

# Trump Administration Reforming Regulations, Creating and Continuing Litigation

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In response to the Trump administration's concern that the industrial sectors, including power, have experienced regulatory uncertainty through environmental regulations that hamper investments and market potential, President Donald J. Trump signed Executive Order 13777, "Enforcing the Regulatory Reform Agenda," on February 24, 2017. The goal of this policy is to alleviate unnecessary regulatory burdens by evaluating existing regulations and making recommendations to repeal, replace, or modify those deemed "burdensome." The intent is to return government agencies—particularly the Environmental Protection Agency (EPA)—to its "statutorily mandated levels of authority" and to provide clear, concise, and legally sound regulatory reform that enhances economic opportunity.<sup>1</sup>

Through this executive order, the EPA began to address some regulatory uncertainties and released guidance memos and Advanced Notices of Proposed Rulemakings. Additionally, on March 28, 2017, Trump signed an executive order titled "Promoting Energy Independence and Economic Growth," which put the Obama administration's signature climate policy—the 2015 Clean Power Plan (CPP)—in the spotlight as a clear priority for the Trump administration's regulatory reform efforts. Following that, the EPA unveiled the "Back-to-Basics" agenda, for-

mally outlining its effort to refocus the agency on a mission of returning power to the states and creating an environment for job growth.<sup>2</sup>

On August 21, 2018, the EPA released the Affordable Clean Energy (ACE) rule, the Trump administration's proposed replacement for the CPP. Both the ACE rule and the CPP were designed to regulate greenhouse gas (GHG) emissions from fossil-fuel-fired power plants under Section 111(d) of the Clean Air Act (CAA), yet the ACE rule dramatically scaled back and shifted the goals set out in the CPP. In an August 21, 2018, open call with stakeholders, Acting Administrator Andrew Wheeler said the aim of the proposed rule is to "rebalance the roles of state and federal authorities to ensure state primacy, change the framework of federal obligations to utilize Best Systems of Emission Reduction (BSER), and revise the New Source Review (NSR) program for power plants"—a program that has received criticism for its lack of clarity for many years from stakeholders on both sides of the aisle.

## AFFORDABLE CLEAN ENERGY RULE

The proposed ACE rule has received mixed reactions since its release. The EPA will continue to seek stakeholder feedback during the 60-day comment period from its *Federal Register* publication on August 31 before the agency incorporates feedback and ultimately finalizes the rule. Like many environmental regulations published in previous administrations, the ACE rule is likely to face litigation in court.

## ACE AND CPP: A COMPARISON

The ACE rule and the CPP vary greatly in several areas.

<sup>1</sup> Executive Order 13777. "Enforcing the Regulatory Reform Agenda." President Donald Trump. 24 February 2017.

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<sup>2</sup> <https://www.epa.gov/home/back-basics-agenda>.

The ACE proposal scales back the GHG emissions goals set out in the CPP, with the EPA projecting overall emissions reductions of 3 percent or less than the CPP's 2035 goal. The EPA estimates that the ACE rule emissions reductions would be equivalent to removing 5 million cars from the road, while the CPP projected it would be equivalent to removing 166 million cars from the road. The ACE rule's lower emissions-reduction projections are due to the EPA altering some of the integral pieces of the CPP.

1. Rather than capping GHG emissions, the ACE rule seeks to improve individual power plant efficiency and allows states more flexibility to develop heat-rate improvements for each specific unit.
2. The ACE rule would apply only to fossil-fuel-fired electric utility steam-generating units, which are generally coal-fired power plants, while the CPP included other GHG emitters, such as gas-fired plants.
3. The ACE rule would bring GHG regulations "inside the fenceline" of an individual power plant, implementing a *best system of emissions reduction* (BSER) based on source-specific heat-rate improvements that are aimed at improving the efficiency and extending the lifespan of the existing coal-fired power plant fleet. Conversely, the CPP went "beyond the fenceline" by implementing a BSER that moved power generation away from coal: first to natural gas and eventually to renewables.
4. The ACE rule proposes changes to the NSR program, specifically the emissions testing method that determines whether NSR is triggered from an overall *annual* emissions assessment to an *hourly* emissions assessment. NSR was not addressed in the CPP.

