying the CPP was not a permissible construction of the Act. See section II.B.2.</p>
<p><b>Improper reliance on forced reductions.</b> Forced reductions in production is not a "system" of emission reduction under Section 111(a), and those provisions should be withdrawn.</p>		<p><b>Yes, ACE eliminated the production reduction and mass-exchange requirements.</b> Instead, it retained only heat-exchange efficiency as a means for reduction. EPA's substantial rewrite of § 60.5740 reflects their elimination of all other alternative emissions reductions systems included in the CPP.</p>
<p><b>Improper reliance on technologies that are not "adequately demonstrated."</b> Without exception, EPA has historically determined BSER by examining "adequately demonstrated" technology that can be cost effectively installed at facilities within the regulated source category. The only "adequately demonstrated" technology available to reduce CO2 emissions from coal EGUs is efficiency improvements. Now, BSER is defined as four building blocks. Although only block one is actually based on a system for reducing emissions from the source category being regulated, as BSER has been applied in the past, EPA nevertheless claims that all four of these building blocks qualify as BSER. The plain meaning of Section 111(d), the legislative history of that section, and the long administrative history of the NSPS program show that EPA's attempt to provide itself with the power to redesign the power grid cannot stand and efficiency improvements should be the only "building block" that qualifies as BSER.</p>		<p><b>Yes, EPA eliminated cogeneration and fuel switching BSER building blocks.</b> Instead, ACE exclusively establishes heat rate improvement (HRI) as the BSER. Section 60.5775a provides that the rule applies to sources with a heat capacity of 250 MMBtu/hr addresses opposition over other methods used in the CPP that burns coal for more than 10.0 percent of the average annual heat input during the 3 previous calendar years.</p>

<p><b>The CPP's "building blocks" do not provide states with adequate flexibility as claimed.</b> The fact that a state determines that it can do better than EPA's assumed stringency for one building block does not mean that a state cannot obtain the level of stringency EPA has set for the other building blocks. Thus, the notion of state implementation flexibility is fundamentally at odds with EPA's building block methodology. Having chosen to determine the "best" amount of emission reduction each state should obtain for each building block, EPA has no logical basis to say that what really matters is the overall goal, not the building blocks.</p>		<p><b>Yes, ACE abandons the "building block" framework used in the CPP.</b> EPA concluded that neither averaging nor trading between EGUs at different plants can be used in state plans to comply with ACE. Those options would not necessarily require any emission reductions from designated facilities and may not actually reflect application of the BSER. Because 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. See 40 CFR 60.5735(a)(2). A single source could potentially shut down or reduce utilization to such an extent that its reduced or eliminated operation generates adequate compliance instruments for a state's remaining sources to meet their standards of performance without any emission reductions from any other source. This compliance strategy would undermine the EPA's determination of the BSER in this rule, which the EPA has determined as heat rate improvements.</p>
<p><b>American Council for Clean Coal Energy</b></p>		
<p><b>The CPP is preempted.</b> EPA Because coal-fired EGUs are regulated under Section 112, EPA lacks authority to, and should not, regulate them under Section 111(d).</p>		<p><b>Partially, since EPA withdrew the CPP but still allowed for some regulation.</b></p>
<p><b>BSER should be limited to source-based approaches.</b> In developing guidelines for states to use to set 111(d) performance standards, EPA is allowed by the CAA to consider only emissions reductions that can be achieved at a regulated facility, i.e., "inside the fence." However, EPA has proposed standards based on measures clearly "beyond the fence."</p>		<p><b>Yes, EPA is requiring states to choose a source-based BSER.</b> The CAA limits "standards of performance" to systems that can be applied at and to a stationary source (i.e., as opposed to off-site measures that are implemented by an owner or operator, such as subsidizing lower-emitting sources) and that lead to continuous emission reductions (i.e., are not intermittent control techniques). Such systems include add-on controls and lower-emitting processes/practices/designs that can be applied to a designated facility, i.e., a building, structure, facility, or installation regulated under CAA section 111.</p>




