

**Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility  
Generating Units**

**Proposed Rule**

**83 Fed. Reg. 44,746 (August 31, 2018)**

**EPA-HQ-OAR-2017-0355**

**COMMENTS OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL  
("ELCON")**

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## INTRODUCTION

The Electricity Consumers Resource Council (“ELCON”) appreciates the opportunity to submit the following comments on the Environmental Protection Agency’s (“EPA’s”) proposed Affordable Clean Energy (“ACE”) rule, Docket ID No. EPA–HQ–OAR–2017–0355, 83 Fed. Reg. 44,746 (August 31, 2018)

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and are consumers of electricity in the footprints of all organized markets and other regions throughout the United States. Reliable and reasonably priced electricity supply is essential to our members’ operations.

ELCON represents both companies that generate electricity and could have been directly regulated by the Clean Power Plan (“CPP”), which EPA now proposes to replace,<sup>1</sup> and companies that are reliant upon affordable and reliable energy to produce products critical to the success and growth of the American economy. ELCON is a participant in the legal challenge to the legality of the CPP in the D.C. Circuit, and believes that the CPP is unlawful and should be set aside in its entirety. ELCON has a strong interest in the regulatory program that replaces the CPP.

Under the proposed ACE rule, EPA would: (1) define the “best system of emission reduction” (“BSER”) for existing coal-fired power plants as on-site, heat-rate efficiency improvements; (2) provide States with a list of “candidate technologies” that can be used to establish standards of performance and be incorporated into their state plans; (3) revise the New Source Review (“NSR”) permitting program to further encourage efficiency improvements at existing power plants; and (4) revise regulations under Clean Air Act Section 111(d) to give States considerable time and flexibility to develop their state plans.

In these comments, ELCON supports prompt revocation and replacement of the CPP. ELCON believes that, as required by Section 111(d) of the Clean Air Act (“CAA”), the CPP’s replacement must (1) establish standards that reflect what can be demonstrated and accomplished at the source (*i.e.*, “within the fence line” of the emissions source), and (2) adopt least-cost guidelines that give States flexibility to implement performance standards based on the unique circumstances of their State and the regulated sources therein, including averaging and trading among plants. ELCON is concerned that the ACE rule as currently proposed may not fully strike the best balance among these sometimes competing considerations and in some cases could have detrimental rather than beneficial effects. Revision of the terms governing applicability of the ACE rule also is needed to more clearly exclude CHP and other self-generation at industrial facilities and to limit “affected sources” to coal-fired generation.

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<sup>1</sup> EPA has separately proposed to repeal the Clean Power Plan. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Docket ID No. EPA-HQ-OAR-2017-0355; FRL-9969-75-OAR, 82 Fed. Reg. 48035 (Oct. 16, 2017). EPA should finalize such action prior to or simultaneously with issuance of a final replacement rule in this proceeding.

ELCON believes that review and reform of the NSR requirements are needed. However, in these comments, ELCON does not take a position on the specific revisions proposed in the ACE rule. Instead, NSR reform should be the subject of separate proceedings that would have general applicability to all facilities affected by NSR, not just coal-fired generation.

**I. ELCON SUPPORTS IMMEDIATE REVOCATION OF THE CPP AND A “WITHIN THE FENCELINE” REPLACEMENT PROGRAM FOCUSED ON STAND-ALONE COAL-FIRED EGUs THAT CLEARLY EXCLUDES INDUSTRIAL CHP AND OTHER SELF-GENERATION FACILITIES**

The CPP exceeds EPA’s authority under the Clean Air Act and must be revoked. As stated in prior comments to EPA, in which ELCON participated, as an initial, overarching matter, EPA must ensure that any program to replace the CPP that ultimately is adopted must be consistent with the statutory requirements of the Clean Air Act.