### KEY POINTS OF THE ACE RULE

The ACE rule is a comprehensive proposal that lays out the Trump administration's GHG emissions-reduction plan for fossil-fuel-fired units, which does the following:

- Defines the BSER for GHG emissions from existing power plants as *on-site, heat-rate efficiency improvements*
- Provides states with a list of *candidate technologies* that can be used to establish standards of performance and incorporated into their state plans

- Proposes an hourly emissions-increase test for determining whether a physical or operational change made to an electricity generating unit may trigger *NSR*
- Allows *states to set their own standards of performance* for making coal-fired power plants more efficient
- Provides states with *additional time and flexibility*

### PROPOSED CHANGES TO NSR UNDER THE ACE RULE

The ACE rule proposes changes to NSR, a preconstruction permitting process dating back to the 1970s that requires industrial facilities to undergo an EPA review for environmental controls if making *non-routine* or *major modifications* to a plant that would create a *significant increase* of a regulated pollutant. However, the EPA's regulatory interpretation of these terms has been highly controversial and subject to considerable uncertainty.

Industry, some states, and even the EPA on occasion have long argued that the NSR program is confusing and could be improved. Many believe the rule has caused power plants and industrial sources to steer away from making any efficiency upgrades in fear of triggering the lengthy and expensive NSR process. In an effort to address some of these problems, the EPA has revised key details of the program in the agency's proposal.

Under the current NSR program, an increase to the *overall emissions on an annual basis* would trigger NSR. The ACE rule proposes to give states the option to replace this existing standard with a measurement of *emissions on an hourly basis*, meaning that NSR would only be triggered if there is an hourly emissions increase—even if total annual emissions might increase. With this change, power plants would be less likely to trigger an expensive NSR review as they make modifications to comply with the ACE rule.

The proposed modifications to the NSR program are unique to the ACE rule, as no counterpart NSR change was included in the CPP, which focused far less on heat-rate improvements to achieve its results. Additionally, the ACE proposed implementation timelines as follows:

- *States:* States will have *three years* to submit their state implementation plans (SIPs) to the EPA for review.

- *EPA*: The EPA will have *one year* to evaluate each SIP after it is submitted.
- *Federal Plan*: If the EPA determines that a state’s plan does not meet the EPA’s criteria or if a state fails to submit a SIP, the EPA will have *two years* to put a federal plan in place for the state.

### POTENTIAL ACE RULE LITIGATION

While it is noteworthy that the ACE rule will avoid much of the litigation that the CPP encountered around its “beyond the fenceline” BSER interpretation—because the newly proposed rule is firmly focused strictly on “inside the fenceline” measures—the rule is likely to be challenged in court in other areas. Some potential areas of litigation are outlined below.

### EPA’s CAA Obligation to Regulate GHG

The ACE rule is likely to be challenged on the assertion that the rule does not meet the EPA’s obligation to regulate sources of GHG under Section 111 of the CAA without establishing concrete targets that states are required to meet. Instead, the ACE rule identifies various control technologies and the BSER, which, opponents might argue, are not the “best.”

### Rebound Effect

A second area where the ACE rule might face litigation is around the concept of the *rebound effect*—the concept that efficiency measures backfire in reducing emissions because ef-

iciency upgrades allow plants to operate more, thus outweighing the environmental benefits of efficiency improvements by increasing overall emissions. This issue will be particularly key with regard to the NSR changes that are proposed.

