

# KIRKLAND & ELLIS

Kirkland Alert

## EPA's Proposed New Emission Limits are Latest Development in Conflicting Visions to Regulate Power Plants

17 May 2023

On May 11, 2023, the U.S. Environmental Protection Agency (“EPA”) issued [proposed carbon emission limits](#) and guidelines for new, modified, reconstructed and existing “fossil fuel”-fired (i.e., coal, oil and gas-fired) power plants. If enacted, the proposed emission limits aim to avoid up to 617 million metric tons of total carbon dioxide through 2042, a sizable increase from the reduction of 11 million short tons projected by 2030 under the current Affordable Clean Energy Rule.<sup>1</sup> This *Alert* analyzes EPA's prior attempt to regulate power plant emissions, the framework of the new proposed emission limits and guidelines, and potential hurdles to final enactment of the new rule.

### Background: Prior Power Plant Emissions Rulemakings & Limits on EPA Authority

#### *Dueling Prior Approaches to Regulation of Power Plant Emissions*

Section 111(b) of the Clean Air Act (“CAA”) authorizes EPA to categorize stationary air pollutant sources and to regulate such sources by setting federal performance standards.<sup>2</sup> Citing this authority, EPA promulgated the [Clean Power Plan](#) in 2015, which plan established specific emission reduction targets and required power plants to shift their energy production from coal to gas and renewable energy sources.<sup>3</sup> Amid legal challenges, including a challenge to EPA's statutory authority to implement the rule that was considered by the U.S. Supreme Court (discussed further below), the Clean Power Plan was repealed on June 19, 2019, and replaced with the Affordable

Clean Energy (“ACE”) rule.<sup>4</sup> The ACE rule aimed to establish guidelines that required states to implement improvement-based plans to reduce emissions at power plants. However, in 2021, the ACE rule was itself vacated by the D.C. Circuit and remanded to EPA for further proceedings. Because the ACE rule’s deadline for states to develop compliant plans passed while the rule was vacated by the D.C. Circuit, in March 2023, EPA extended the deadline for state plans under the ACE rule until April 15, 2024.<sup>5</sup>

### *SCOTUS Asserts Limits on EPA Rulemaking Authority*

Under Section 111(d) of the CAA, any performance standards set by EPA must reflect “the degree of emission limitation achievable through the application of the best system of emission reduction which...the [EPA] determines has been adequately demonstrated.”<sup>6</sup> According to the U.S. Supreme Court’s ruling in *West Virginia v. EPA* on June 30, 2022 (discussed further in Kirkland’s previous client *Alert* [here](#)), Section 111(d) does not grant EPA the authority to regulate carbon emissions from existing power plants through the proposed “generation shifting approach” in the Clean Power Plan.<sup>7</sup> The Supreme Court’s ruling did not eliminate EPA’s authority to regulate greenhouse gas (“GHG”) emissions from power plants but determined that the manner in which EPA attempted to regulate carbon emissions in the Clean Power Plan (i.e., by requiring power plants to shift energy production to renewable sources) did not satisfy the “best system of emission reduction” requirement under the Clean Air Act.<sup>8</sup> On May 11, 2023, EPA issued [proposed Clean Air Act emission limits and guidelines](#) for carbon dioxide from new, modified, reconstructed and existing fossil fuel-fired power plants based on best available control technologies. The proposed rule, discussed further below, purports to reflect the best system of emission reduction (“BSER”) and use technology-based improvements, including carbon capture and sequestration (“CCS”) and low-GHG hydrogen, to lower carbon emissions at power plants. In a similar manner to the ACE rule (vis a vis the Clean Power Plan), the proposed rule also seeks to repeal its predecessor (i.e., the ACE rule) upon approval. If the ACE rule is ultimately repealed, it is unlikely that the aforementioned April 15, 2024 deadline for state plan submissions will stand as EPA has proposed that states should be required submit plans under the new proposed emission limits and guidelines by June 2026.<sup>9</sup>

## EPA’s Proposed Rule to Revise GHG Standards and Guidelines for Fossil Fuel-Fired Power Plants

### *Structure of the Rule*

EPA has proposed five actions regulating GHG emissions from new, modified, reconstructed and existing fossil fuel-fired electric generating units (“EGUs”). The proposed rule:

