

## In this week's Washington Update:

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We also provide links to information on events taking place during the week ahead.

## ***This Week in Review***

**(1) NACAA Will Hold Virtual Spring Membership Meeting in May (March 28, 2020)** – NACAA announced that its Spring Membership Meeting, originally scheduled as an in-person gathering in Phoenix, Arizona on May 18-19, 2020, will proceed in the form of two half-day (3.25 hours) sessions on the originally scheduled dates using a webcast platform. NACAA cancelled the in-person meeting due to concerns regarding the COVID-19 pandemic. The two-part webcast will feature some of the most critical panels that had been planned for Phoenix. NACAA members, as well as our federal and multijurisdictional organization partners, are welcome to pre-register and to participate on May 18-19 at no cost. Registration details will be available soon. For further information: [http://www.4cleanair.org/sites/default/files/Documents/AGENDA-NACAA\\_Spring\\_Mtg\\_Webinar-2020.pdf](http://www.4cleanair.org/sites/default/files/Documents/AGENDA-NACAA_Spring_Mtg_Webinar-2020.pdf)

**(2) EPA Issues COVID-19 Memo Effecting Temporary but Broad Enforcement Discretion; Environmental Groups Respond (May 26, 2020)** – EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance issued a memorandum detailing the agency's intent to effect enforcement discretion during the COVID-19 pandemic. Citing "the travel and social distancing restrictions imposed by both governments and corporations or recommended by the Centers for Disease Control and Prevention to limit the spread of COVID-19," Susan

Parker Bodine articulates the agency's intent to relax provisions of its enforcement activities. Noting that the pandemic may affect the ability of an operation to meet enforceable limitations on air emissions, among other environmental harms, Bodine writes, "In general, the EPA does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the noncompliance." Bodine adds that where emissions regulations are exceeded EPA expects regulated facilities to comply with regulatory requirements and return to compliance as quickly as possible. She further notes that this policy is temporary but provided no information about the potential endpoint or the criteria under which EPA would reconsider the policy. Representatives of nearly two dozen environmental organizations, led by the Environmental Integrity Project, responded to the memo with a letter to Bodine in which they decry the broad latitude offered to potential violators: "We understand the coronavirus is a public health emergency that may require a flexible response from EPA. That response must be tailored to specific and appropriate circumstances and not offer a blanket waiver of requirements that many companies that are up and running may have no trouble meeting." They note further, "It is not clear why refineries, chemical plants, and other facilities that continue to operate and keep their employees on the production line will no longer have the staff or time they need to comply with environmental laws." For further information:

<https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf> and  
<https://environmentalintegrity.org/wp-content/uploads/2020/03/Letter-to-EPA-on-coronavirus-waivers.pdf>

**(3) EPA Issues Draft "Begin Actual Construction" Guidance for NSR Permitting (March 25, 2020)** – EPA released a draft guidance document titled, "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations." In it, the agency introduces a new interpretation of the phrase "begin actual construction" as it appears in rules implementing the New Source Review (NSR) permitting program. Those regulations provide that no owner or operator of a new major stationary source or a source undertaking a major modification shall "begin actual construction" before obtaining an NSR permit. The term "begin actual construction" is in turn defined to mean, "in general, initiation of physical, on-site construction activities on an emissions unit which are of a permanent nature." EPA's previous, longstanding interpretation of this language was most recently articulated in the 1995 "Seitz Letter," in which the agency opined that "prohibited (permanent and/or preparatory) preconstruction activities ... would include any construction that is costly, significantly alters the site, and/or [is] permanent in nature." Further, the Seitz Letter stated, the rules "reasonably prohibit any preconstruction 'intended to accommodate' an 'emissions unit' or which is an 'integral part of the source or modification.'" In its newly released draft guidance document EPA states that this previous interpretation "is considered by many industry stakeholders to be overly and unnecessarily restrictive." Upon review, the agency is adopting a revised interpretation that provides as follows: A source owner or operator may, prior to