### Increased Public Health Impacts

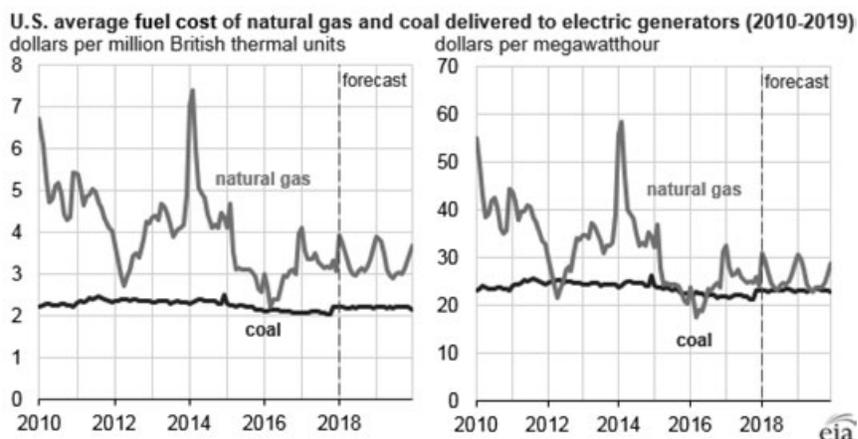
The increases in emissions would lead to increased levels of carbon dioxide, sulfur dioxide, nitrogen dioxide, and mercury, increasing the significant public health impacts and possibly spurring litigation.

### INDUSTRY IMPACT

While the EPA projects \$400 million in compliance savings compared to the costs associated with the CPP, the ACE rule is unlikely to make an impact on the trend of power companies moving away from coal to other generation sources. Due to external market forces, such as the low cost of natural gas (**Figure 1**), and stakeholder demands for cleaner energy sources, many states have already made significant progress in meeting the GHG emissions-reduction goals set out in the CPP.

In the long term, the impact of the ACE rule may rely on the outcome of the 2020 presidential election. As outlined in the timeline above, the ACE rule could take up to six years to implement once it has been litigated and finalized, opening the possibility that future administrations could enact alternative GHG regulations or legislation that suit their energy

**Figure 1. EIA: Cost of Natural Gas vs. Coal, 2010–18**



policies. Alternatively, if Trump is re-elected in 2020, the rule might be fully implemented during his tenure, which means future administrations could face pushback from stakeholders if investments and plans have already been executed in order to comply with the ACE rule.

## MERCURY AND AIR TOXICS STANDARDS RULE: EPA'S NEXT RECONSIDERATION

Following the unveiling of the proposed ACE rule, the EPA indicated that it will focus on another controversial rule mired in uncertainty and litigation—the Mercury and Air Toxics Standards (MATS) rule. MATS was a transformative regulatory event that irrevocably changed the entire power sector. The rule was nominally aimed at mercury emissions from power plants, yet its impact went well beyond the measurably small amount of public health benefit from reducing mercury emissions alone.

Although MATS has largely been implemented, its legal status remains uncertain in the wake of the US Supreme Court's 2015 decision in *Michigan v. EPA*, which invalidated the EPA's methodology for setting MATS. The Obama administration's attempt to fix the issues raised in *Michigan v. EPA* was challenged in court by the Trump administration in 2017, and the litigation remains on hold while the EPA reviews the rule.

Looking ahead, the EPA is statutorily required to complete its Risk and Technology Review (RTR) of MATS in 2020, and that means the agency must soon begin its work on the rule. In late August 2018, the EPA confirmed that it will reconsider the *appropriate and necessary* (A&N) finding that underpins MATS.

## Statutory Basis, Rulemakings, and Litigation History

### The statute

In 1990, Congress enacted a comprehensive set of amendments to the CAA, which required reductions in air pollution from nearly all major sources of air pollution. In order to avoid the problem of imposing overlapping regulations from the new programs on power plants, Congress enacted Section 112(n), which states that the EPA “shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units.” The Section 112(n) compro-

mise further states that the EPA “shall regulate electric utility steam generating units . . . if the Administrator finds such regulation is *necessary and appropriate*.” (Emphasis added.)<sup>3</sup> Thus, the regulation of mercury and other toxic air pollutants from power plants would depend on the completion and evaluation of the Section 112(n) study, which was ultimately not completed until the year 2000 under the Clinton administration—seven years after it was due.