1. Revises new source performance standards (“NSPS”),<sup>10</sup> which are technology-based pollution control standards that the EPA is authorized to develop under the CAA, for new fossil fuel-fired stationary combustion turbine units;
2. Revises NSPS for existing fossil fuel-fired steam generating units that undertake large modification;
3. Proposes new GHG emission guidelines for existing fossil fuel-fired steam generating EGUs, which include coal, oil and natural gas-fired steam generating EGUs;
4. Proposes GHG emissions guidelines for existing large, frequently operated stationary combustion turbines; and
5. Proposes to repeal the 2019 ACE rule.<sup>11</sup>

The proposed rule requires states to submit plans for the establishment, implementation and enforcement of performance standards for existing sources to EPA within 24 months of the effective date of the emission guidelines.<sup>12</sup> Compliance deadlines for stationary sources begin by 2030 for existing steam generating units, and 2032 or 2035 for existing combustion turbine units, depending on their subcategory. Requirements vary depending on the type of unit involved (e.g., new or existing, fuel type, frequency of operation and operating horizon) and emission limits for all existing plants would not take effect until 2030, while hydrogen-based limits would be phased in starting in 2032 and CCS-based standards for gas plants would phase in by 2035.

States must identify and categorize affected EGUs into one or more of 13 subcategories. These subcategories are dependent upon dates of operation, capacity, and the cost effectiveness of installing emissions controls. For some subcategories, the proposed rule phases in NSPS or guidelines over time in recognition of the costs and time needed to install controls.

EPA estimates that the aforementioned actions to avoid up to 617 million metric tons of total CO<sub>2</sub> through 2042 and would also result in cutting tens of thousands of tons of particulate matter (PM<sub>2.5</sub>), sulfur dioxide, and nitrogen oxide, harmful air pollutants, while also requiring states to engage with environmental justice communities that are disproportionately burdened by pollution and climate change.<sup>13</sup>

*Peaking Power Plants Exempted from New Rule*

Notably, the proposed rule would exempt peaking power plants (so-called “peakers”) which consists of combustion turbines with a capacity factor of less than 20 percent that only run for short periods of high demand each year. Additionally, under the proposed rule coal plants that have committed to retiring before 2040 would be subject to only minimal additional restrictions. However, for long-term existing coal-fired steam generating units that have not committed to retiring before 2040, as well as for units in the CCS existing combustion turbine generating unit subcategory (consisting of natural gas fired stationary combustion turbines that will comply with a standard of performance based on CCS), EPA is proposing CCS-based standards with a 90 percent capture rate by 2030 and 2035, respectively.

## CCS and Hydrogen Technologies as “Best System of Emission Reduction” for Power Plants

Large-scale adoption of CCS technology and low-GHG hydrogen fuel would be critical for power plants in meeting their emissions reduction obligations under the proposed rule.<sup>14</sup> While CCS technology is in development and has already been successfully adopted at certain energy projects in the U.S.,<sup>15</sup> further investment in developing the physical and regulatory infrastructure necessary for CCS and hydrogen fuel projects is needed, which may undermine EPA’s argument that the requirements of the proposed rule reflect the BSER (which must be both cost effective and adequately demonstrated). For example, CCS projects seeking to permanently sequester CO<sub>2</sub> are required to obtain a Class VI Underground Injection Control permit prior to injection; however, only two states currently have authority to issue such permits pursuant to EPA’s delegated program and EPA estimates that it can take two years to obtain such permits from EPA,<sup>16</sup> which could lead to delays in construction timelines and increased costs. However, the federal government has also implemented legislation aimed at reducing the cost of developing such infrastructure.

