

CARBON POLLUTION STANDARDS LITIGATION

Internal deliberative pre-decisional - FOR USE BY 2024 PRESIDENT-ELECT TRANSITION TEAM MEMBERS ONLY

ISSUE SUMMARY:

In May 2024, EPA finalized the Carbon Pollution Standards (CPS), to regulate emissions of greenhouse gases (GHG) (in the form of carbon dioxide (CO₂) standards) from new gas-fired and existing fossil fuel-fired power plants. The final rule has been challenged by numerous parties in the D.C. Circuit. Petitioners filed motions to stay implementation of the CPS pending judicial review, which the D.C. Circuit and the Supreme Court denied. As of October 2024, merits briefing is proceeding in the D.C. Circuit.

KEY POINTS:

On May 9, 2024, EPA promulgated the CPS under section 111(b) and (d) of the Clean Air Act. 89 FR 39798. The CPS consists of several independent rules, including: (1) repeal of the Affordable Clean Energy (ACE) Rule; (2) emission guidelines requiring states to regulate GHG emissions from existing fossil fuel-fired power plants, including both coal-fired and oil/gas-fired steam generating units; and (3) revisions to the new source performance standards for GHG emissions from new and reconstructed fossil fuel-fired stationary combustion turbines.

The CPS was challenged by various state and industry parties and consolidated as *West Virginia v. EPA*, No. 24-1120 (D.C. Cir.). In their merits briefs before the D.C. Circuit, the petitioners raised the following arguments:

- The technology on which the primary standards are based, either carbon capture and storage (CCS) at a 90% capture rate, or, for existing coal-fired power plants, co-firing 40% natural gas, is not adequately demonstrated or cost-effective, and the standards based on that technology are not achievable;
- Even if sources could install CCS, they could not do so by the compliance date set out in the CPS;
- The adoption of standards based on CCS raises a major question because it will force most existing coal-fired sources to retire and preclude new gas-fired sources from opening, and therefore constitutes unlawful generation shifting in violation of *West Virginia v. EPA*;
- EPA unduly restricts states' discretion in regulating existing sources; and
- The standards will jeopardize the reliability of the electric grid.

Other states, NGOs, and industry groups intervened in support of EPA. The case will be fully briefed by November 1, 2024, and it appears likely that the Court will hold oral argument before the end of 2024 and issue a decision by June of 2025.

This case follows earlier decisions regarding the EPA's prior rulemakings to address GHG emissions from the power sector (the 2015 Clean Power Plan and the 2019 ACE Rule) in the D.C. Circuit, *American Lung Ass'n v. EPA*, 985 F.3d 914 (2021), and the Supreme Court, *West Virginia v. EPA*, 597 U.S. 697 (2022).

ONGOING/UPCOMING REVIEWS:

- The court has not yet set a schedule for oral argument.

KEY EXTERNAL STAKEHOLDERS:

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| <input checked="" type="checkbox"/> Congress | <input checked="" type="checkbox"/> Industry | <input checked="" type="checkbox"/> States | <input type="checkbox"/> Tribes | <input checked="" type="checkbox"/> Media | <input type="checkbox"/> Other Federal Agency |
| <input checked="" type="checkbox"/> NGO | <input type="checkbox"/> Local Governments | <input checked="" type="checkbox"/> Public | | | |

MOVING FORWARD:

- EPA's defense of the case is proceeding.