North America

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I. United States

The Trump Administration's efforts to roll back federal climate regulation have accelerated. The Environmental Protection Agency (EPA) and the Department of Transportation's National Highway Transportation Safety Administration (NHTSA) have released two proposals to repeal or significantly weaken the twin pillars of former-President Obama's strategy to reduce greenhouse gas (GHG) emissions.[1] Their adoption would represent a significant setback for achieving the United States' (US) Paris Climate Agreement commitments.[2] However, both proposals face additional legal steps before they can be implemented, including public comment and judicial review.

1. Agencies Propose to Roll Back Passenger Vehicle GHG and Fuel Economy Standards and Limit State Authority

In August 2018, EPA and NHTSA released a joint proposal that would roll back GHG emission standards and fuel economy standards for passenger vehicles and light duty trucks (collectively 'light duty vehicles') that had been promulgated during the Obama Administration. The proposal would also constrain the authority of states to develop their own programs to limit vehicle emissions.[3]

a. Background

In 2012, EPA and NHTSA jointly issued regulations that would limit GHG emissions and increase fuel economy of light duty vehicles from Model Years (MY) 2017-2021.[4] In the 2012 rulemaking, EPA also promulgated GHG emission standards for MY 2022-2025 light duty vehicles. Because the standards vary by vehicle size, their effect depends on the types of vehicles actually sold. However, EPA found the standards were expected to result in a fleetwide average GHG emissions rate of 163 grams of CO_2 per mile driven (equivalent to 54.5 miles per gallon) by 2025.[5] EPA made a commitment to re-examine the practicability of the MY 2022-2025 standards by 2018. Due to limitations in NHTSA's statutory authority, fuel economy standards did not extend through MY 2025; rather, NHTSA identified intended standards for MY 2022-2025 light duty vehicles and made a commitment to evaluate the appropriateness of those standards in 2018.

b. EPA and NHTSA Joint Proposal to Flatline GHG and Fuel Economy Standards

The EPA and NHTSA joint proposal would freeze both GHG and fuel economy standards at the MY 2020 level through MY 2026.[6] This would result in an expected fleetwide average emission rate for light duty vehicles of 240 grams of CO_2 per mile,[7] and an increase of up to 931 million metric tons of carbon dioxide equivalent through 2035.[8] The agencies also took comment on alternative levels of stringency for the GHG emission standards and fuel economy standards, including retention of the current MY 2022-2025 standards.

DOI: 10.21552/cclr/2018/3/14

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1 See, Executive Office of the President, 'The President's Climate Action Plan' (June 2013) <https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf> accessed 30 August 2018.

2 Trevor Houser et al, 'The Biggest Climate Rollback Yet?' (August 2018) <https://rhg.com/research/the-biggest-climate-rollback-yet/> accessed 30 August.

3 The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed 24 August 2018) [hereinafter 'SAFE Rule Proposal'].

4 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed Reg 62,624 (15 October 2012).

5 ibid 62, 636.

6 SAFE Rule Proposal, 83 Fed Reg, 42,989.

7 ibid.

8 (n 2).

The agencies conducted new analysis in order to provide support for the proposed flatlining of the GHG and fuel economy standards.[9] The agencies relied on new modelling that found the cost of deploying the technology needed to comply with the current standards would exceed the costs anticipated by the agencies in prior analyses. The agencies also found that fuel savings benefits to consumers would be less than previously anticipated. By using an estimate of climate damages caused by GHG emissions that is limited to domestic, rather than global, costs, the agencies also deemphasized the climate benefits of the current standards. Finally, the agencies emphasised new analyses that purport to show the current standards will increase traffic fatalities. However, these safety conclusions have been subject to significant criticism, including by academic researchers on whom EPA and NHTSA's analyses rely.[10]

c. Frustrating State Policies to Limit GHG Emissions

In addition to scaling back the ambition of federal standards, the agencies have proposed to withdraw authority for states to set their own GHG emission standards for new light-duty vehicles and to mandate that a portion of vehicles sold must be zero emission vehicles (ZEV).[11] Under Section 209 of the Clean Air Act, California has special authority to set standards for new motor vehicles that are at least as stringent as federal standards when granted a waiver by EPA.[12] Other states may then adopt California's standards.[13] In 2013, California was granted a waiver that allowed it to independently establish GHG emission standards for MY 2022-2025 light duty vehicles and to mandate ZEV sales.[14] Thirteen states (and the District of Columbia) independently adopted California's emission standards and nine states adopted California's ZEV mandates.[15]

EPA has proposed to withdraw California's waiver on the grounds that the California regulations are preempted by federal fuel economy law and because California did not meet the statutory requirements for granting a waiver under the Clean Air Act. Some experts have called into question whether EPA has legal authority to withdraw a waiver under these circumstances.[16] Whether the Trump Administration is successful in withdrawing California's waiver will significantly influence the extent to which state policy can step into the void of federal climate regulation.