EPA relies on the tax credits and other funds allocated for CCS projects authorized by Congress in the Inflation Reduction Act in August 2022 as supporting the notion that CCS technologies qualify as part of the BSER, enabling EPA to establish standards based on what those technologies can achieve. In addition, other incentives may be available to projects utilizing CCS and low-GHG hydrogen fueling technologies, such as pursuant to the California Low Carbon Fuel Standard or similar programs, which may help reduce the cost of implementing such technologies. Further discussion of the Inflation Reduction Act’s incentives, including for CCS, can be found in Kirkland’s prior client *Alert* [here](#).<sup>17</sup>

# Potential for Legal Challenges to the Proposed Rule

## *Upcoming Litigation Battle*

Section 111(d) of the CAA authorizes EPA to regulate existing power plants by setting performance standards to reduce pollutant emissions;<sup>18</sup> however, the extent of EPA's authority to regulate will be a point of contention as the proposed rule moves through the public comment process and beyond. Coming less than a year after the Supreme Court's ruling in *West Virginia v. EPA*, similar legal challenges are expected for EPA's latest power plant rule once it concludes the public notice and comment period and issues a final version of the rule (currently expected in the Summer of 2024). EPA adjusted its approach to power plant emissions rulemaking following the *West Virginia v. EPA* decision to focus on implementing technology-based changes within the individual plant "fence line," rather than encouraging a system-wide "generation shifting" approach. Republican state attorneys general have stated that they intend to challenge the rule just as in *West Virginia v. EPA*. The Supreme Court also recently agreed to hear a case with potential ramifications for the so-called *Chevron* doctrine, a doctrine which grants administrative agencies discretion to reasonably interpret ambiguous statutory language.<sup>19</sup> A ruling that reverses or narrows the *Chevron* doctrine could open new avenues to challenge EPA's proposed rule beyond the plaintiffs' successful in *West Virginia v. EPA* (which relied on a major questions doctrine). Whether CCS and low-GHG hydrogen are cost effective and adequately demonstrated technologies, as well as whether CCS fully falls within a facility's "fence line" due to pipelines and storage sites beyond power plant sites, are expected to be key components to such future legal challenges.

## *Non-litigation Challenges in Congress*

Certain members of Congress have expressed an intent to oppose the proposed rule through non-litigation-based measures. For example, Democratic West Virginia Senator Joe Manchin issued a press release stating that he would oppose all EPA nominees until the new standards are halted.<sup>20</sup> If Senator Manchin stands firm in this pledge, the successful confirmation of future EPA nominees would require the support of every other remaining Democrat in the Senate. Further, Republican Senator Shelley Moore Capito of West Virginia pledged to introduce a Congressional Review Act resolution of disapproval to overturn the new rule after it is finalized.<sup>21</sup> The Congressional Review Act can be used to overturn recently finalized rules with the passage of resolutions by a simple majority in each chamber of Congress. The

President has the ability to veto such a measure should it be successful in Congress; however, it is possible the process will extend past the 2024 election, and a new Congress and Presidential Administration could be less supportive of the rule.

## Next Steps for the Proposed Rule

EPA will host webinars on June 6 and June 7, 2023, where it will provide an overview of the proposed rules, basic details on the how to engage in the rulemaking process, as well as a Q&A period. The notice and comment period for the proposed rule will extend for 60 days after its publication in the Federal Register. The final rule is currently expected to be published Summer of 2024. In the meantime, investors, companies and organizations with interests in power plants should follow the progress of the proposed rule, including the potential for changes based on the public comment period and the potential for legal challenges, and consult with counsel and other advisors on potential next steps to take. Kirkland will continue to monitor any developments in the proposed rule.

---

1. See EPA Finalizes Affordable Clean Energy Rule, Ensuring Reliable, Diversified Energy Resources while Protecting our Environment (June 19, 2019) available at [https://www.epa.gov/newsreleases/epa-finalizes-affordable-clean-energy#:~:text=ACE%20will%20reduce%20emissions%20of,SO2%20emissions%20by%205%2C700%20tons.](https://www.epa.gov/newsreleases/epa-finalizes-affordable-clean-energy-rule-ensuring-reliable-diversified-energy#:~:text=ACE%20will%20reduce%20emissions%20of,SO2%20emissions%20by%205%2C700%20tons.) ↩

2. 42 U. S. C. §7411(b). ↩

3. 40 C.F.R. Part 60, Vol. 80, No. 205. ↩

4. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (July 8, 2019) (codified at 40 C.F.R. Part 60). ↩

5. Delay of Submittal Date for State Plans Required Under the Affordable Clean Energy Rule, 88 Fed. Reg. 14918 (Mar. 10, 2023) (codified at 40 C.F.R. Part 60). ↩