CAA Section 111(d) mandates a source-specific approach that reflects what can be demonstrated and accomplished “within the fence line” of the emissions source. Section 111 defines “standard of performance” as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction.” 42 U.S.C. § 7411(a)(1). Section 111(d) requires EPA to develop “procedure[s]” for States to promulgate these standards “for...existing source[s].” 42 U.S.C. § 7411(d)(1). Section 111 further defines a “stationary source” as “any building, structure, facility, or installation.” 42 U.S.C. § 7411(a)(3). EPA’s regulations implementing Section 111(d) reinforce that regulations are to operate “within the fence line” in stating that an “emission guideline” is to be based on the BSER “for designated facilities.” 40 C.F.R. § 60.21(e). A “designated facility” is “an existing facility” that would be subject to a NSPS if it were a new source. 40 C.F.R. § 60.21(b). Thus, CAA Section 111(d) and the EPA regulations clearly specify that regulation must be at the level of the source.

The CPP’s outside the fence line/system planning approach was both inconsistent with EPA’s statutory authority and bad policy. It would have given favorable treatment – effectively duplicative subsidies – to renewable sources. Any federally-imposed EPA program that picks winners and losers by limiting access to compliance incentives would be inconsistent with EPA’s stated goal of providing maximum flexibility to the States and realizing carbon dioxide reductions from a diverse group of sources, without imposing other impacts on the power delivery system such as reduced reliability.

The proposed ACE rule appropriately focuses standard-setting at the facility level, which is consistent with EPA’s statutory authority. Within this framework, a key threshold issue is the scope of “affected sources” that will be subject to the ACE rule. Like the CPP itself, ELCON is concerned that EPA or the States will exceed their authority under the Clean Air Act by imposing emission reduction obligations beyond the regulated source category. Any such obligations on companies beyond the regulated source are unlawful. The proposed ACE rule defines affected EGU as steam generating units that are connected to a utility power distribution

system with nameplate capacity and base load capacity greater than specified thresholds.<sup>2</sup> EPA then lists six categories of EGUs that would be excluded from the scope of the rule and the state plans.<sup>3</sup> Although the exclusions clearly seem intended to encompass industrial combined heat and power (“CHP”) units, the regulatory language used in, for example, the exclusion set out in proposed section 60.5780a(a)(6) is opaque and may not be clear to an implementing State. All industrial self-generation, including CHP and related processes such as condensing turbine arrangements, should be explicitly excluded.

CHP and other industrial self-generation efficiently provides power to the manufacturing processes that they are closely integrated with and support. Generation equipment that is integrated with industrial process equipment is planned and operated to optimize the overall manufacturing process including the safe operation of critical infrastructure. The reliabilities of the generation and the industrial process are tightly coupled, and they act as a single integrated facility. This is especially true of behind-the-meter generation (“BTM”) such as CHP that is sized to serve the on-site load and has no material export capability. For example, many manufacturing processes use steam (or other thermal applications) as the primary driver and the cogeneration of steam and electricity is an essential feature of the process. These devices, which are part and parcel of the load itself, cannot be treated as if they were conventional, stand-alone generators, and forcing them to act as stand-alone generation by imposing specified heat rate efficiently improvements would compromise and potentially harm the manufacturing process by interfering with the steam or thermal balance.

To avoid any possible ambiguity, EPA should include in the ACE rule an explicit exclusion for combined heat and power facilities where the electrical, thermal, and chemical output of the facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements. EPA also should revise the definition of “affected sources” to specifically clarify that only coal-fired generation falls within the scope of the ACE rule.

## **II. EPA SHOULD IMPROVE THE COST EFFECTIVENESS OF THE ACE RULE BY GIVING STATES THE FLEXIBILITY TO ADOPT AVERAGING AND TRADING AMONG PLANTS**

EPA’s existing source implementing regulations require a division of responsibility between the federal and State governments under CAA Section 111(d). These regulations separately establish requirements for federal emission guidelines in 40 C.F.R. § 60.22, which “reflect[]” the BSER but do not include emission standards, and for state plans at 40 C.F.R. §

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<sup>2</sup> Proposed section 60.5775a.

<sup>3</sup> Proposed section 60.5780a; *see* 83 Fed. Reg. at 44754-55.