obtaining an NSR permit, undertake physical, on-site activities – including activities that may be costly, that may significantly alter the site and/or are permanent in nature – *provided* that those activities do not constitute physical construction on an *emissions unit*, as the term is defined in 40 C.F.R. § 52.21(b)(7) (“any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant...”). Further, an “installation necessary to accommodate” the emissions unit at issue is not considered part of that emissions unit, and construction activities that involve such “accommodating installations” may be undertaken in advance of obtaining an NSR permit. EPA argues that the rationale for its prior interpretation – that it could become more difficult to deny issuance of a permit once a source has placed significant “equity in the ground” – is “of less concern today.” On the contrary, EPA asserts, it is reasonable to imagine that the *more* “equity” a permit applicant places in the ground, “the *less* leverage, as a practical matter, that applicant would retain in the permitting process.” The document does not provide guidance on how the specific parameters of an emissions unit are to be ascertained for purposes of determining whether a given activity constitutes “construction . . . on an emissions unit” – this analysis is left for the permitting authorities and sources to work through. EPA notes at the conclusion of the document that it is an “interpretive rule” not subject to notice-and-comment rulemaking and does not create binding requirements on permitting authorities, except for EPA Regional offices and air agencies exercising delegated authority to issue federal PSD permits. “Depending on the particular regulatory context and wording of the applicable [State Implementation Plan (SIP)], air agencies implementing a SIP-approved program may be able to apply this revised interpretation as well,” the agency adds. The draft guidance is subject to an informal public comment period. Comments may be submitted via a form on EPA’s website through May 11, 2020. For further information: <https://www.epa.gov/nsr/forms/draft-guidance-interpretation-begin-actual-construction-under-new-source-review>

**(4) API Seeks Relief for Oil and Natural Gas Industry Amid COVID-19 Pandemic; EPA Temporarily Waives Summertime Gasoline Volatility Requirements and Promises Additional Relief (March 20, 23 & 27, 2020) –**

The American Petroleum Institute (API) sent letters to President Donald Trump and EPA Administrator Andrew Wheeler seeking relief in the form of temporary “non-essential compliance discretion” for the oil and natural gas industry during the COVID-19 pandemic. In his March 20, 2020 letter to President Trump, Michael J. Sommers, President and Chief Executive Officer of API, writes that such discretion – being sought from numerous federal agencies and/or their state counterparts – should be applied to obligations related to “recordkeeping, training or other non-safety critical requirements” due to potential “limited personnel capacity to manage the full scope of the current regulatory requirements.” With respect to EPA, Sommers identifies waivers of seasonal fuel requirements and relevant associated state waivers as well as routine testing and reporting requirements as types of relief required. In a March 23, 2020 letter to Administrator Wheeler, Frank J. Macchiarola, a Senior Vice President of API, provides a seven-page EPA-specific list of API member company priority issues for relief and asks that, as necessary,

EPA coordinate with its state agency counterparts. Macchiarola specifically requests that EPA “publicly provide guidance related to performance delays tied to challenges with the pandemic” relative to three categories of constraints: 1) administrative constraints while working remotely, 2) physical constraints with on-site testing/monitoring requirements and 3) operability of assets. Among the challenges API lists in its seven-page document, and for which it seeks relief, are timely project permits and permit renewals; periodic certification and reporting; compliance with seasonal fuel requirements; fugitive Leak Detection and Repair; greenhouse gas reporting; Benzene Waste Operations; New Source Performance Standards and Maximum Achievable Control Technology standards; Continuous Emission Monitoring Systems and stack tests; cooling tower sampling; and fence-line monitoring. On Friday, EPA announced it will temporarily waive the May 1, 2020 summertime low-volatility requirements and blending limits for gasoline due to the sharp decline in demand for gasoline as a result of the COVID-19 pandemic, which has led to an upstream build-up of winter gasoline that that will prevent retailers and wholesalers from loading summer-compliant gasoline into storage tanks, thus causing a summer gasoline shortage. This waiver is in effect through May 20, 2020; EPA says that it will monitor the adequacy of gasoline supplies and “should conditions warrant, may modify or extend this waiver at a later date.” EPA also announced that it does not intend to unilaterally revisit or rescind any small refinery exemptions granted for prior compliance years and that it plans “to develop an appropriate implementation and enforcement response to the Tenth Circuit’s decision in *RFA v. EPA* once appeals have been resolved and the court’s mandate has been issued.” The agency also plans to extend the Renewable Fuel Standard compliance date for small refineries; this action is forthcoming.

