



Will States' Input Clarify The Final Affordable Clean Energy Rule?

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As the environmental world anxiously awaits the final Affordable Clean Energy (ACE) Rule, we are taking the opportunity to look back at some of the comments the U.S. Environmental Protection Agency (EPA) is considering.

For background, see our [overview of the proposed ACE Rule](#), which EPA published on August 31, 2018. EPA accepted comment for 60 days and held a public hearing on October 1, 2018, in Chicago, Illinois.

In a court filing on May 6, 2019, EPA stated that a draft of the final ACE Rule was sent to the U.S. Office of Management and Budget for interagency review on April 26, 2019. EPA intends and expects to issue the final ACE Rule in June 2019.

According to Regulations.gov, the [proposed rule received 499,689 comments](#). Of those, only 5,458 comments are available online. The discrepancy arises from EPA's practice of withholding comments that are confidential, inappropriate, or duplicative (e.g. from a mass-mail campaign). The [full online docket](#) includes over 1.8 million comments on multiple rulemaking actions.

In this post, we will focus on comments made by state governors and state environmental agencies. Executive Order 13132 requires EPA to consult with state and local officials early in the process of promulgating rules that have federalism implications, impose substantial costs on state and local governments, and are not required by statute. If EPA does not consult, it can

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alternatively provide the funds necessary to pay the direct compliance costs. EPA specifically solicited comments from state and local officials.

Nineteen state governor and state environmental agency comments are available on the online docket, including comments from California, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Minnesota, New Mexico, New York, Oregon, South Carolina, South Dakota, Virginia, West Virginia, Wyoming, and the Western Governors Association. In these, a few trends emerged:

- **Concern over engagement process.** Many state governors and environmental agencies expressed concern that EPA's consultation and public engagement for the ACE Rule could have been more robust. Even states largely in support of the ACE Rule suggested additional time would allow for more meaningful comments. South Dakota, who otherwise supported the rule, suggested the possibility that EPA should pay the compliance costs of the rule due to the state's perception that EPA had not followed Executive Order 13132. Several states contrasted this with the public participation for the proposed rule's predecessor, the Clean Power Plan. While the ACE Rule was open for 60 days of public comment and EPA held a single, one-day public hearing, the public participation process for the Clean Power Plan included 167 days of comment and four, two-day public hearings in diverse locations.
- **Desire for a model state plan or guidance document.** Most states appreciated and supported the flexibility the ACE Rule provided to the states, but also seemed worried about creating too much discretion for a future EPA administration to reject their state plans. States both in support of and adverse to the ACE Rule sought clarity in the form of a guidance document, a model state plan, or additional regulatory language. Many wanted to know what EPA would consider an approvable state plan, wanting to avoid EPA rejection of their plans after years of development. Specific clarifications that the states requested include: timing of compliance and an ultimate compliance date for all sources; the process for developing a state plan, including public participation requirements; methodology for establishing baseline emissions; mechanisms for determining compliance and for enforcement; and criteria for determining a unit to be at or near the end of its remaining useful life.
- **Identifying emission reducing technologies states can implement.** Several states commented on which technologies and systems states could consider when writing their state plans. The states agreed with EPA that the list of candidate technologies should not be considered an exclusive list. But at the same time, some states wanted to limit what actions states could implement to achieve the emissions guidelines set by EPA. Specifically, the debate centered around whether a state plan would be adequate if it included regional emission trading programs, shifting generation to natural gas or renewable sources, or carbon capture and sequestration. Although EPA rejected these technologies and systems for purposes of setting the emission guidelines, could (and should) EPA allow states to meet the emission guidelines by using these technologies and systems?

- **Cleanup regarding the ACE Rule's applicability.** One clarification I'm sure we'll see in the final rule relates to applicability. Many states commented that EPA was inconsistent when referring to affected sources, sometimes referring to coal-fired electric generating units, while other times referring to all fossil fuel types, including natural gas-fired and oil-fired units. Everyone sought consistency and clarity on this topic.

It's not surprising that the millions of comments received for the multiple rulemaking actions in the ACE Rule docket have left the agency behind schedule for promulgating the final ACE Rule. As the agency considers and responds to the comments – including those from state officials to which Executive Order 13132 directs EPA to give special attention – it will be interesting to see what revisions and improvements may result with respect to the issues tagged above. We will, of course, provide an overview of the final rule upon its publication.