The ACE rule, The Trump Administration’s proposed rule for carbon emissions in the carbon sector, purports to regulate greenhouse gases from power plants. Its real goal seems to be minimizing the burden on coal-fired plants. *Legal Planet* has already carried some excellent posts about the proposal’s policy flaws. I’d like instead to talk about its legal basis. In particular, I’d like to talk about how much the rule seems to rely on the *Chevron* doctrine, a judicial approach generally reviled by conservatives.

Basically, the *Chevron* rule says that if a statute is ambiguous, the court will accept a reasonable interpretation of the statute by an administrative agency. In this case, the issue is whether measures to reduce carbon emissions are limited to physical plant modifications or can include other measures, such as reduced operation of high polluting plants or substituting renewable energy or natural gas for coal.

EPA proposes to adopt the more limited interpretation of the statute, basically allowing only equipment changes as a way to reduce emissions. Maybe I’m missing something, but I don’t see anything in the proposal saying that the statute is unambiguous or that EPA’s interpretation is the only one possible. Instead, over and over again, it uses the language of reasonableness. Here are some examples:

- Certain “interpretative constraints. . . reasonably may be applied” to this statute.
- “[T]o the extent that the Agency, due to the fact that Congress did not expressly forbid such an approach, does possess that discretion, today it proposes not to exercise it.”
- Certain measures “should be excluded from consideration” (not “must be excluded”).
- “The proposed interpretive scope of the BSER is reasonable” because it best fits EPA’s expertise.
- “Also, the proposed interpretive scope of the BSER is reasonable considering the several important economic, policy and technology shifts occurring in the power sector.”
- EPA believes the uncertainty factor “further supports the unreasonableness” of the alternative interpretation.
- EPA believes its interpretation “is the best way to ensure GHG emission reductions” under all the circumstances (not, “the only way allowed by the statute”)

EPA does use some other language hinting that the statute may require its interpretation, but it never says so explicitly.

In its arguments regarding reasonableness, EPA nowhere addresses the fact that its approach undeniably allows far smaller reductions of greenhouse gases than the Obama Administration’s alternative, or that it will admittedly result in a significantly larger number

of deaths – neither of which is contested. Also, EPA’s interpretation seems to leave little if any room for imposing requirements on power plants using natural gas, an issue that it leaves for another day. Thus, about half the emitters in the power industry are ignored. In what sense does the most “reasonable” interpretation ignore these factors? Are dead Americans just not relevant to EPA’s decision?

If the courts end up following the path EPA seems to have laid out, they will hold that its interpretation is reasonable rather than required. And that means a future EPA could revert to the Obama Administration’s broader interpretation of EPA’s powers by finding that interpretation to be more reasonable than the Trump Administration’s.