



THE ROAD AHEAD: LEGAL CHALLENGES FACING THE MINING INDUSTRY UNDER THE BIDEN ADMINISTRATION

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WMA Annual Meeting

July 22, 2021

SEASON OF DRAMATIC CHANGE

- U.S. rejoins Paris Agreement on climate change
- New U.S. Nationally Determined Contribution (NDC)
 - Reduce GHG emissions by 50-52% by 2030
 - 100% carbon emissions-free electricity by 2035
- Clean Power Plan 2.0
- Revised NEPA Regulations
- Other regulatory changes
- Looming conflicts: expansion of environmental regs. vs. other policy goals

ORIGINAL CLEAN POWER PLAN: OBAMA EPA

Obama EPA Issues Final CPP August 2015

- Goal: reduce CO₂ emissions from electrical power generation by 32% by 2030
- Relied on CAA § 111(d) “best system of emissions reduction” (BSER)
- Novel interpretation of § 111(d) to allow “***outside the fence line***”: shift electricity generation to natural gas & renewables

Three building blocks:

1

Improve heat rate of existing coal-fired power plants

2

Substitute increased electricity generation from natural gas plants vs. coal-fired plants

3

Substitute increased electricity generation from new zero emitting renewable energy sources (e.g., wind & solar) for coal-fired plants



CPP FACES IMMEDIATE LEGAL CHALLENGES

- Coalition of 27 states & industry groups file challenges in D.C. Circuit Court of Appeals
- Decision not issued before 2016 election

D.C. Circuit Court denies request for emergency stay of rule

U.S. Supreme Court issues stay of rule - Feb. 9, 2016

5-4 decision

Prevents implementation of CPP pending any final review by Supreme Court

First time Supreme Court had ever stayed a regulation before a judgement from lower court

D.C. Circuit Court hears argument on merits of CPP - Sept. 27, 2016

TRUMP CHANGES COURSE

- Trump announces withdrawal from Paris Agreement
- Trump issues Energy Independence EO - Mar. 2017
 - Facilitate development of U.S. energy resources
 - Reduce unnecessary regulatory burdens on domestic energy
 - EPA announces review of CPP
- EPA issues NPRM to repeal CPP - Oct. 2017
 - Reverses course on scope of CAA § 111(d)
 - Commits to issue new rule regarding CO₂ emissions
- Legal challenges to CPP stayed by D.C. Cir.



TRUMP EPA: AFFORDABLE CLEAN ENERGY RULE (ACE)

- EPA formally repeals CPP and replaces it with ACE - June 2019
 - Relies on CAA § 111(d) to establish emission guidelines for states to use when developing plans to limit CO₂ from coal-fired EGUs
 - Goal: reduce CO₂ by 35% by 2030
- States have 3 years to submit plans
- BSER must be applicable to, at, and on the premises an affected facility: ***inside the fence line***

ACE RULE FACES IMMEDIATE LEGAL CHALLENGE

- 23 States & environmental groups immediately challenge ACE

D.C. Circuit Court Vacates ACE Rule - Jan. 2021

Rejects Trump EPA's
"inside the fence line"
interpretation

Remands to EPA to
consider new regulatory
framework to replace ACE

Biden EPA declines to seek further legal
review of decision

WHAT LIES AHEAD?

- EPA Feb. 2021 memo: states have no binding requirement to submit plans setting GHG emissions for EGUs
- Biden EPA has broad latitude to promulgate new rule
 - Could apply outside the fence line restrictions
 - Reissue the CPP?
 - Rely on alternative provision(s) of CAA?
- Any new rule likely to face legal challenge
- Wild Card: what will Supreme Court say?





UNCERTAIN FUTURE OF CEQ'S 2020 NEPA RULE

- Trump CEQ revised NEPA regulations - July 2020
- First significant revision since rules adopted in 1978
- Designed to simplify, streamline & expedite environmental reviews
- Codifies key judicial decisions on scope of reviews



REVISED NEPA REGULATIONS: PROCEDURAL CHANGES

- One year to complete an EA (75 pages)
- Two years to complete EIS (150 pages typical; 300 pages for unusual scope/complexity)
- Applicant may prepare either EA or EIS
- May tier to EA
- Public comments must be specific

SUBSTANTIVE CHANGES: “EFFECTS” OF GOVT. ACTION

- Under new definition, “effects” **must**:
 - Be reasonably foreseeable
 - Have close causal relationship
 - Not remote in time, geography, or product of lengthy causal chain (similar to proximate cause - “but for” causation not enough)
 - Exclude effects that the agency has no ability to prevent
 - Limited statutory authority
 - Would occur regardless of agency action



STREAMLINES DEFINITION OF “EFFECTS”

- *Eliminates “direct” and “indirect” from definition*
- *Eliminates separate definition of “**cumulative impacts**”*
 - Current 40 CFR § 1508.7 “‘Cumulative impact’ is impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”
 - Major source of litigation

CLARIFY SCOPE OF JUDICIAL REVIEW

- **Exhaustion** - comments not raised during public comment period are forfeited
- No **final agency action** until agency issues ROD or other final action
- **Remedies**
 - NEPA failure remedied by procedural compliance
 - No presumption of injunctive relief from NEPA failure
- **Harmless Error** - minor/non-substantive error ≠ invalidate agency action



WHAT'S NEXT FOR 2020 NEPA REGS?

- Multiple legal challenges in federal district courts (CA, VA, NY, DC)
- W.D. Va.- dismissed facial challenge on procedural grounds (June 2021)
 - Plaintiffs couldn't yet show "harm" from new rules
 - Rejected Biden DOJ's Request for remand w/out vacatur
- **2020 Rule remains in effect**
- CEQ extended date for agencies to issue conforming rules (from Sept. 2021 to Sept. 2023)



OTHER CHANGES ON THE HORIZON

- Renewed Social Cost of Carbon protocol & GHG guidance docs.
- 30 x 30 initiative: conserve 30% of U.S. land & waters by 2030
 - Multi-agency task force: Interior, Commerce, Agriculture
 - Possible future regs. from BLM, USFS, Commerce, etc.
- New CWA regulations



CHANGES TO ENVIRONMENTAL REGS VS. OTHER BIDEN ADMINISTRATION GOALS

- Critical minerals needed to meet Biden's green energy goals
 - Lithium, nickel, copper needed for green energy goals
 - U.S. uses approx. 35k tons of lithium, but only produces 5k tons
 - Domestic need for lithium = 100k tons by 2025, possibly 700K- 800K by 2030
- How to shift supply chains for critical minerals to U.S. while expanding environmental regulations?
- Efficient permitting needed for new infrastructure & renewable energy projects

MOVING FORWARD IN PERIOD OF UNCERTAINTY

- Multi-faceted litigation
 - Will new regs. survive legal challenges?
 - General challenge to decisions/regs. vs. project specific
 - Focus on venue
- Planning/permitting will need to be nimble
 - Close coordination with regulators
 - Consider impacts under existing vs. previous NEPA regs.
 - Articulate legal basis for analysis/decisions

THANK YOU!



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