## EPA Mercury Rulemakings and Litigation

The history of the EPA's implementation of Section 112(n) is a chronicle of delay, uncertainty, and unpredictable fluctuations in regulatory approaches, and its litigation continues to this day. The confusing and unpredictable characteristics of the EPA's attempts to regulate mercury from power plants are evident in the back-and-forth nature of the EPA's rules since 2000, when the Section 112(n) study was released.

In the study, the Clinton EPA found that MATS was A&N, but this finding was withdrawn five years later under the Bush administration and replaced with a mercury cap-and-trade system called the Clean Air Mercury Rule (CAMR). However, just three years later, the US Court of Appeals for the DC Circuit vacated CAMR and directed the EPA to write a utility air toxics rule. Under the Obama administration, the EPA reinstated the Clinton EPA's original A&N finding for MATS, and in 2012, the EPA interpreted the A&N phrase to preclude the agency from considering costs when deciding whether to regulate power plants. The same year, the EPA released a *regulatory impact analysis* (RIA) for MATS in which the agency calculated \$9.6 billion in annual compliance costs, \$4 billion–\$6 billion in *direct benefits* from reducing hazardous air pollutants, most of which are mercury, and an additional \$37 billion in ancillary *cobenefits* from the rule by reducing other pollutants such as particulate matter and SO<sub>2</sub> (Figure 2).

In 2015, states and industry challenged the EPA in *Michigan v. EPA*, arguing that the EPA acted unlawfully by refusing to consider cost. The Supreme Court overturned MATS, determining that the EPA should have considered costs and the rule was sent back to the EPA.

<sup>3</sup> 1990 Clean Air Act Amendments, Section 112(n). US Environmental Protection Agency.

However, the Supreme Court did not require the EPA to conduct a formal cost-benefit analysis on its A&N finding. Instead, the agency was left to address the question of whether agencies should consider ancillary benefits when performing cost-benefit analysis, which the EPA would address in its 2016 supplemental finding.

Meanwhile, MATS implementation proceeded and was largely completed by 2016.

### EPA issues supplemental cost finding

Following *Michigan v. EPA*, the EPA completed its supplemental finding in April 2016, which confirmed that it is A&N to regulate toxic air emissions from power plants. The agency provided two independent bases for its finding, only one of which relied on the monetization of cobenefits.

The EPA's first approach evaluated various categories of cost incurred by power plants when complying with the rule, including revenues, capital expenditures, retail electricity rates, and potential impact on reliability. The EPA's second approach used the agency's RIA for MATS to demonstrate that the benefits outweighed the costs: for every dollar spent to reduce toxic pollution from power plants, the American public would see up to \$9.00 in health benefits. However, the EPA acknowledged that the benefits numbers that form the basis for this conclusion are derived almost entirely from cobenefits. In 2016, the supplemental finding was challenged by *Murray Energy* in the DC Circuit.<sup>4</sup>

On April 18, 2017, the Trump administration requested that the DC Circuit hold the litigation in *Murray Energy v. EPA* and the EPA's supplemental finding in abeyance and requested that the date for oral argument be continued in-

definitely. The court granted this motion, with a requirement that status reports be filed every 90 days. That order continues to govern the proceedings and the EPA has issued no official further proceedings regarding the supplemental finding.

### MATS recent status

Last year, Assistant Administrator for Air and Radiation Bill Wehrum said that the EPA cannot ignore Supreme Court decisions on the agency's statutory requirements and that MATS was one of his top priorities. This August, EPA confirmed it will reconsider the A&N finding. As part of this review, the EPA will reassess the issue of cobenefits, possibly arguing that only the benefits of reducing emissions of the regulated toxic air pollutants (in this case, primarily mercury) should be counted when performing a cost-benefit analysis. This approach departs from the Obama-era finding, which counted all benefits stemming from the regulation, including cobenefits from particulate matter reductions.

