

March 30, 2012

Resources

[JW Environmental Practice Area](#)

[JW Environmental Attorneys](#)

[Contact JW](#)

www.jw.com

Offices

Austin

100 Congress Avenue
Suite 1100
Austin, TX 78701

Dallas

901 Main Street
Suite 6000
Dallas, TX 75202

Fort Worth

777 Main Street
Suite 2100
Fort Worth, TX 76102

Houston

1401 McKinney Street
Suite 1900
Houston, TX 77010

San Angelo

301 W. Beauregard
Avenue
Suite 200
San Angelo, TX 76903

San Antonio

112 E. Pecan Street
Suite 2400
San Antonio, TX 78205

EPA Proposes Unprecedented Regulation of Nation's Power Plants

By [Mike Nasi](#) and [Jacob Arechiga](#)

On March 27, 2012, the U.S. Environmental Protection Agency (EPA) released its proposal to regulate greenhouse gases emitted from newly constructed fossil-fueled (e.g. coal, natural gas) power plants. Known as the greenhouse gas New Source Performance Standards (NSPS) for power plants,¹ the rule proposal places limits on the amount of greenhouse gases that a new fossil-fueled power plant can emit. The pre-publication version of the rule proposal is [available here](#).

It is fair to say that the approach taken by EPA in this rulemaking is unprecedented. The structure of the Clean Air Act has led EPA to historically propose emission limits by source category or subcategory. For example, in the power industry, what this has meant is that EPA has looked at the best performing, or group of performing, coal-fired power plants and has set limits for all coal-fired power plants based on that standard of performance; EPA has looked at the best performing, or group of performing, gas-fired power plants and has set limits for all gas-fired power plants based on that standard of performance; and so on. This structure and precedent has ensured that EPA stayed within their legal role of making technical determinations to reduce emissions at sources, while not making sweeping energy policy and fuel choices for the entire country – a role strictly reserved for Congress and the states.

In this rulemaking, EPA has taken the unprecedented step of combining all fossil-fueled power plants (coal, coal refuse, oil, petroleum coke, and natural gas) into one category and has set a limit for all fuel types based solely on the performance of one fuel type. Specifically, EPA has set a limit of 1,000 pounds of carbon dioxide per megawatt-hour (lb CO₂/MWh) for all of these power-plant categories, with few exceptions. This limit is based on the performance of not just one type of fuel – natural gas – but one technology that uses that fuel - combined cycle power plants. Simple cycle natural gas plants are not included in the category or factored into the standard.

In order for new coal-fired power plants to meet this limit, EPA anticipates that they will have to install carbon capture and sequestration (CCS) technology. CCS involves capturing CO₂ emissions and then finding places to store this CO₂, typically in underground wells. Although CCS has extraordinary potential, especially in connection with enhanced oil recovery (EOR) projects, this technology is not operating in a commercially viable manner, at scale, anywhere in world, let alone the United States. This reality marks the other "first" that EPA is engaging in through this rulemaking – implementing a standard for an essential component of the U.S. power fleet that has never been commercially achieved at scale at any power plant, anywhere, at any time.

Suffice it to say that the precedent that this rule would set, in and

of itself, will trigger substantial litigation. Other industries have good cause for concern that they too could be subjected in the future to GHG standards not achievable by commercially demonstrated technology and based on the performance of other industry categories. A host of legal challenges can also be expected from states and electricity users due to the fact that the rule will significantly curtail and, in some regions, prevent the construction of new power plants that will be needed to meet rising demand.

Except for a limited number of "transitional sources" (mainly units with existing air permits but have yet to start construction), any new fossil-fueled source which begins construction after the publication of this rule proposal in the *Federal Register* must comply with this rule. Publication will likely occur next month. The applicability of these rules could change depending upon whether EPA makes changes to the proposal before it finalizes the rule package or, of course, if a court stays or vacates the rule.

For additional information on this rule proposal, please contact **Mike Nasi** at 512.236.2216 or mnasi@jw.com or **Jacob Arechiga** at 512.236.2049 or jarechiga@jw.com.

¹ Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units; Proposed Rule; republication version released March 27, 2012.

*If you wish to be added to this e-Alert listing, please **SIGN UP HERE**. If you wish to follow the JW Environmental group on Twitter, please **CLICK HERE**.*

Austin

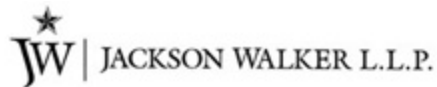
Dallas

Fort Worth

Houston

San Angelo

San Antonio



Environmental e-Alert is published by the law firm of Jackson Walker L.L.P. to inform readers of relevant information in environmental law and related areas. It is not intended nor should it be used as a substitute for legal advice or opinion which can be rendered only when related to specific fact situations. For more information, please call 1.866.922.5559 or visit us at www.jw.com.

©2012 Jackson Walker L.L.P.

Click here to unsubscribe your e-mail address
901 Main Street, Suite 6000 | Dallas, Texas 75202