For further information:

[http://www.4cleanair.org/sites/default/files/Documents/API\\_Letter\\_to\\_Pres\\_Asking\\_for\\_Relief-032020.pdf](http://www.4cleanair.org/sites/default/files/Documents/API_Letter_to_Pres_Asking_for_Relief-032020.pdf),

[http://www.4cleanair.org/sites/default/files/Documents/API-Second\\_Letter\\_to\\_Pres-Asking\\_for\\_Relief-032320.pdf](http://www.4cleanair.org/sites/default/files/Documents/API-Second_Letter_to_Pres-Asking_for_Relief-032320.pdf)

and

<https://www.epa.gov/newsreleases/epa-announces-steps-protect-availability-gasoline-during-covid-19-pandemic>

**(5) EPA Extends Application Deadline for Exchange Network Grants (March 20, 2020)** – Due to potential applicant difficulties associated with the COVID-19 pandemic, EPA is extending the application due date for fiscal year 2020 National Environmental Information Exchange Network grants. Applications must now be submitted by 11:59 p.m. Eastern time on Friday, April 10, 2020. The Exchange Network (EN) was launched in 2002 as an inter-governmental collaborative partnership of EPA, states, territories and tribes to foster better environmental management and decision-making through increased access to timely, high-quality environmental information. The Exchange Network Grant Program seeks project applications that 1) facilitate sharing of environmental data, especially through shared and reusable services; 2) streamline data collection and exchanges to improve its timeliness for decision making; 3) increase the quality and access to environmental data through discovery, publishing, outbound and analytical services so it is more useful to environmental managers; 4) develop

foundational EN shared services to reduce burden and avoid costs for co-regulators and the regulated community; and 5) expand and improve participation in the EN by strengthening the requisite information management and technology capabilities for interested parties to fully participate in the EN. EPA has suggested that state and local air agencies could apply for grant funding to integrate their systems with the Combined Air Emissions Reporting Common Form or to assist with challenges in using the Emissions Inventory System. For further information: [https://www.epa.gov/sites/production/files/2020-02/documents/fy20\\_exchange\\_net\(\)\\_444work\\_solicitation\\_notice\\_-\\_feb.4v2.2020\\_-\\_final.pdf](https://www.epa.gov/sites/production/files/2020-02/documents/fy20_exchange_net()_444work_solicitation_notice_-_feb.4v2.2020_-_final.pdf)

**(6) EPA IG to Evaluate Status of SIP Submittals and Approvals (March 25, 2020)** – EPA’s Office of Inspector General (OIG) announced plans to evaluate the status of submittals and approvals of State Implementation Plans (SIPs) under the Clean Air Act. In a memorandum to Anne Idsal, EPA Acting Assistant Administrator for the Office of Air and Radiation, James Hatfield, Director of the Air Directorate of the OIG Office of Audit and Evaluation writes, “Although this evaluation is a discretionary, self-initiated assignment, the Inspector General has received requests related to this topic from members of Congress, and we have considered those requests when planning the scope of work.” OIG’s objectives are to determine the following: 1) the number of SIPs awaiting EPA approval, 2) factors that are causing delays in SIP approvals, 3) the extent to which states have not submitted required SIPs to EPA, 4) the potential impact of delays in SIP processing on achieving the National Ambient Air Quality Standards and 5) the steps EPA is taking to address delays in SIP processing. For further information: <https://www.epa.gov/office-inspector-general/notification-status-clean-air-act-state-implementation-plan-submittals-and>

