

## 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) Opening Briefs Filed in Cases Challenging ACE Rule (April 17 & April 20, 2020)** – Seven opening briefs were filed on behalf of petitioners in consolidated cases – under lead case *American Lung Association v. EPA* (No. 19-1140) – opposing the Affordable Clean Energy (ACE) Rule in the U.S. Court of Appeals for the District of Columbia Circuit. Opening briefs were delayed until April 17, 2020 due to the COVID-19 pandemic. In their brief, public health and environmental petitioners argue that EPA does not address its endangerment finding obligations for CO<sub>2</sub>; that Clean Air Act (CAA) Sec. 111 does not bar generation fuel shifting (as was motivated by the Clean Power Plan); and that ACE does not set emission reduction requirements, is arbitrary and capricious and unlawfully deregulates oil and gas plants. State and municipal petitioners (including New York, California, Colorado, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, the District of Columbia, and the Cities of Boulder, Chicago, Los Angeles, New York, Philadelphia and South Miami) argue in their brief that CAA Sec. 111 allows for a wide range of approaches; that EPA's restrictive reading of Sec. 111 is not supported; and that the ACE rule does not weigh pollution reduction, fails to set emission reductions, contravenes Sec. 116 of the CAA and unlawfully deregulates emissions from fossil gas-fired power plants. A group of fossil fuel-producing and -using entities and allied conservative think tanks filing as Robinson Enterprises, Inc. et al. argues in its brief that Sec. 111 is an unlawful substitute for using the NAAQS to regulate CO<sub>2</sub>; that EPA made no endangerment finding specific to power plants; and that these plants are already regulated under CAA Sec. 112. A group of electric

utilities and trade association allies argues that EPA's reading of Sec. 111 is overly restrictive; that Sec. 111 can reasonably include generation fuel shifting; that trading and averaging should not be excluded from ACE compliance; and that EPA has unlawfully ignored its authority to approve more protective state plans. A group of clean energy trade association petitioners argues that the CAA supports generation fuel shifting as the best system of emission reductions (BSER) and that EPA arbitrarily dismissed onsite "emissions-reducing utilization" such as energy storage and zero emission generation as a compliance pathway. Petitioners grouped as the Biogenic CO<sub>2</sub> Coalition argue in their brief that EPA blocking biomass co-firing as part of BSER is inconsistent with the CAA and technically unworkable and intrudes on the authority of states. Finally, a group of coal industry petitioners (whose case *Westmoreland Mining Holdings, LLC v. EPA* is among the consolidated cases) argues that EPA has never developed an endangerment finding for coal plants and that coal-fired power plants are already regulated under Sec. 112. This week, *amicus curiae* ("friend of the court") briefs were filed by Thomas C. Jorling (a former congressional staff member and key author of the 1970 Clean Air Act), a group of National Parks conservation advocates, a group of administrative law professors, a coalition of medical societies and associations, a grid experts group, the New York University School of Law's Institute for Policy Integrity, a group of climate scientists and a local government coalition (including the National League of Cities, U.S. Conference of Mayors and 23 additional cities and mayors). Eight additional *amicus* briefs, predominantly siding with the petitioners, are expected by the 12 AM deadline on April 24. For further information: <http://climatecasechart.com/case/american-lung-association-v-epa/>

**(2) EPA Temporarily Relaxes Continuous Emission Monitoring Quality Assurance Testing Requirements During COVID-19 National Emergency (April 22, 2020)** – To reduce the risk of exposure to COVID-19 by power plant operators and other essential personnel, EPA published in the *Federal Register* (85 Fed. Reg. 22,362) an interim final rule that temporarily amends the 40 C.F.R. Part 75 regulations applicable to sources that monitor and report emissions using continuous emission monitoring systems (CEMS) under the Acid Rain Program, Cross-State Air Pollution Rule and/or NO<sub>x</sub> SIP Call. Under Part 75, if a facility misses a deadline for a required CEMS quality-assurance test, it must report substitute data that is higher than what the source typically emits. The temporary amendments provide that if an affected unit fails to complete a required test by the applicable deadline because of travel, plant access or other safety restrictions implemented to address the COVID-19 national emergency, and if the unit's actual monitored data would be considered valid if not for the delayed test, the unit may temporarily continue to report actual monitored data instead of substitute data. EPA states in the preamble, "The amendments do not suspend emissions monitoring or reporting requirements or alter emissions standards under any program, and EPA expects the amendments not to cause any change in emissions levels." The interim final rule was issued without prior notice or opportunity for public comment under the "good cause" exception to the Administrative Procedure Act and became effective immediately upon publication