<p><b>Improper federal power grab.</b> EPA's beyond-the-fence approach to setting standards impermissibly usurps states' traditional sovereign power to regulate electric generation and use within their borders.</p>		<p><b>Yes, the ACE rules gives states greater control over their reduction plans.</b> ACE recognizes, under CAA Section 111(d), that EPA's statutory role is to determine the BSER and the degree of emission limitation achievable through application of the BSER, and that the states' role is to develop plans that establish unit-specific standards of performance that reflect application of the BSER.</p> <ul style="list-style-type: none"> <li>•The CAA provides that states establish the standards of performance and explicitly directs EPA to allow states to consider "the remaining useful life of the source" and other source-specific factors in establishing standards of performance.</li> <li>• States will evaluate applicability to their existing sources of the six candidate technologies and improved operating and maintenance practices and take into consideration source-specific factors in establishing a standard of performance at the unit level.</li> <li>• States will submit plans to EPA that establish standards of performance and include measures that provide for the implementation and enforcement of such standards.</li> <li>• The plan submissions must explain how the state applied the BSER to each source – and how the state took other factors into consideration – in setting unit-specific standards. These plans are due in three years.</li> </ul>
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Totals	
	15
	0
	1
NA	0



## Appendix B






<b>CAA Affordable Clean Energy Rule ANPRM</b>					
	Date Proposed:	Aug-18	Date Finalized:	Jul-19	Current Status: Issued
Original Rule Docket ID	EPA-HQ-OAR-2013-0602, EPA-HQ-OAR-2017-0545			Final Rule Docket ID	EPA-HQ-OAR-2017-0355
<b>Industry Comments</b>			<b>Tracks with Trump Rule</b>		
<b>U.S. Chamber of Commerce, American Chemistry Council, and Others.</b>					
<p><b>BSER should be limited to source-based approaches.</b> Any Rule to establish standards of performance under Section 111(d) must reflect what can be demonstrated and accomplished “within the fence line” of the emissions source.</p>			<p><b>Yes, EPA is requiring states to choose a source-based BSER.</b> The CAA limits “standards of performance” to systems that can be applied at and to a stationary source (i.e., as opposed to off-site measures that are implemented by an owner or operator, such as subsidizing lower-emitting sources) and that lead to continuous emission reductions (i.e., are not intermittent control techniques). Such systems include add-on controls and lower-emitting processes/practices/designs that can be applied to a designated facility, i.e., a building, structure, facility, or installation regulated under CAA section 111.</p>		
<p><b>Improper reliance on technologies that are not "adequately demonstrated."</b> For EGUs, the BSER should be based on emissions limitations that can be adequately demonstrated at existing sources, and no more stringent than the New Source Performance Standard (“NSPS”) established for CO2 emissions from EGUs.</p>			<p><b>Yes, EPA only considered HRI to be within BSER.</b> EPA eliminated cogeneration and fuel switching BSER building blocks. Section 60.5775a provides that the rule applies to sources with a heat capacity of 250 MMBtu/hr addresses opposition over other methods used in the CPP that burns coal for more than 10.0 percent of the average annual heat input during the 3 previous calendar years.</p>		










<p><b>State-determined factors for setting emissions standards.</b> EPA should provide guidance to the States on how to set their standards of performance, including “presumptively approvable” standards. However, any rule must expressly reaffirm that the States have broad flexibility to identify the appropriate factors to consider.</p>		<p><b>Partially, ACE rule promotes state flexibility but doesn't set presumptive standards.</b> According to EPA, Congress made explicit the requirement that the EPA allow states to take into account the “remaining useful life” of an existing source, “among other factors,” when applying a standard of performance to any particular source. Accordingly, the Agency's identification of the BSER is based on what is “adequately demonstrated” and broadly achievable for a source category across the country, while each state—which will be more familiar with the operational and design characteristics of actually existing sources within their borders—is responsible for developing source-specific standards reflecting application of the BSER. However, EPA declined to provide a presumptive standard because states are responsible for setting the standards in III.E.2.</p>
<p><b>Insufficient implementation flexibility for states.</b> Any rule should also clarify that the States have broad authority and flexibility to incorporate appropriate compliance mechanisms into their plans. Those mechanisms may be based on State law programs and should provide the maximum flexibility available under those programs, including the ability to interact with other States’ programs and sources to accomplish the reductions described by the performance standards. EPA’s rule may offer examples of programs that could be used to facilitate cost-effective compliance with a State performance standard or achieve equivalent emissions reductions.</p>		<p><b>Yes, ACE rule allows states to design plans that afford designated facilities broad discretion in meeting its standard of performance.</b> For example, there are technologies, methods, and/or fuels that can be adopted at the designated facility to allow the source to comply with its standard of performance that were not determined to be the BSER, but which may be applicable and prudent for specific units to use to meet their compliance obligations. Examples of non-BSER technologies and fuels include HRI technologies that were not included as candidate technologies, CCS, and natural gas co-firing. The EPA is, however, excluding some measures from use as compliance measures: averaging and trading and bio-mass cofiring.</p>
<p><b>NSR reforms will provided needed flexibility.</b> EPA should take steps to reduce the likelihood that efforts to comply with any future Rule independently trigger requirements under the Clean Air Act’s New Source Review (“NSR”) provisions.</p>	<p>NA</p>	<p><b>Unaddressed, NSR reforms will be addressed in a separate rule.</b></p>
<p>API</p>		
<p><b>BSER should be limited to source-based approaches.</b> EPA’s evaluation of the BSER must only include those systems of GHG emission reduction that are applied to or at the existing stationary source (i.e., within the fence line of the EGU), and therefore should exclude actions beyond the source itself</p>		<p><b>Yes, EPA is requiring states to choose a source-based BSER.</b> The CAA limits “standards of performance” to systems that can be applied at and to a stationary source (i.e., as opposed to off-site measures that are implemented by an owner or operator, such as subsidizing lower-emitting sources) and that lead to continuous emission reductions (i.e., are not intermittent control techniques). Such systems include add-on controls and lower-emitting processes/practices/designs that can be applied to a designated facility, i.e., a building, structure, facility, or installation regulated under CAA section 111.</p>