**(7) Congress Passes Massive Pandemic Relief Package (March 25 & s7, 2020)** – The Senate and House of Representatives – by a vote of 96 to 0 and by voice vote, respectively – passed a \$2-trillion relief package containing emergency supplemental appropriations to address the COVID-19 pandemic. The President is expected to sign it. Part of the measure – H.R. 748, the “Coronavirus Aid, Relief, and Economic Security (CARES) Act – includes \$340 billion in funds for federal agencies, including EPA. The agency is slated to receive \$7.2 million for research efforts related to COVID-19; staffing and associated costs for expediting registrations and other actions tied to addressing coronavirus; cleaning and disinfecting EPA facilities; and enhancing the agency’s telework infrastructure. Among the measures that did not make it into the final bill were provisions backed by some Members of Congress and environmental organizations to require airlines receiving federal aid under the legislation to offset carbon emissions. For further information:

[https://www.appropriations.senate.gov/imo/media/doc/Coronavirus%20Supplemental%20Appropriations%20Summary\\_FINAL.pdf](https://www.appropriations.senate.gov/imo/media/doc/Coronavirus%20Supplemental%20Appropriations%20Summary_FINAL.pdf),

<https://www.appropriations.senate.gov/news/senate-passes-critical-bipartisan-legislation-to-address-national-coronavirus-crisis>

and

<https://www.appropriations.senate.gov/news/shelby-urges-swift-passage-of-comprehensive-coronavirus-bill>

**(8) Senate EPW Considers HFC Phase-Out Bill Without Formal Hearings (March 25, 2020)**

– The Senate Committee on Environment and Public Works (EPW) announced it will forego an in-person hearing on a bill that includes provisions to phase out hydrofluorocarbons (HFCs) and, instead, accept written testimony from interested parties and conduct Q&A in writing. EPW has been considering a bill – S. 2754, the American Innovation and Manufacturing Act of 2019 – that includes provisions establishing a 10-year phase out of HFCs. These chemicals are sometimes used as refrigerants, replacing alternatives that were banned under the Montreal Protocol treaty phasing out chemicals that deplete stratospheric ozone. However, HFCs are also known to have high potential to effect climate damage and are being phased out under the Kigali Amendments to the Montreal Protocol. The HFC phase-out provisions included in S. 2754 were the subject of controversy earlier this month when, on a bipartisan basis, they were attached to comprehensive energy legislation that subsequently failed to pass (see related article in the March 13, 2020 *Washington Update*). The Senate EPW had scheduled a hearing to consider the HFC provisions separately, however due to the COVID-19 pandemic the hearing has been replaced with a process allowing for the electronic submission of written testimony from 9:00 a.m. (ET) on Wednesday, March 25, 2020, until 4:00 p.m. (ET) on Wednesday, April 8, 2020, and the electronic exchange of written questions and answers for the record.

For further information:

<https://www.epw.senate.gov/public/index.cfm/hearings?ID=AD135031-18BB-4802-BE96-FAEE3ABDF120> and <https://www.congress.gov/bill/116th-congress/senate-bill/2754?q=%7B%22search%22%3A%5B%22s+2754%22%5D%7D&s=1&r=1>

**(9) Petitioners and Petitioner-Intervenors File Reply Briefs in Litigation Challenging EPA's Denial of New York's Section 126 Petition (March 19, 2020)**

– Petitioners and petitioner-intervenors filed, in the U.S. Court of Appeals for the District of Columbia Circuit, reply briefs in litigation challenging EPA's denial of New York's petition, filed under Clean Air Act Section 126(b), which sought EPA action to compel emission reductions from upwind sources that contribute to ozone pollution in New York. In their opening brief, the petitioners – New York, New Jersey and the City of New York – argue that EPA's pervasive reliance on the Cross-State Air Pollution Rule Update and Close-Out rendered the agency's denial of New York's petition unlawful and arbitrary and capricious; EPA's Step One denial arbitrarily ignored current and ongoing air quality problems within the New York metropolitan area; EPA's Step Three denial applied an unreasonable burden to New York's petition and ignored available emission reductions; and a deadline for EPA action following vacatur and remand is necessary and appropriate. Petitioner-intervenors – Adirondack Counsel, Serra Club and Environmental Defense Fund – argue in their brief that New York's petition advances beyond Step One for the 2008 and 2015 ozone standards; EPA's denial of New York's petition at Step Three is incompatible with the text and structure of the Clean Air Act as well as D.C. Circuit precedent; EPA fails to confront evidence of highly cost-

effective emission reductions from dozens of sources in New York's petition; and petitioners' arguments regarding *Wisconsin* and *New York II* are properly before this court. For further information:

[http://www.4cleanair.org/sites/default/files/Documents/Litigation-Petitioners Reply Brief-Case Challenging EPA Denial of NYs 126 Petition-031920.pdf](http://www.4cleanair.org/sites/default/files/Documents/Litigation-Petitioners%20Reply%20Brief-Case%20Challenging%20EPA%20Denial%20of%20NYs%20126%20Petition-031920.pdf) and [http://www.4cleanair.org/sites/default/files/Documents/Litigation-Petitioner-Intervenors Reply Brief-Case Challenging EPA Denial of NYs 126 Petition-031920.pdf](http://www.4cleanair.org/sites/default/files/Documents/Litigation-Petitioner-Intervenors%20Reply%20Brief-Case%20Challenging%20EPA%20Denial%20of%20NYs%20126%20Petition-031920.pdf)

**(10) EPA Publishes Final Risk and Technology Review Standards for Municipal Solid Waste Landfills (March 26, 2020)** – EPA published the final Risk and Technology Review standard for Municipal Solid Waste Landfills that had been announced on February 25, 2020 (85 Fed. Reg. 17,244). EPA has determined that the remaining risks are acceptable and that there are no new developments in controls that would warrant additional requirements. EPA is clarifying that the standards are applicable during periods of startup, shutdown and malfunction. Additionally, the agency is incorporating several minor amendments, including measures to reorganize the existing rule to reduce overlap in the applicability of and promote consistency with the 1996 and 2016 New Source Performance Standards and Emission Guidelines. For further information: <https://www.govinfo.gov/content/pkg/FR-2020-03-26/pdf/2020-04800.pdf> and <https://www.epa.gov/stationary-sources-air-pollution/municipal-solid-waste-landfills-national-emission-standards>

**(11) NACAA Requests Comment Period Extension for Supplemental Proposed Science Transparency Rule (March 20, 2020)** – NACAA sent a letter to EPA Administrator Andrew Wheeler requesting that he extend the comment period on the Supplemental Notice of Proposed Rulemaking (SNPRM) titled, "Strengthening Transparency in Regulatory Science." This SNPRM was published in the *Federal Register* on March 18, 2020 (85 Fed. Reg. 15,396), at which time the agency set an April 17, 2020 deadline for public comments. The proposal was first published, and comments accepted, two years ago, in April 2018. In the letter to Administrator Wheeler, NACAA requests an additional 60 days to provide comment, with a deadline no earlier than June 17, 2020. Publicly (though not in response to NACAA's request), EPA has stated that no extension is necessary as the federal government website for submitting public comments is functioning. NACAA writes in its letter that, "Simply having the ability to submit a letter electronically via the regulations.gov website is wholly insufficient to afford 'business as usual' review and prudent comment – we are in a time of global pandemic, agency lockdowns, and social distancing to protect the health of Americans, and smart engagement between EPA and the states will require patience and pragmatic accommodation of this reality. In order to ensure that state and local agencies have an adequate opportunity to review and respond to the proposal, additional time beyond the 30-day comment period is necessary." For further information: <http://4cleanair.org/sites/default/files/resources/NACAA%20Science%20Transpare>

[ncy%20SNPRM%20Extension%20Letter.pdf](#)  
<https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05012.pdf>

and

### ***The Week Ahead***

- [EPA Clean Air Act Advisory Committee's Mobile Sources Technical Review Subcommittee Virtual Meeting](#) – March 31, 2020

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