2. EPA Proposes to Replace the Clean Power Plan with a Significantly Less Stringent Alternative

EPA has proposed to withdraw the Obama Administration's signature regulation to limit GHG emissions from the power sector, the Clean Power Plan, and replace it with a less stringent alternative, the Affordable Clean Energy (ACE) rule.[17] Like the Clean Power Plan, the ACE rule would be promulgated under Section 111(d) of the Clean Air Act, and would require states to develop plans to reduce GHG emissions from certain existing fossil fuel-fired power plants based on EPA's evaluation of the best system of emission reduction that has been adequately demonstrated (BSER).[18] However, the ACE rule, if finalized, would be significantly different than the Clean Power Plan in a number of respects.

First, where the Clean Power Plan would have applied to coal and natural gas-fired power plants, the ACE rule is limited to existing coal-fired power plants.

Second, citing legal objections, the ACE rule rejects EPA's determination in the Clean Power Plan that BSER includes reducing power sector emissions by shifting generation from higher - emitting sources

9 See, SAFE Rule Proposal, 83 Fed Reg 43,206-232.

10 Brad Plumer, 'Trump Officials Link Fuel Economy Rules to Deadly Crashes. Experts are Skeptical' (*NYTimes.com*, 2 August 2018) <https://www.nytimes.com/2018/08/02/climate/trump-fuel-economy.html> accessed 30 August 2018.

11 SAFE Rule Proposal, 83 Fed Reg, 43,232.

12 42 USC § 7543.

13 42 USC § 7507.

14 Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program, 78 Fed Reg, 2,112 (9 January 2013).

15 Stephen Edelstein, 'Which States Follow California's Emission and Zero-Emission Vehicle Rules' (*Greencarreports.com*, March 2017) <https://www.greencarreports.com/news/1109217_which-states-follow-californias-emission-and-zero-emission-vehicle-rules> accessed 30 August 2018.

16 Denise A Grab et al, 'No Turning Back: An Analysis of EPA's Authority to Withdraw California's Preemption Waiver Under Section 209 of the Clean Air Act' (*Policyintegrity.org*, 2018) <http://policyintegrity.org/files/publications/No_Turning_Back.pdf> accessed 30 August 2018.

17 Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 83 Fed Reg 44,746 (31 August 2018) [hereinafter 'ACE Proposal'].

18 42 USC § 7411(d).

such as coal plants to lower-emitting sources such as renewables and natural gas combined cycle plants. Rather, the ACE rule proposes that BSER for coal plants is a list of 'candidate technologies' that can improve the efficiency by which those plants burn coal to produce electricity.

The ACE rule rejects EPA's long-standing approach under Section 111(d) to establish nationally-applicable numeric emission guidelines for regulated sources based on BSER. Rather, under ACE, each state plan would set unit-specific standards of performance in the form of a maximum allowable GHG emission rate, based on those candidate technologies that the state determines are achievable at the plant. Under this approach states, not EPA, determine the overall stringency of the program.

Another area of difference is the compliance flexibility provided to regulated power plants. Whereas the Clean Power Plan encouraged states to rely on averaging and trading among plants within and between states, the ACE rule allows for averaging only among units within an individual plant and not between plants. It is for this reason that EPA's economic analysis shows higher compliance costs for the ACE rule than the Clean Power Plan under a number of scenarios.[19]

Finally, the extent to which the ACE rule would result in GHG emission reductions as compared to the Clean Power Plan is uncertain. On the one hand, the falling costs of natural gas and renewable energy mean that power sector decarbonization is already on pace to exceed the level expected under the Clean Power Plan, despite the fact that it was put on hold by the US Supreme Court before it could go into effect.[20] Yet the Clean Power Plan may nonetheless have driven substantial additional emission reductions by requiring all states to implement emission reduction plans and not just those states that have already adopted ambitious climate policy.[21] In contrast, the ACE rule requires only emission *rate* improvements in the form of efficiency improvements. But, increased efficiency can improve the economics of coal plant generation and so can, perversely, result in an increase in total emissions. In addition, EPA has also proposed to relax existing requirements that states make comprehensive upgrades when making efficiency improvements. This has the potential to extend the life of high-emitting coal plants. For these reasons, the ACE rule has the potential to increase overall GHG pollution.[22]

II. Canada

Canada is moving forward with climate policy at the federal level but has scaled back its ambition and urgency in order to mitigate provincial opposition.

In April, Canada finalized regulations to reduce methane emissions from the oil and gas sector by 40 to 45 percent from 2012 levels by 2025 in accordance with a 2016 agreement between Prime Minister Trudeau and President Obama.[23] The regulations would set strict limits on venting of methane and impose universal leak detection and repair requirements. However, the final regulations delay compliance requirements by 3 years compared with a May 2017 proposal.