6. 42 U. S. C. §7411(d)(1). ↩

7. In our [July 2022 Alert](#) we discuss the *West Virginia v. EPA* decision and its implications. ↩

8. See *West Virginia v. EPA*, 597 U.S. \_\_\_\_\_ (2022). ↩

9. See New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule (May 8, 2023), available at [https://www.epa.gov/system/files/documents/2023-05/FRL-8536-02-OAR%2011EGU%20NPRM%2020230504\\_Admin.pdf](https://www.epa.gov/system/files/documents/2023-05/FRL-8536-02-OAR%2011EGU%20NPRM%2020230504_Admin.pdf). ↩

10. NSPS apply to new, modified and reconstructed stationary source categories. The NSPS establishes emission limitations achievable through application of adequately demonstrated best available techniques (“BAT”), taking into account factors such as cost, non-air quality health or environmental impacts, and energy requirements. The NSPS are developed and implemented by EPA and are delegated to the states. However, even when delegated to the states, EPA retains authority to implement and enforce the NSPS. See EPA, Demonstrating Compliance with New Source Performance Standards and State Implementation Plans available at <https://www.epa.gov/compliance/demonstrating-compliance-new-source-performance-standards-and-state-implementation-plans>. ↩

11. See New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule (May 8, 2023), available at [https://www.epa.gov/system/files/documents/2023-05/FRL-8536-02-OAR%2011EGU%20NPRM%2020230504\\_Admin.pdf](https://www.epa.gov/system/files/documents/2023-05/FRL-8536-02-OAR%2011EGU%20NPRM%2020230504_Admin.pdf). ↩

12. See Fact Sheet on State Plans, Greenhouse Gas Standards and Guidelines for Fossil Fuel-Fired Power Plants Proposed Rule, available at <https://www.epa.gov/system/files/documents/2023-05/FS-StatePlans-GHG-for%20Power%20Plants%20FINAL%205-10-23.pdf>. ↩

13. See EPA, EPA Proposes New Carbon Pollution Standards for Fossil Fuel-Fired Power Plants to Tackle the Climate Crisis and Protect Public Health (May 11, 2023), available at <https://www.epa.gov/newsreleases/epa-proposes-new-carbon-pollution-standards-fossil-fuel-fired-power-plants-tackle>. ↩

14. For example, the Regulatory Impact Analysis (“RIA”) for the proposed rule notes that EPA determined that “the BSEER for existing coal-fired steam EGUs that expect to operate in the long-term is CCS with 90 percent capture of CO<sub>2</sub>.” See RIA for the [Proposed Power Plan Rule], dated May 2023, at p. 52. ↩

15. See [The Global CCS Institute’s CCS Facilities Database](#) for details on operational CCS projects in the US. ↩

16. See [EPA Report to Congress: Class VI Permitting](#), dated October 2022, at p. 13. ↩

17. In our [August 2022 Alert](#) we discuss the various climate change tax incentives included in the Inflation Reduction Act. ↩

18. 42 U. S. C. §7411(d). [↩](#)

19. The Supreme Court granted the petition for certiorari for the pending Loper Bright Enterprises et al. v. Raimondo case on May 1, 2023 ([link](#)). [↩](#)

20. Senator Manchin's Press Release ([link](#)). [↩](#)

21. Senator Capito's Press Release ([link](#)). [↩](#)

## Authors

Paul D. Tanaka, P.C.

Partner / Bay Area – San Francisco / Houston

Jonathan E. Kidwell

Partner / Dallas

James Dolphin

Partner / Houston

Emily Tabak

Partner / Salt Lake City

Jennifer C. Cornejo

Partner / Houston

Matt Swanson

Associate / Bay Area – San Francisco

Joshua S. Davenport

Associate / Washington, D.C.

## Related Services



## Practices

- Environmental

## Suggested Reading

- 06 July 2022 Kirkland Alert The Major Questions Doctrine Reigns Supreme in *West Virginia v. Environmental Protection Agency* – Implications for Climate Policy and Impact Investing
- 02 August 2022 Kirkland Alert Schumer and Manchin’s Inflation Reduction Act Includes Significant Tax Incentives to Combat Climate Change
- 04 August 2022 Kirkland Alert Manchin-Schumer Inflation Reduction Act: Proposed Environmental and Climate Policy Initiatives

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.

© 2023 Kirkland & Ellis International LLP.