60.24, which must “include emission standards.”<sup>4</sup> Reinforcing this, Section 111(d) further provides that States are the entities that “apply[] a standard of performance to any particular source” and are entitled to adjust the standard to account for the individual circumstances of the source. 42 U.S.C. § 7411(d)(1). Thus, EPA’s central task in the proposed ACE rule is to establish an appropriate BSER.

In developing a regulatory program to replace the CPP, EPA also must strike a difficult balance. It is critical that EPA remain focused on promoting and protecting the primary role that the States—not the federal government—play in implementing emissions guidelines under CAA Section 111(d) and their obligation to ensure reliable, lowest cost electricity. While guidance and technical assistance to assist States can be helpful in appropriate circumstances, EPA must ensure that it is not unduly influencing State decisions or restricting the States’ flexibility to identify and incorporate the emission reduction opportunities that are best suited to each State and enable emission reduction to be achieved in the most efficient and least cost manner.

The proposed ACE rule would laudably give the States considerable discretion to establish the required “standard of performance” in light of a particular facility’s technology and practices that are already being implemented, remaining useful life, and other appropriate factors based on the unique circumstances of their particular State and the regulated sources that operate there. Further, the proposed ACE rule appropriately reaffirms that the States have discretion to consider multiple factors when actually setting the standard appropriate for a particular source or class of sources. As noted above, the CAA’s text mandates that States be permitted to consider a range of source-specific variables in setting those standards.<sup>5</sup> Moreover, States can “provide for the application of less stringent emissions standards or longer compliance schedules,” or no standards at all, on a “case-by-case” basis when various facility-specific factors apply, such as unreasonable costs of control resulting from plant age, physical impossibility of installing control equipment, or other factors.<sup>6</sup> More generally, “EPA envisions that, under the proposed program, the states would set standards based on considerations most appropriate to individual sources or groups of sources . . . As such, states have considerable flexibility in determining emission standards for units, as contemplated by the express statutory text.”<sup>7</sup>

ELCON is concerned, however, that the proposed ACE rule does not fully extend the flexibility of States to address a fundamental objective -- any final rule to replace the CPP should not drive a harmful increase in electricity costs, especially where costs exceed benefits. Affordable and reliable electricity provides American businesses a competitive advantage in the

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<sup>4</sup> 40 C.F.R. § 60.24(a); *see also* Final Rule, State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53340, 53343 (Nov. 17, 1975) (“EPA’s emission guidelines will not have the purpose or effect of national emission standards”).

<sup>5</sup> *See* 42 U.S.C. § 7411(d)(1) (EPA must “permit the State in applying a standard of performance to any particular source...to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”).

<sup>6</sup> 40 C.F.R. §60.24(f).

<sup>7</sup> 83 Fed. Reg. at 44763.

global economy. EPA should take great care to avoid measures that would raise the cost of electricity for consumers and businesses and threaten that important economic advantage. Under CAA Section 111 and the case law interpreting it, EPA and the States have broad discretion and responsibility to consider the costs associated with setting performance standard.<sup>8</sup> Here, such costs include the effect of an overall increase in the cost of electricity for ELCON's members and other consumers and businesses that could threaten important economic interests.

EPA has failed to establish that the ACE rule as proposed would be the least costly approach and offer benefits that would exceed its costs. In its initial analysis of the costs and benefits of the proposed ACE rule dated August 28, 2018,<sup>9</sup> The Brattle Group speculates that full implementation of the ACE rule might be more costly than the CPP. Specifically, Brattle noted that based on EPA's own analysis under some scenarios the ACE rule could be more expensive to implement than the CPP, by \$1.7 to \$3.0 billion. Brattle stated that "[t]his somewhat counterintuitive result is likely due to the ability under CPP to trade emissions allowances through emission-reduction measures (such as dispatch switching) that are less expensive than implementing [heat rate improvements] at \$100/kW."<sup>10</sup>

On the benefits side, Brattle found that EPA could be overstating the existing coal fleet's potential for heat rate improvement projects by basing the rule on inefficient plants that have already retired. Much of the existing fleet may have already deployed measures the EPA identified as the best systems of emission reduction where it made sense. Brattle concluded that:

- "EPA's analysis indicates minimal impact on CO2 emissions" and "EPA's own analysis shows that the ACE rule will not really achieve any more reductions in CO2 emissions by 2035 than the continuation of the historical trends since 2005."
- Even these "estimated (minimal) emissions reductions are likely overstated" as "some states will likely adopt lower HRI requirements for many plants and none at all for some plants, since the states have the discretion to set unit-specific emissions standards."
- Instead, "the ACE rule could result in running the coal units more (particularly the ones that implemented HRIs) especially if gas prices increased, and may result in increasing the total emissions."<sup>11</sup>

One way to mitigate the potential costs of the ACE rule would be to recognize the flexibility of States to provide for trading of emission allowances. Although the proposal also allows state plans to rely on emission averaging and trading among affected coal-fired units at a

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<sup>8</sup> See, e.g., *Lignite Energy Council v. EPA*, 198 F.3d 930, 933 (D.C. Cir. 1999); *Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d 427, 433-34 (D.C. Cir. 1973).

<sup>9</sup> The Brattle Group's Notes on the Affordable Clean Energy Rule, [http://www.ourenergypolicy.org/wp-content/uploads/2018/08/14387\\_affordable\\_clean\\_energy\\_rule\\_synopsis\\_final\\_8\\_28\\_18.pdf](http://www.ourenergypolicy.org/wp-content/uploads/2018/08/14387_affordable_clean_energy_rule_synopsis_final_8_28_18.pdf).

<sup>10</sup> *Id.* at p. 2.

<sup>11</sup> *Id.* at pp. 1-2.

particular plant and “recognizes that there are significant benefits of averaging and trading across affected sources,”<sup>12</sup> EPA nonetheless has proposed that state plans should not be allowed to incorporate averaging and trading among different plants, such as a state-wide or interstate cap-and-trade program. EPA specifically solicits comment on this issue.<sup>13</sup> It is surprising that on every other issue except this cost-saving one, the proposed ACE rule emphasizes the States’ “considerable flexibility;” perhaps the reason is reflected in EPA’s request for comment “on whether there is a way to allow trading between affected EGUs across affected sources while not encouraging generation shifting.”<sup>14</sup>

ELCON submits that CAA Section 111(d) authorizes States to include averaging and trading between existing sources in the plans they submit to meet the requirements of a final emission guideline; this is different from the CPP, which exceeded EPA’s statutory authority by establishing beyond-the-fence-line guidelines that would not be applicable to an individual source. Allowing States to give affected sources the option of meeting CO<sub>2</sub> reduction targets through measures taken within or beyond the source boundaries could significantly mitigate the cost implications of the proposed ACE rule. EPA identifies three concerns that “may weigh against the inclusion of averaging and trading” between facilities, none of which hold water. EPA’s points referencing CAA Sections 111(d) and 116 may bar EPA from mandating that States allow for such averaging and trading, but they do not preclude EPA giving States the option of doing so. EPA also references “practical concerns” such as the relative complexity of such an approach and increased “difficulty in ensuring robust compliance . . . .” EPA fails to give sufficient credit to the States and to recognize that other emission allowance and trading regimes are well established and effective. State flexibility to adopt emission averaging and trading would be a fuel neutral solution to mitigate unnecessary costs.

## CONCLUSION

For the reasons described above, EPA should proceed to revoke and replace the CPP. ELCON emphasizes that the most important components of the proposed ACE rule are to establish standards that reflect what can be demonstrated and accomplished at the source (i.e., “within the fence line” of the emissions source), which is consistent with EPA’s statutory authority, although revision of the terms governing applicability of the ACE rule is needed to more clearly exclude CHP and other self-generation at industrial facilities and to limit “affected sources” to coal-fired generation. Further, in the final rule, EPA should grant States greater flexibility to adopt cost-reducing mechanisms, such as averaging between plants and tradable performance standards.

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<sup>12</sup> 83 Fed. Reg. at 44768.

<sup>13</sup> 83 Fed. Reg. at 44767-78.

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