

In this week's Washington Update:

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This Week in Review

(1) EPA's Supplemental "Science Transparency" Proposal Published in *Federal Register* with April 17 Public Comment Deadline (March 18, 2020) – EPA published in the *Federal Register* (85 Fed. Reg. 15,396) a supplemental notice of proposed rulemaking that includes what the agency describes as "clarifications, modifications and additions" to its "Strengthening Transparency in Regulatory Science" proposed rule of April 2018. To review, the original proposal would require EPA to ensure that data and models underlying the scientific studies on which significant regulatory decisions are based are "publicly available in a manner sufficient for independent validation." It would also, among other things, impose requirements for the analysis of models used in scientific studies upon which EPA relies. EPA is now proposing to expand the scope of the rule to apply not only to significant regulatory actions, but also "influential scientific information." The supplemental proposal includes definitions of "influential scientific information" and "pivotal science," as well as other additions, modifications and deletions to the proposed regulatory text that EPA says are intended to promote clarity. In particular, EPA proposes to clarify that the requirements for the analysis of models would apply to "data and models," not just "dose-response" data and "dose-response" models. EPA acknowledges that many commenters on the April 2018 proposal expressed concern that it would likely preclude the agency's use of valid data and models that include confidential business information (CBI), proprietary data, personally identifiable information (PII) and older studies. Thus, EPA now proposes both a "modified" and an "alternative" approach to the data and model availability provisions. The "modified" approach would allow EPA to consider studies where there is "tiered access" to data and models that have CBI, proprietary data or PII that cannot be sufficiently de-identified. In the "alternative"

approach, EPA would, all other things being equal, give “greater consideration” to studies where the underlying data and models are either publicly available (as in the original approach) or available through tiered access (as in the modified approach). However, the agency would still be able to consider studies where there is no access or limited access to underlying data and models. The supplemental proposed rule also sets forth factors the EPA Administrator would consider in determining whether to grant an exemption to the proposed public availability requirements. Finally, EPA is taking comment on whether to use its “housekeeping” authority independently as authority for taking this action or in conjunction with the environmental statutory provisions cited as authority in the 2018 proposal. Comments on the supplemental proposed rule are due by April 17, 2020. EPA emphasizes that it is soliciting comments only on the changes and additions to the proposed regulatory text contained in the supplemental proposal; comments on the original proposal that are not addressed, altered or replaced by the supplemental proposal “will be deemed outside the scope of this supplemental action.” For further information: <https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05012.pdf> and <https://www.epa.gov/osa/strengthening-transparency-regulatory-science>

(2) Court Rejects DOJ Arguments Against California-Quebec Carbon Trading Program (March 12, 2020) – The U.S. District Court for the Eastern District of California denied two claims raised in a Department of Justice (DOJ) lawsuit against California and other parties (*United States v. California et al.*, Case 2:19-cv-02142) challenging the constitutionality of a carbon emissions trading program linking the Golden State and the Canadian province of Quebec. The Justice Department filed suit in September 2018 arguing that the linkage that allows trading between the California and Quebec programs constitutes a treaty or compact requiring congressional approval, and in December 2019 sought summary judgement on two aspects of the case relating to whether the agreement constituted a treaty. In this week’s decision rejecting DOJ’s arguments, the court notes that “treaty” is a term of art with a clear body of case law that does not describe the linked programs. The court also describes the differences between the linked programs, including Quebec’s more aggressive emission reduction goals, broader scope of pollutants and sources covered and administrative and accounting differences in how the programs operate. Moreover, while both California and Quebec have contracted the Western Climate Initiative, Inc. to administer some aspects of their programs, Quebec’s program was operating for three years before trading was allowed with California. The court notes that since the time the two programs were linked California has, likewise, modified its program more than five times without consulting with Quebec; the court asserts this shows “there is no ‘mutual government’ or ‘cession of sovereignty’ representative of a treaty.” DOJ attorneys said they will litigate other aspects of the California-Quebec agreement on the basis of foreign affairs and commerce clause claims. For further information: <http://www.caed.uscourts.gov/caednew/index.cfm/clerks-office/cases-of-interest/219-cv-2142-usa-v-state-of-california-et-al-climate-initiative/>

and

<http://4cleanair.org/sites/default/files/resources/court%20cal%20quebec%20decision%20march%202020.pdf>