<p><b>State-led program.</b> CAA Section 111(d) grants States primacy to set standards for performance; accordingly, States should be afforded the flexibility provided under Section 111(d) and their respective state laws to set standards of performance based on the systems or controls that apply at or to the particular circumstances of the EGUs in their state.</p>		<p><b>Yes, the ACE rules gives states greater control over their reduction plans.</b> ACE recognizes, under CAA Section 111(d), that EPA’s statutory role is to determine the BSER and the degree of emission limitation achievable through application of the BSER, and that the states’ role is to develop plans that establish unit-specific standards of performance that reflect application of the BSER.</p> <ul style="list-style-type: none"> <li>•The CAA provides that states establish the standards of performance and explicitly directs EPA to allow states to consider “the remaining useful life of the source” and other source-specific factors in establishing standards of performance.</li> <li>• States will evaluate applicability to their existing sources of the six candidate technologies and improved operating and maintenance practices and take into consideration source-specific factors in establishing a standard of performance at the unit level.</li> <li>• States will submit plans to EPA that establish standards of performance and include measures that provide for the implementation and enforcement of such standards.</li> <li>• The plan submissions must explain how the state applied the BSER to each source – and how the state took other factors into consideration – in setting unit-specific standards. These plans are due in three years.</li> </ul>
<p><b>Exclusions for industrial combined heat and power generating units and natural gas-fired peaking units.</b> This will encourage the GHG emission reduction and contribution to electricity grid reliability afforded by both of these sources</p>		<p><b>Yes, ACE rules excludes combine heat and power and gas-fired peaking units.</b> The rule excludes stationary combustion turbine that meets the definition of a simple cycle stationary combustion turbine, a combined cycle stationary combustion turbine, or a combined heat and power combustion turbine from being designated facilities.</p>
<p><b>Promote natural gas.</b> EPA’s emission guidelines to states should fully recognize and promote the benefits of natural gas in reducing GHG emissions. All options that reduce CO2 emissions from EGUs – including use of natural gas – should be acknowledged and given full credit as contributors to compliance.</p>	<p>NA</p>	<p><b>Unaddressed</b></p>
<p><b>NSR reform will provide flexibility.</b> EPA should consider and eliminate the collateral impacts and additional regulatory burdens of the New Source Review (“NSR”) program, facilitating the implementation of energy efficiency and other environmentally beneficial projects.</p>	<p>NA</p>	<p><b>Unaddressed, NSR reforms will be addressed in a separate rule.</b></p>