in the *Federal Register* (April 22, 2020). The amendments promulgated in the rule will apply from March 13, 2020, the date on which the President declared COVID-19 to be a “national emergency,” until 60 days after the national emergency is terminated by Congress or the President, but no later than 180 days from the April 22 effective date of the rule (i.e., October 19, 2020). EPA will accept public comments on the interim final rule through May 22, 2020. For further information: <https://www.govinfo.gov/content/pkg/FR-2020-04-22/pdf/2020-08581.pdf> and <https://www.epa.gov/airmarkets/emission-monitoring-regulatory-actions>

**(3) In Opening Brief EPA and NHTSA Defend Regulatory Requirements for Heavy-Duty Truck Trailers (April 21, 2020)** – Respondents EPA and NHTSA filed their opening brief in the U.S. Court of Appeals for the District of Columbia Circuit in litigation in which the Truck Trailer Manufacturers Association (TTMA) is challenging provisions of the federal agencies’ 2016 joint “Phase 2 Rule” (setting greenhouse gas and fuel efficiency standards for heavy-duty trucks) which, for the first time, make heavy-duty truck emission and fuel economy standards applicable to trailers. EPA and NHTSA counter the allegations made by TTMA in its February 10, 2020 opening brief (see related article in the February 8-14, 2020 *Washington Update*), arguing that 1) NHTSA reasonably exercised its discretion to conclude that the Energy Independence and Security Act authorizes fuel efficiency standards for trailers, 2) the Clean Air Act authorizes the regulation of greenhouse gas emissions from tractor-trailers, tractor-trailers fall within the CAA’s definition of “motor vehicle” and trailer manufacturers are among multiple “manufacturers” of tractor-trailers and 3) the two federal agencies’ respective portions of the Phase 2 Rule function independently and are severable. EPA and NHTSA conclude that TTMA’s petition for review should be denied. [http://www.4cleanair.org/sites/default/files/Documents/Litigation-Trailers-TTMAvEPA-Respodents\\_Brief-042120.pdf](http://www.4cleanair.org/sites/default/files/Documents/Litigation-Trailers-TTMAvEPA-Respodents_Brief-042120.pdf)

**(4) Democratic Lawmakers Pressure EPA About COVID-19 Enforcement Discretion Policy (April 21-22, 2020)** – Members of Congress sent four letters to EPA challenging aspects of the agency’s March 26, 2020 memorandum outlining its open-ended enforcement discretion policy during the COVID-19 pandemic. In an April 21, 2020 joint letter leaders of the U.S. House of Representatives’ Energy and Commerce, Transportation and Appropriations Committees raise concerns and ask EPA to respond to a number of questions about the policy and its effects on EPA’s mission. “EPA’s current policy resets the default, where instead of an affirmative duty on regulated entities to comply, the burden is now upon EPA to first request information and then determine whether an entity’s non-compliance meets EPA’s criteria for discretion,” write Energy and Commerce Chairman Frank Pallone (D-NJ), Transportation and Infrastructure Chairman Peter DeFazio (D-OR) and Interior-EPA Appropriations Subcommittee Chairwoman Betty McCollum (D-MN). In their April 22, 2020 letter they seek modifications to EPA’s policy and clarification on the lack of an end-date, the lack of notification requirements even if there is a threat to public health, insufficient transparency provisions and EPA’s ability to assess compliance. “Despite EPA’s stated commitment to environmental compliance, we are concerned your policy creates an expectation that companies