(3) EPA Extends Application Deadline for 2020 Community-Scale Air Toxics Monitoring Grants (March 18, 2020) – In recognition of the strain that the coronavirus pandemic is placing on many state, local and tribal air agencies, EPA announced that it is extending the application deadline for the 2020 Community-Scale Air Toxics Monitoring grants competition. The new deadline is May 1, 2020. EPA expects to award 10 to 20 grants to state, local and tribal monitoring agencies that want to conduct monitoring and analysis to identify or better understand the impacts of air toxics in their communities. Grants will be awarded to projects that fall into one of four categories: 1) characterizing the impacts of air toxics in a community (community-scale monitoring); 2) assessing impacts of toxics emissions from specific sources (near-source monitoring); 3) evaluating new and emerging testing methods for air toxics; and 4) analyzing existing air toxics data and developing or enhancing analytical, modeling and/or implementation tools. EPA anticipates awarding a total of up to \$5 million in grants during the 2020 calendar year; the maximum individual grant amount is \$750,000. Grant applications may address any individual or group of air toxics, but pollutants of particular interest to EPA in this year's competition include ethylene oxide, chloroprene, benzene, 1,3-butadiene and metals such as hexavalent chromium, nickel and arsenic. For further information: <https://www.epa.gov/amtic/community-scale-air-toxics-ambient-monitoring-csatam>

(4) EPA Extends Deadline for Targeted Airshed Grant Applications until April 10, 2020 (March 19, 2020) – EPA extended the deadline for state, local and tribal agencies to apply for financial assistance under the FY 2019-2020 Targeted Airshed Grants program. The new deadline is April 10, 2020 (extended from March 27, 2020). The grant program is intended to provide assistance to eligible agencies to plan and carry out projects that will reduce air pollution in areas that EPA determines are the top five most polluted areas in terms of ozone or fine particulate matter (annual average or 24-hour standards). This is a competitive grant program under which EPA expects to award \$106,512,000, distributed among eight to 15 assistance agreements. EPA expects to notify those selected by June 26, 2020 and provide the awards by October 1, 2020. For further information: <https://www.epa.gov/grants/2019-2020-targeted-airshed-grant-program>

(5) Researchers Analyze Impact of Ozone and Climate Change on Perennial Crop Yields (March 16, 2020) – A group of researchers that conducted a statistical analysis of pollution exposure and perennial crop yields in California from 1980 to 2015 reported that reductions in ambient ozone during the 35-year period resulted in a \$600-million annual increase in production by the early 2010s. In "Impacts of ozone and climate change on yields of perennial crops in California," published in *Nature Food*, the researchers – from three University of California campuses as well as several other academic institutions – report that although significant research has been conducted relative to annual crops, little is

known about the effects of air quality and climate change on perennial crops, including fruits and nuts, which represent about 38 percent California's agriculture based on economic value. In summarizing their work, the researchers say, "[O]n the basis of statistical modelling of historical data and downscaled climate model projections, we jointly assess the impacts of climate and ozone levels on historical and future yields of perennial crops in California. Although the effects of warming to date are not statistically significant for many perennial crops, the yields of most perennials show a significant negative response to ambient ozone, ranging from -2% for strawberries to -22% for table grapes, implying total losses of roughly US\$1 billion per year. This suggests that historical improvements in California's air quality that reduced ozone exposures may have had large, unaccounted co-benefits for the state's perennial crop yields, and further pollution reduction could create additional gains." For further information: <https://www.nature.com/articles/s43016-020-0043-8.pdf>

(6) EPA Publishes Final Risk and Technology Review Standards for Vegetable Oil Production and Boat Manufacturing and Reinforced Plastic Composites Production (March 18 and 20, 2020) – EPA published in the *Federal Register* the final Risk and Technology Review Standards for the Vegetable Oil Production source category (85 Fed. Reg. 15,608) and the Boat Manufacturing and Reinforced Plastic Composites Production source category (85 Fed. Reg. 15,960), which were announced on February 25, 2020. For both source categories, EPA determined that the remaining risks are acceptable and that there are no new developments in controls that would warrant additional requirements. The agency also clarified that the standards are applicable during periods of startup, shutdown and malfunction. For further information: <https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-04459.pdf>, <https://www.epa.gov/stationary-sources-air-pollution/solvent-extraction-vegetable-oil-production-national-emission>, <https://www.govinfo.gov/content/pkg/FR-2020-03-20/pdf/2020-04661.pdf> and <https://www.epa.gov/stationary-sources-air-pollution/boat-manufacturing-national-emission-standards-hazardous-air>

(7) Former Air Appointee Returns to EPA as Chief of Staff (March 16, 2020) – Mandy Gunasekara, an early appointee to the Office of Air and Radiation by then-Administrator Scott Pruitt, has returned to EPA to serve as Administrator Andrew Wheeler's Chief of Staff following the departure of Ryan Jackson, who served in the post until February 21, 2020. Gunasekara was a former staffer for Senator James Inhofe (R-OK) and served as the Principal Deputy Assistant Administrator in the EPA Office of Air from March 2017 until February 2019, when she resigned to launch a nongovernmental organization – the Energy 45 Fund – dedicated to communicating support for the Trump Administration's environmental agenda. For further information: <https://www.epa.gov/newsreleases/mandy-gunasekara-sworn-epa-chief-staff> and <https://youtu.be/hmKaLI6EfpE>

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