<p><b>Exclusions for modified EGUs.</b> EPA should ensure that existing EGUs that undergo reconstruction or modification and become subject to the New Source Performance Standards (“NSPS”) under CAA Section 111(b) for EGUs are excluded from the requirements of the state-based programs for existing EGUs.</p>		<p><b>Yes, ACE rule clearly only applies to existing EGUs.</b> Whatever the scope of a state's authority under state law may be to design a scheme to meet the emissions guidelines, the EPA's authority to approve state plans that contain standards of performance for existing sources only extends to measures that are authorized statutorily. Specifically, the EPA's authority is constrained to approving measures that comport with the statutory interpretations, including interpretations of the limitations on “standards of performance” and the underlying BSER. For example, CAA section 111(d)(1) clearly contemplates that state plans may only contain requirements for existing sources, and not other entities. Therefore, in implementing the ACE rule, the EPA may not approve state plan requirements on entities other than existing EGUs, which are the designated facilities under this rule</p>
<p><b>Exclusions for CCS retrofits.</b> EPA should ensure that retrofiting of carbon capture and storage (“CCS”) technologies by EGUs would not be considered reconstruction or modification for purposes of determining applicability of Section 111(b) NSPS and other CAA programs, and that EGUs using CCS should not be subjected to increased monitoring or reporting requirements beyond measurements of stack-level CO2 emissions and/or electricity generation monitoring required for non-CCS EGUs.</p>	<p>NA</p>	<p><b>Unaddressed</b></p>
<p><b>UARG</b></p>		
<p><b>Respect for state authority.</b> EPA must recognize the standard-setting authority explicitly reserved for states under section 111(d). EPA must respect the states’ role in the section 111(d) regulatory process, including their authority to consider “the remaining useful life of the existing source” and “other factors” when adopting standards of performance for individual sources in their plans.</p>		<p><b>Yes, the ACE rules gives states greater control over their reduction plans.</b> ACE recognizes, under CAA Section 111(d), that EPA’s statutory role is to determine the BSER and the degree of emission limitation achievable through application of the BSER, and that the states’ role is to develop plans that establish unit-specific standards of performance that reflect application of the BSER.</p> <ul style="list-style-type: none"> <li>•The CAA provides that states establish the standards of performance and explicitly directs EPA to allow states to consider “the remaining useful life of the source” and other source-specific factors in establishing standards of performance.</li> <li>• States will evaluate applicability to their existing sources of the six candidate technologies and improved operating and maintenance practices and take into consideration source-specific factors in establishing a standard of performance at the unit level.</li> <li>• States will submit plans to EPA that establish standards of performance</li> </ul>








		<p>and include measures that provide for the implementation and enforcement of such standards.</p> <ul style="list-style-type: none"> <li>• The plan submissions must explain how the state applied the BSER to each source – and how the state took other factors into consideration – in setting unit-specific standards. These plans are due in three years.</li> </ul>
<p><b>Defining the HRI BSER.</b> UARG urges EPA to adopt the following BSER: “Efficient generation at the affected EGU achievable through a combination of best operating practices and/or equipment upgrades.”</p>		<p><b>Yes, the ACE rule sets HRI as sole BSER.</b> EPA defined BSER as including the “application of a specific set of emission reduction technologies . . . and operational practices.”</p>
<p><b>Problems with the implementation schedule.</b> UARG believes a multiple-year compliance period would be appropriate.</p>		<p><b>Yes, EPA allowed for compliance schedules longer than twelve months.</b> The longer compliance schedule applies provided that states establish provisions for increments of progress.</p>
<p><b>Flexible application of BSER in standard-setting.</b> Although standards of performance must be premised on the application of BSER to an individual source, sources should never be required to actually incorporate the BSER and may satisfy the standard of performance in other ways.</p>		<p><b>Yes, the ACE rule clarifies how states properly apply BSER to sources.</b> While states are required to apply the BSER, states may also consider the mitigating effects on the emission reductions that would result from the installation of a particular candidate technology, and may as a result of this consideration determine that installing that particular candidate technology at a particular source is not reasonable.”</p>
<p><b>Incorporating historical emissions rates in HRI determinations.</b> An approach to the emission guidelines based on units’ demonstrated efficiency will ensure that EGUs are required to undertake measures to maintain and improve their heat rates and thus limit their CO2 emissions.</p>		<p><b>Yes, EPA stated that state standards based on individual sources’ “historical emission rates.”</b></p>
<p><b>HRI determination must be context specific.</b> EPA should reject the approach used in its statistical analysis from the CPP rulemaking, which was wholly inappropriate for identifying potential heat rate improvement opportunities. EPA must give significant weight to the fact that heat rate improvements may have variable benefits for individual EGUs, may not be cumulative, will degrade over time, and may be overwhelmed by changes in load.</p>		<p><b>Yes, the ACE rule provides states a large degree of flexibility to implement standards specific to individual EGUs.</b> In explaining the ACE’s HRI cost standards, EPA explained that the variable benefits of HRI improvements would make some adopting certain technologies for one unit unreasonable at another.</p>