In July 2018, Canada's environment minister announced plans to limit the scope of the Pan-Canadian Approach to Pricing Carbon Pollution. This regulatory 'Benchmark' program, issued in 2016, allows Canadian provinces to implement carbon pricing schemes that meet specified requirements and imposes a backstop carbon tax for those provinces that have not done so by 2018.[24] Under the federal plan, regulated entities will face a tax on each tonne of carbon dioxide emitted in excess of a threshold that is set based on industry average emissions. The new proposal would raise that threshold so that emitters—particularly those in the cement, iron and

19 ACE Proposal, 83 Fed Reg, 44,786. Note that EPA's analysis assumes no interstate trading under the Clean Power Plan scenario and so likely understates the cost differential between the ACE rule and the Clean Power Plan; ibid 44,783.

20 Denise A Grab & Jack Lienke, 'The Falling Cost of Clean Power Plan Compliance' (2017) (*Policyintegrity.org*, 2018) <http://policyintegrity.org/files/publications/Falling_Cost_of_CPP_Compliance.pdf> accessed 30 August 2018.

21 John Larsen and Whitney Herndon, 'What the Clean power Plan Would Have Done' (*RHG.com*, 9 October 2017) <https://rhg.com/research/what-the-cpp-would-have-done/> accessed 30 August 2018.

22 See Julie McNamara, 'Trump Administration's 'Affordable Clean Energy Rule Is Anything But' (*ucsusa.org*, 31 August, 2018) <https://blog.ucsusa.org/julie-mcnamara/ace-dangerous-clean-power-plan-replacement> accessed 2 September 2018.

23 Government of Canada, 'Canada's Methane Regulations for the Upstream Oil and Gas Sector' (2018) <https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/proposed-methane-regulations-additional-information.html/> accessed 30 August 2018.

24 Government of Canada, 'Guidance on the Pan-Canadian Carbon Pollution Pricing Benchmark' (1 January 2018), <https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework/guidance-carbon-pollution-pricing-benchmark.html> accessed 30 August 2018.

steel, lime, and nitrogen fertilizer industries—would be subject to lower tax liability.[25]

Notwithstanding these changes, Canadian Prime Minister Justin Trudeau is encountering new and growing provisional opposition to his climate agenda.

In April, Alberta also issued draft regulations to limit methane emissions.[26] These require targeted, rather than universal, leak detection and repair, and include less stringent methane venting limits. Alberta has argued that its approach should take precedence over federal regulations, citing authority that allows provinces to regulate methane so long as their policy is 'equivalent' to federal policy. Environmental organizations have argued that Alberta's regulations do not meet this test.[27]

In June 2018, Doug Ford was elected as the new Premier of Ontario on a platform that included repealing the province's cap-and-trade program. Days after he was sworn in, Ford announced legislation that would fulfil that campaign promise, and indicated his intent to withdraw Ontario from the joint agreement linking the province's cap-and-trade program with those in Quebec and California.[28] Shortly thereafter, the provincial government announced a constitutional challenge against the federal carbon tax backstop that will apply in the absence of provisional carbon pricing policy.[29]

25 Nick Gamache, 'Liberals Plan to Soften Carbon Tax Plan Over Competitiveness Concerns' (*CBC.com*, 1 August 2018) <https://www.cbc.ca/news/politics/liberals-carbon-price-lower-1.4769530> accessed 30 August 2018.

26 Shawn McCarthy, 'Ottowa, Alberta Poised for Conflict Over Methane Regulations' (*Theglobeandmail.com*, 25 April 2018) <https://www.theglobeandmail.com/business/article-ottawa-alberta-poised-for-conflict-over-methane-regulations/> accessed 30 August 2018.

27 Drew Nelson, 'Canada Adopts Historic Methane Rules. Alberta May Undercut Them' (*Edf.org*, 26 April 2018) <http://blogs.edf.org/energyexchange/2018/04/26/canada-adopts-historic-methane-rules-alberta-may-undercut-them/> accessed 30 August 2018.

28 Government of Ontario, 'Premier-Designate Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax' (2018) <https://news.ontario.ca/opd/en/2018/06/premier-designate-doug-ford-announces-an-end-to-ontarios-cap-and-trade-carbon-tax.html> accessed 30 August 2018.

29 Paola Loriggio, 'Ontario Launching Constitutional Challenge of Federal Carbon Tax Plan' (*Theglobeandmail.com*, 2 August 2018) <https://www.theglobeandmail.com/canada/article-ontario-launching-constitutional-challenge-of-federal-carbon-tax-plan-2/> accessed 30 August 2018.