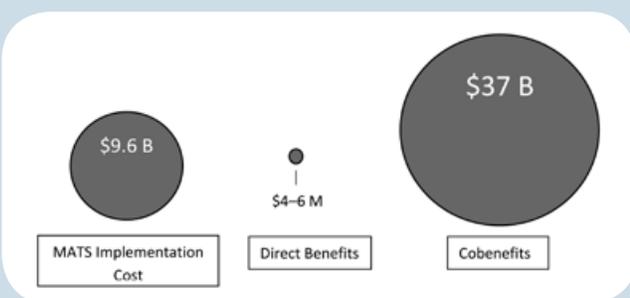
It is clear that the cobenefits issue is a priority for the Trump administration. In the EPA's proposed ACE rule, the agency adopts an aggressive approach toward cobenefits, particularly targeting the large disparity between the monetized value of the mercury benefits alone and the monetized value of the cobenefits resulting from criteria pollutant reductions. However, revisiting the A&N finding and cobenefits issue could jeopardize the MATS rule as a whole.

Further, eliminating the MATS rule would create significant complications for industry, which has already spent billions complying with the rule.

### Utilities' support of MATS

On July 10, 2018, a group of electric utilities, including the Edison Electric Institute, the National Rural Electric Cooperative Association, and the Clean Energy Group, submitted a letter asking the EPA to leave MATS in place,<sup>5</sup>

**Figure 2.** EIA: Comparison of MATS Implementation Cost, Direct Benefits and Cobenefits\*



<sup>4</sup> [https://www.edf.org/sites/default/files/content/murray\\_mats\\_supplemental\\_finding\\_petition.pdf](https://www.edf.org/sites/default/files/content/murray_mats_supplemental_finding_petition.pdf).

<sup>5</sup> Letter from Utilities to EPA Urging Agency to Keep MATS in Place. Received by EPA July 10, 2018. *The Edison Electric Institute, The American Public Power Association, The National Rural Electric Cooperative Association, The Clean Energy Group, The Class of '85 Regulatory Response Group, The International Brotherhood of Electrical Workers, and The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers.*

indicating a shift in industry thinking. In the letter, the utilities stated that “industry has already invested *significant capital—estimated at more than \$18 billion.*” (Emphasis added.) In addition, states are relying on the continued compliance and implementation for their air quality plans. States asked that Wehrum leave the underlying MATS rule in place and finish the RTR “as expeditiously as possible,” which is required to be completed by 2020.

The key considerations for utilities are:

- Even if MATS were to be repealed federally, some states would likely exercise the ability to impose MATS, which could further fracture power markets.
- MATS repeal would be subject to litigation and thus increase uncertainty.
- Turning off pollution controls poses challenges and could raise public relations concerns.
- Many utilities’ focus has shifted from preserving coal-fired generation and instead building gas-fired power toward an updated grid,

including intermittent renewables and distributed generation.

- Shutting off controls could trigger NSR, a long and expensive process.
- Relitigating MATS is not a priority for utilities and is unlikely to produce significant results, even if successful.

### Possible EPA Options

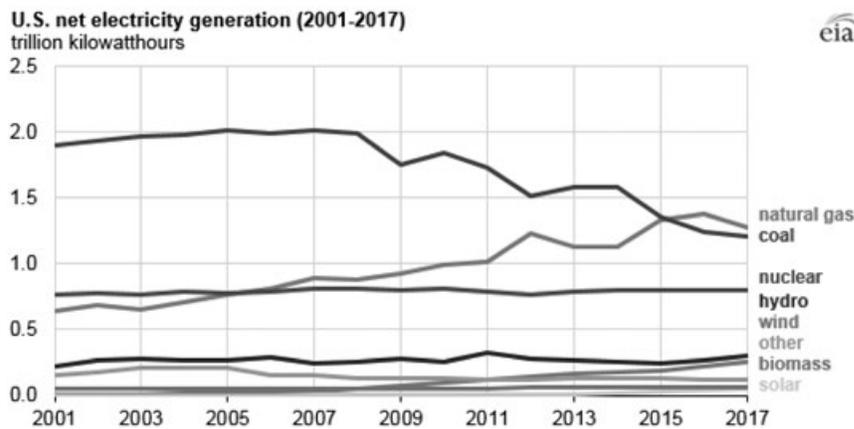
In the EPA’s reconsideration of MATS, there are several options and legal pathways to follow, which eventually might be part of a proposed or final rule. It is worthwhile to note that the EPA’s proposed ACE rule, combined with revisiting the NSR program and litigation regarding the cobenefits issue, could influence the EPA’s strategy going forward on the MATS rule. See **Table 1**.