<p><b>Gross-based emissions limits.</b> UARG believes that EPA should adopt the approach it used in the 2015 NSPS Rule for modified coal-fired EGUs and base any output-based emission limitations for existing EGUs on gross, rather than net, output. UARG also believes that heat rate improvements focused on EGUs' emission control systems are unlikely to be useful in achieving CO2 emission standards.</p>		<p><b>Partially, EPA grants states discretion to choose basing emissions limitations on gross or net output.</b></p>
<p><b>Implementation flexibility through averaging.</b> UARG encourages EPA to make clear in any replacement rule that states may offer flexible options to assist sources in meeting the performance standards. Some of the types of flexible options that states might want to consider include: averaging among units at a plant, averaging among units within a corporate fleet (i.e., units with the same owner), averaging among non-affiliated units within the state, or averaging or trading among affected units in different states.</p>		<p><b>No, ACE prohibits averaging among units at a single plant or among different plants as a way to establish standards.</b> It notes that "the Agency's determination that individual EGUs are subject to regulation under ACE precludes the Agency from attempting to change the basic unit from an EGU to a combination of EGUs for purposes of ACE implementation."</p>
<p><b>NSR reform in a separate rulemaking.</b> Although UARG wants EPA to address NSR reform and believes this to be very important, the Agency should address these issues in rulemakings specifically aimed at that subject.</p>		<p><b>Yes, EPA commits to NSR reform through a separate rulemaking.</b> The ACE rule states in the preamble that "while the EPA intends to take final action on the NSR reform at a later time in a separate action, the consequences of that action are no longer considered in parallel with ACE."</p>
<p><b>NAM</b></p>		
<p><b>State-led program.</b> When establishing standards of performance for existing sources under Section 111(d), States must be permitted to conduct a BSER analysis, select the best system of emission reduction for a source category or subcategory, and then translate that into a source-specific emission standard.</p>		<p><b>Yes, the ACE rules gives states greater control over their reduction plans.</b> ACE recognizes, under CAA Section 111(d), that EPA's statutory role is to determine the BSER and the degree of emission limitation achievable through application of the BSER, and that the states' role is to develop plans that establish unit-specific standards of performance that reflect application of the BSER.</p> <ul style="list-style-type: none"> <li>• The CAA provides that states establish the standards of performance and explicitly directs EPA to allow states to consider "the remaining useful life of the source" and other source-specific factors in establishing standards of performance.</li> <li>• States will evaluate applicability to their existing sources of the six candidate technologies and improved operating and maintenance practices and take into consideration source-specific factors in establishing a standard of performance at the unit level.</li> <li>• States will submit plans to EPA that establish standards of performance and include measures that provide for the implementation and enforcement of such standards.</li> <li>• The plan submissions must explain how the state applied the BSER to</li> </ul>

		each source – and how the state took other factors into consideration – in setting unit-specific standards. These plans are due in three years.
<b>Update implementing regulations.</b> NAM recommends that the EPA update the 1975 implementing regulations under Section 111(d) to fix any unlawful interpretations of its statutory authority.		<b>Yes, EPA established new implementing regulations under section 111(d).</b>
<b>Separate endangerment finding.</b> We urge the EPA to establish that, for any and all future 111(b) or (d) standards of performance that pertain to GHGs, the Agency must first make a separate significant contribution endangerment finding based on GHG emissions for the category.	NA	<b>Not addressed.</b> While EPA noted that the only GHG regulated by the ACE is CO2, it did not address separate, category-specific endangerment findings.
<b>Flexibility through voluntary reductions at non-EGUs.</b> While the States and EPA are prohibited from imposing binding GHG emission reduction obligations on any entities other than affected EGUs, States should have flexibility to incorporate voluntary opportunities to reduce net GHG emissions that are broader than those used in the BSER analysis.	NA	<b>Not addressed.</b>
<b>BSER should be limited to source-based approaches.</b> BSER analysis and emissions guidelines established under Section 111(d) must be source-based and rely solely on actions that can be undertaken on site by the affected facility. When considered within the broader context of Section 111, the system of emission reductions refers to the range of options that can be implemented by an existing source to reduce its emissions—not anything that reduces the emissions of affected sources regardless of the entity that undertakes the emission reduction.		<b>Yes, EPA is requiring states to choose a source-based BSER.</b> The ACE rule's behind the fenceline approach requires states to establish source specific standards for individual sources.
<b>Defining the HRI BSER.</b> EPA's regulations should promote efficiency and reliability improvements through equipment upgrades. Emission reductions that can be accomplished onsite by EGUs through heat rate		<b>Yes, EPA adopted HRI as BSER for emissions reductions and allowed the standard to be satisfied through operational improvements or equipment upgrades.</b>



