

ACE Implementation FAQ

1. Does EPA plan to issue a model rule?

EPA does not currently plan to issue a model rule. EPA believes the final rule provide sufficient information to allow states to establish appropriate standards of performance and develop their state plans. States also have additional flexibility to consider remaining useful life and other source-specific factors, which the EPA may not be able to adequately address in a model rule for ACE. EPA is aware that some states plan to issue rules requiring designated facilities to submit permit applications with CO₂ emission limits that are consistent with the level of stringency achievable through application of the BSER candidate technologies. The state would then consolidate those permits into their state plan. EPA believes that this may be a workable approach and expects that public comments on such plans will be helpful to other states that are considering this approach.

2. Why are states required to include the information listed in section §60.5740a(4) in their plans?

EPA believes that the unit-specific information required in section §60.5740a(4) is necessary to demonstrate how a standard of performance has been established. This information will assist EPA and the public in evaluating plan submissions through the notice and comment rulemaking process. The final rule requires that the information be contained in plans “as applicable.” If a state believes that use of certain required unit-specific information is not necessary to the establishment of standards of performance, then the state would have to demonstrate that in the submitted state plan.

3. What if the information required in section §60.5740a(4) is designated as confidential business information (CBI)? What if it is not reasonable to project such information out through 2035? What flexibilities exist to address those concerns?

EPA has well established protocols (*See* 40 CFR part 2, subpart B) for handling and storing CBI and will handle all information in a state plan that is properly designated as CBI according to those procedures. Note that some information may not be designated as CBI (*e.g.*, emissions data is statutorily not considered as CBI under CAA section 114). Additionally, states have their own policies and procedures on the handling and use of CBI over which EPA has no authority. States should work with their corresponding regional EPA contact if there are concerns regarding submission or handling of CBI or if there are questions regarding use of publicly available information resources.

In some circumstances, states may be able to use publicly available information in establishing standards of performance. For example, the U.S. Energy Information Administration (EIA) routinely collects operational information from U.S. power generating sources and provides projections for the electric sector. States may be able to utilize such publicly available information in establishing standards of performance and in projecting operation into future years.

4. Can a state use permits and/or administrative orders (in lieu of a state regulation) to include standards of performance in their state plan submission?

EPA acknowledged in the preamble of the final rule (*See* 84 FR 32553) that standards of performance and other state plan requirements may be included in state permits and administrative orders. The newly promulgated implementing regulations similarly allow that standards of performance and other

state plan requirements may be adopted and implemented through permits and administrative orders. See §60.27a(g)(2)(iii).

However, there may be requirements under the ACE rule or the implementing regulations which are not addressed by a permit or administrative order. For example, under the ACE rule at §60.5740a(a)(6)(i) and under the implementing regulations at §60.26a, a plan submittal must include supporting material demonstrating the state's legal authority to implement and enforce each component of its plan, including the standards of performance. In addition, §60.5740a(a)(3) requires that the submittal must include a demonstration that each designated facility's standard of performance is quantifiable, permanent, verifiable, and enforceable. To the extent that these and other requirements are not met by the terms of the incorporated permits and administrative orders, states would still need to include materials in a state plan submission demonstrating how the plan meets these requirements.

EPA is aware that a number of states are already taking the approach to use permits to establish standards of performance. States using permits to establish standards of performance would need to demonstrate to EPA that they have the legal authority to do so. EPA notes that a state plan becomes federally applicable to the ACE designated facilities upon approval by EPA, and only then the plan requirements are title V applicable requirements appropriate for inclusion in a title V permit. Because of this sequencing, if a state wishes to use title V permits for the purpose of establishing a standard of performance for existing facilities, it is advisable that, until EPA approves the plan submittal, the future applicable requirements be either designated as state-enforceable only, included as part of facility compliance plan in the permit application, or incorporated for future implementation contingent to the state plan approval. For example, if a state were to establish a standard of performance in a state plan submittal through a title I permit (e.g. PSD or minor NSR permit), the requirements of such standard are federally enforceable and have applicable title V requirements by virtue of the title I permit, and therefore those requirements could be subject to review through the title V process before EPA evaluates the standard through the state plan process. Additionally, if a state with the necessary authority uses a title I permit to establish standards of performance prior to plan approval, then the state should first work with the appropriate EPA regional office to ensure that the standard is appropriate so as to mitigate the potential of having to revise the standard as a result of EPA's review of the plan.

5. Must states account for the proposed reforms to New Source Review (NSR) when establishing standards of performance and developing their state plans for ACE?

EPA did not finalize the proposed reforms to the NSR program as part of the final ACE package; therefore, states are not required to consider such proposed reforms when establishing standards of performance under ACE. Additionally, the reforms were proposed as optional, not mandatory, for states in developing plans in response to ACE.

The optional nature of the proposed reforms is explained in the preamble of the ACE Proposal ...

“As the hourly emissions test for NSR would be one tool for implementing the ACE rule, EPA expects that some states may determine that they do not need or desire to change the NSR applicability requirements for EGUs. Consequently, EPA does not intend the NSR hourly emissions test to be a mandatory element of

state programs (as EPA had proposed in 2007). EPA is proposing for this action that states would have the discretion to decide whether to incorporate the NSR hourly emissions test for EGUs into their rules.” 83 FR 44782

Because the changes to NSR were proposed as optional, a state would not be required to revise a plan that does not account for any subsequent finalization of reforms to NSR. If EPA finalizes the proposed NSR reforms after a state has submitted its plan, and that state wants to take advantage of those new NSR flexibilities, then the state plan would need to be revised (particularly the standards of performance) to reflect that flexibility.