There are other approaches that might allow the EPA to adjust or substantially amend the MATS rule and its implementation framework or timing without either fully revoking the rule or leaving it virtually unchanged, while still recognizing the rule as A&N. All of

**Table 1.** EIA Possible Responses

<p>Retain the A&amp;N Finding, but Exclude Co-Benefits Analysis</p>	<ul style="list-style-type: none"> <li>•The bulk of the utility industry would likely support this, but it would open MATS to legal challenges under the new cost benefit approach from the environmental community</li> <li>•This might allow EPA to obtain a favorable court opinion without requiring a full revocation of MATS</li> </ul>
<p>Determine that Regulation Is Not Appropriate and Necessary</p>	<ul style="list-style-type: none"> <li>•If upheld in courts, MATS would likely be revoked</li> <li>•Litigation would ensue and EPA would need to contend with the existing record that MATS compliance is affordable and able to be implemented</li> <li>•EPA could argue that MATS benefits are in the order of \$4-6 million per year and does not justify regulation</li> <li>•It is unclear how industry sources would react to this approach in litigation or policy, but their July 2018 letter suggests they would oppose any pre-rule context</li> <li>•Environmental groups would certainly challenge this approach and might prevail</li> </ul>
<p>Defend Obama Administration Supplemental Finding</p>	<ul style="list-style-type: none"> <li>•In light of the recent receptivity of the utility industry towards leaving MATS in place, EPA could decide to re-initiate defense of the supplemental finding - however unlikely, as evidenced by the affirmative action of the Trump administration to hold the case in abeyance and past direction under Assistant Administrator Wehrum</li> <li>•This course could become more attractive to the Trump administration if a favorable opinion regarding co-benefits is attained during EPA’s proposed repeal of the Clean Power Plan</li> </ul>

**Figure 3.** US Net Electricity Generation (2001–17)



these options would involve substantial litigation and, thus, the possibility of seeking additional judicial stays or delays of compliance for specific sources. Such options might also allow utilities to seek stays or delays in other contexts, such as the cross-state or regional-haze rules based on uncertainty surrounding MATS.

The possible compromise approaches are these:

- Determine that a formal cost-benefit analysis aimed only at the toxics-rule portion justifies a very weak regulation.
- Use both the industry economic analysis and a toxics-only cost-benefit analysis to set a moderate rule, potentially addressing issues such as start-ups and shutdowns, in a more industry-friendly fashion.
- Seek judicial permission, in light of ongoing rule implementation, to unwind the MATS rule in a phased and flexible fashion.
- Seek credits for MATS compliance under programs such as New Source Review or the ACE.

#### INDUSTRY INPUT AND GUIDANCE VITAL

There can be little doubt that the regulatory reforms made under the Trump administration have and will continue to make a significant impact on the power industry. However, in the administration's efforts to provide regulatory

clarity, certainty, and relief, the reforms have encountered opposition from both predictable and unlikely stakeholders who, at one point, may have supported their initiatives. In addition, the regulatory reforms are unlikely to reverse the widespread retirement of coal-fired power plants due to (1) the low price of natural gas and (2) the industry's compliance with MATS in 2015–16 (Figure 3).

It does not seem that the administration will slow down its regulatory reform initiatives any time soon, as the president, legislators, agencies, and departments continue to announce reconsiderations, guidance memos, and regulations and legislation that implement regulatory reform. The administration has continued to seek industry's input and feedback on these initiatives, and, as a result, industry must stay engaged at the local, state, and federal levels.

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