<p>improvements reduce the amount of fuel needed to produce a given unit of energy.</p>		
<p><b>Flexible application of BSER in standard-setting.</b> EPA should seek comment on regulatory approaches using the availability of efficiency upgrade. Using a case-by-case decision process as part of a replacement rule’s guidelines would allow the best equipment upgrades available to address needed repairs, considering the expected life of the unit and its dispatch needs and economics. CAA Section 111(d) BSER analysis requires EPA to establish achievable standards based on all variations of operating conditions, not just idealized, cherry-picked data or circumstances. Any standard that fails to account for these issues is not achievable within the meaning of the statutory BSER definition and certainly has not been “adequately demonstrated” as demanded by Section 111.</p>		<p><b>Yes, the ACE rule accounts for the variability of operating conditions and provided range of options states could consider in setting their standards.</b></p>
<p><b>NMA</b></p>		
<p><b>Use one action for repeal and replace.</b> While EPA has proceeded in two different rulemakings to repeal and to consider a possible replacement rule, NMA urges EPA to finalize both rulemakings either at the same time or very near in time.</p>		<p><b>Yes, the EPA incorporated repeal of the CPP in its final ACE rule.</b></p>
<p><b>Limited content of ACE rule.</b> EPA should limit the replacement rule to (a) establishing the BSER, (b) issuing guidance as to what sorts of emission reduction systems are “best” considering the statutory BSER factors, and (c) setting forth a procedure for the submission and EPA review of state plans.</p>		<p><b>Yes, EPA's replacement rule only establishes BSER, provides standard-setting guidelines for states, and addresses state implementation guidelines.</b></p>
<p><b>Criteria for evaluating state plans.</b> Because the CPP was based on an overly aggressive interpretation of EPA power vis-à-vis the states, the replacement rule should contain narrative preamble language setting forth the criteria EPA will use to judge whether a state plan is “satisfactory.” EPA should be guided by the Supreme Court’s decision in Alaska Department of Environmental Conservation v. EPA, 540 U.S. 461 (2004).</p>		<p><b>Partially, the replacement rule contains a provision setting forth criteria for evaluating state plans.</b> The preamble explains this provision and the criteria that the EPA will consider in determining whether a state plan is “satisfactory.”</p>
<p><b>Defining the HRI BSER.</b> NMA urges EPA to define the BSER for coal units generically and broadly as “efficient generation at the affected electric utility unit (EGU) that is achievable through a combination of</p>		<p><b>Yes, EPA adopted HRI as BSER for emissions reductions and allowed the standard to be satisfied through operational improvements or equipment upgrades.</b></p>




best operating practices and/or equipment upgrades, as determined by weighing and balancing the BSER factors.”		
<b>Bar on CCS as BSER.</b> Carbon Capture and Storage (CCS) should not be considered to be a proper BSER measure because it is not adequately demonstrated.		<b>Yes, the ACE rule explicitly bars CSS as a BSER.</b>
<b>Improper technologies for source-based BSER.</b> Measures that might be asserted to be at-the-source, such as fuel-switching, conversion of coal to gas, or co-firing, should not be considered to be within the BSER.		<b>Yes, EPA only considered HRI to be within BSER.</b>
<b>Accounting for NSR in program implementation.</b> EPA should recognize that, if efficiency improvements would trigger new source review (NSR), states must consider the extra costs that BACT requirements will entail in determining the section 111(d) performance standards.		<b>Yes, the ACE rule allows states to take account of NSR costs.</b> EPA anticipated that states may take into account costs associated with NSR as a source-specific factor in considering" whether certain candidate technologies are reasonable.
<b>NSR reform in a separate rulemaking.</b> The NSR program should be reformed in order to enhance the ability of the coal units to undertake efficiency projects and lower their CO2 emissions rate. NMA nevertheless strongly recommends that EPA’s efforts to reform NSR not be linked to its section 111(d) replacement rulemaking given the added complexity. The rulemakings should proceed separately.		<b>Yes, EPA commits to NSR reform through a separate rulemaking.</b>
<b>Maintain existing implementing regulations.</b> There is no need to make substantive changes to EPA’s general section 111(d) regulations. NMA would welcome a return to the section 111(d) program as it has long been understood and implemented. NMA does not believe that 40 C.F.R. § 60.24(f), if applied with proper deference to reasonable state decision-making, prevents states from appropriately setting standards of performance based on their consideration of remaining useful life and other factors.		<b>No, EPA established new section 111(d) implementing regulations in the ACE.</b>
<b>American Coalition for Clean Coal Electricity</b>		
Repeal the CPP.		<b>Yes, the ACE rule repealed the CPP.</b>
<b>Promoting grid reliability.</b> A CPP replacement rule should ensure that the CAA section 111(d) program does not threaten the reliability and resiliency of the electric grid by causing the premature shutdown of additional coal-fired capacity.		<b>Yes, the ACE rule rejected requirements that could weaken grid reliability by forcing fuel-switching.</b> The rule eliminated the CPP's grid modernization/demand side response as a BSER option. Now only HRI improvements are BSER options. See 40 CFR 60.5735a2.

<p><b>BSER should be limited to source-based approaches.</b> EPA has authority only to develop guidelines for the states to set CO2 performance standards that satisfy two related statutory requirements. First, the standards must be based on those control measures that are determined to be the “best system of emission reduction” (BSER) and second, in making this BSER determination, EPA may consider only those control measures “that can be applied at, to or for” an individual stationary source.</p>		<p><b>Yes, EPA is requiring states to choose a source-based BSER.</b> The CAA limits “standards of performance” to systems that can be applied at and to a stationary source (i.e., as opposed to off-site measures that are implemented by an owner or operator, such as subsidizing lower-emitting sources) and that lead to continuous emission reductions (i.e., are not intermittent control techniques). Such systems include add-on controls and lower-emitting processes/practices/designs that can be applied to a designated facility, i.e., a building, structure, facility, or installation regulated under CAA section 111.</p>
<p><b>Accounting for NSR in program implementation.</b> A CPP replacement rule should identify BSER based on reasonable and cost-effective control measures for limiting CO2 emissions from EGUs, and not on measures that are novel or extraordinarily costly.</p>		<p><b>Yes, the ACE rule allows states to take account of NSR costs.</b> EPA anticipated that states may take into account costs associated with NSR as a source-specific factor in considering" whether certain candidate technologies are reasonable.</p>
<p><b>State-led program.</b> A replacement rule should establish a flexible implementation framework that allows states to account for the differences and diversity of the coal-fueled generating fleet in establishing unit-specific standards of performance. Performance standards, in a replacement rule, should be set in a manner that will not have the effect of dictating or interfering with the unit’s utilization and operating profile.</p>		<p><b>Yes, the ACE rules gives states greater control over their reduction plans.</b> ACE recognizes, under CAA Section 111(d), that EPA’s statutory role is to determine the BSER and the degree of emission limitation achievable through application of the BSER, and that the states’ role is to develop plans that establish unit-specific standards of performance that reflect application of the BSER.</p> <ul style="list-style-type: none"> <li>• The CAA provides that states establish the standards of performance and explicitly directs EPA to allow states to consider “the remaining useful life of the source” and other source-specific factors in establishing standards of performance.</li> <li>• States will evaluate applicability to their existing sources of the six candidate technologies and improved operating and maintenance practices and take into consideration source-specific factors in establishing a standard of performance at the unit level.</li> <li>• States will submit plans to EPA that establish standards of performance and include measures that provide for the implementation and enforcement of such standards.</li> <li>• The plan submissions must explain how the state applied the BSER to each source – and how the state took other factors into consideration – in setting unit-specific standards. These plans are due in three years.</li> </ul>
<p><b>Implementation flexibility through averaging or trading.</b> The EPA guidelines should confirm states’ broad authority to implement the CO2 control requirements through flexible, emissions averaging or market-based mechanisms that can achieve required CO2 reductions in the most cost-effective and efficient manner.</p>		<p><b>No, while states have flexibility in establishing standards of performance, they are unable to use averaging and trading.</b></p>

**NSR reform will provide flexibility.** A CPP replacement rule should reform the NSR program because it is a major deterrent to improving the efficiency of the coal fleet.

NA

**Unaddressed, NSR reforms will be addressed in a separate rule.**

Totals	
	31
	3
	3
NA	7

## Endnotes

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- <sup>1</sup> David Mora, *We Found a ‘Staggering’ 281 Lobbyists Who’ve Worked in the Trump Administration*, PROPUBLICA, Oct. 15, 2019 (last updated), <https://www.propublica.org/article/we-found-a-staggering-281-lobbyists-who-ve-worked-in-the-trump-administration> (last visited Mar. 27, 2020). [back to text]
- <sup>2</sup> See Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017); Exec. Order 13777, 82 Fed. Reg. 12285 (Mar. 1, 2017). [back to text]
- <sup>3</sup> Nadja Popovich, Livia Albeck-Ripka, & Kendra Pierre-Louis, *95 Environmental Rules Being Rolled Back Under Trump*, N.Y. TIMES, Dec. 21, 2019 (last updated), <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html> (last visited Mar. 27, 2020). [back to text]
- <sup>4</sup> David Cutler & Francesca Dominici, *A Breath of Bad Air: Cost of the Trump Environmental Agenda May Lead to 80 000 Extra Deaths per Decade*, THE JAMA FORUM, June 12, 2018, <https://jamanetwork.com/journals/jama/fullarticle/2684596?appid=scweb&appid=scweb&alert=article> (last visited Mar. 27, 2020) [back to text]
- <sup>5</sup> Amit Narang & Matt Kent, *Your Wish is My Command: Corporate Capture of the Regulatory Process Evident in Trump’s First Two Years* (Public Citizen, May 9, 2019), available at [https://www.citizen.org/wp-content/uploads/Wishlist\\_report.pdf](https://www.citizen.org/wp-content/uploads/Wishlist_report.pdf). [back to text]
- <sup>6</sup> Tom Yulsman, *Study Shows that Trump’s New ‘Affordable Clean Energy’ Rule Will Lead to More CO<sub>2</sub> Emissions, Not Fewer*, DISCOVER, June 19, 2019, <https://www.discovermagazine.com/environment/study-shows-that-trumps-new-affordable-clean-energy-rule-will-lead-to-more> (last visited Mar. 27, 2020). [back to text]
- <sup>7</sup> See, e.g., Nat. Res. Defense Council, *NRDC Comments on EPA’s Proposed ‘ACE’ Rule to Replace the CPP*, Oct. 31, 2018, <https://www.nrdc.org/resources/nrdc-comments-epas-proposed-ace-rule-replace-cpp> (last visited Mar. 27, 2020) [follow hyperlink entitled “Joint Comments on Legal Issues (PDF)”]. [back to text]
- <sup>8</sup> See White House Off. Info. & Reg. Affairs, Off. Mgmt & Budget, Exec. Off. President, *Regulatory Reform Results for Fiscal Year 2019*, <https://www.reginfo.gov/public/do/eAgendaEO13771> (last visited Mar. 27, 2020). [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Final\\_Accounting\\_for\\_Fiscal\\_Year\\_2019.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2019.pdf). [back to text]
- <sup>9</sup> Christian Detisch & Alison Grass, *Scott Pruitt’s Troublesome Ties to the Oil and Gas Industry* (Food & Water Watch, Jan. 18, 2017), <https://www.foodandwaterwatch.org/news/scott-pruitts-troublesome-ties-oil-and-gas-industry> (last visited Mar. 27, 2020). [back to text]
- <sup>10</sup> Rebecca Leber, *The Next Likely EPA Chief Has Almost Completed His Former Coal Client’s Wish List*, MOTHER JONES, Jan. 16, 2019, <https://www.motherjones.com/politics/2019/01/andrew-wheeler-bob-murray-confirmation-hearing/> (last visited Mar. 27, 2020). [back to text]
- <sup>11</sup> Lisa Friedman, *Bill Wehrum, an Architect of E.P.A. Rollbacks, Faces New Ethics Inquiry*, N.Y. TIMES, July 22, 2019, <https://www.nytimes.com/2019/07/22/climate/william-wehrum-epa-inquiry.html> (last visited Mar. 27, 2020). [back to text]
- <sup>12</sup> Ari Natter & Jennifer A. Dlouhy, *U.S. EPA Chief of Staff Is Headed to Top Coal Mining Group*, BLOOMBERG, Jan. 30, 2020, <https://www.bloomberg.com/news/articles/2020->

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<sup>13</sup> Corbin Hiar, *Incoming EPA Chief of Staff Draws Fire*, GREENWIRE, Mar. 11, 2020, <https://www.eenews.net/stories/106257165> (last visited Mar. 27, 2020). [back to text]

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