across the country now have license to violate our environmental laws, and that such violations will be forgiven if the companies argue they were supposedly 'caused' by COVID-19. In the meantime, unlawful pollution in response to the policy will lead to public health harms that cannot be undone by future EPA enforcement efforts," the letter reads. The signatories ask for a response from EPA by May 5, 2020. In a second letter, dated April 22, 2020, 22 Democratic members of the U.S. House of Representatives Oversight and Reform Committee challenge the need for the enforcement discretion policy and seek transparency about companies requesting enforcement waivers and no-action assurances on a rolling basis. They also request information about what industry groups met or communicated with EPA prior to March 26 that may have shaped the policy. The 22 committee members, led by Chairwoman Carolyn Maloney (D-NY), ask EPA to provide documentation and a briefing by May 6. In a third letter, dated April 21, 2020, Michigan Senators Gary Peters and Debbie Stabenow raise questions about the impact of COVID-19 on minority and low-income populations: "We urge EPA to more narrowly tailor the guidance, and to recommend best practices to regulated entities where possible in order to prevent unnecessary gaps in complying with public health and environmental standards." Finally, in a fourth letter, dated April 22, 2020, 84 members of the U.S. House of Representatives – led by Rep. Bobby Rush (D-IL), Chairman of the House Energy and Commerce Subcommittee on Energy – explore the impact of EPA regulatory reforms on minority communities. The signatories describe EPA's enforcement discretion actions as "unacceptable," pointing to public health studies that indicate links between particulate matter pollution and COVID-19 mortality: "Keeping in mind the connectivity of these studies, minorities account for 60 percent of all U.S. COVID-19 deaths despite representing only 40 percent of the current population." For further information: [https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/EPA.2020.4.21.%20Letter%20re%20Enforcement.OI\\_0.pdf](https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/EPA.2020.4.21.%20Letter%20re%20Enforcement.OI_0.pdf), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-04-22.Dem%20Members%20of%20COR%20to%20Wheeler%20-%20EPA%20re%20Environmental%20Laws%20FINAL.pdf>, <https://www.peters.senate.gov/imo/media/doc/200421%20COVID19%20MI%20environmental%20equity%20letter.pdf> and <https://rush.house.gov/sites/rush.house.gov/files/documents/Rush%20Letter%20to%20EPA%20re%20Air%20Pollutants%20and%20COVID-19.pdf>

**(5) Two More Studies Link Exposure to Air Pollution with COVID-19 Deaths (April 20, 2020)** – Two studies recently posted online explore the association between air pollution and death from COVID-19. In the first, titled "Assessing nitrogen dioxide (NO<sub>2</sub>) levels as a contributing factor to coronavirus (COVID-19) fatality" and published in *Science of the Total Environment*, Yaron Ogen of Martin Luther University Halle-Wittenberg in Germany examines the relationship between long-term exposure to NO<sub>2</sub> and COVID-19 fatalities. By conducting a regional-scale spatial analysis and comparing the results with the number of COVID-19 deaths in Italy, Spain, France and Germany, Ogen found that of the 4,443 fatalities, 3,487 (78 percent) occurred in five regions located in northern Italy and central Spain. These same five regions also have the highest NO<sub>2</sub> concentrations

as well as airflow conditions that prevent efficient dispersion of air pollution. Ogen concludes that his results “indicate that the long-term exposure to this pollutant may be one of the most important contributors to fatality caused by the COVID-19 virus in these regions and maybe across the whole world.” In the second study, “Air Pollution and COVID-19 in England,” which has not yet undergone peer review, five researchers at the University of Cambridge compared COVID-19 cases and deaths through April 8, 2020 to monitored air pollution data from 120 sites in different regions of England over the same time period. In doing so, they found a positive correlation between NO<sub>2</sub> and NO<sub>x</sub> and COVID-19 cases and morbidity. Interestingly, the researchers “found a consistent inverse association between ozone ambient levels” and the number of COVID-19 cases and deaths. The lowest ozone levels occurred in highly urbanized areas, such as London and the Midlands. The researchers state in their study that “[g]iven the highly reactive nature of ozone, decreased levels in these regions may indicate increased conversion of ozone to secondary gaseous species, a phenomenon previously reported for areas with increased traffic. For instance, ozone can readily react with other gaseous species and particulates in the environment, resulting in the formation of respiratory irritants, such as terpene derivatives. Therefore, the detrimental effects of low ozone concentration observed in this study could be linked to increased generation of ozone oxidation products. Further research is necessary to determine the exact identity of these pollutants and their effect on COVID-19 severity and progression.” They note also that their study, combined with other recent studies, suggests that “poor air quality increases the lethality of COVID-19. Future and more detailed studies may further elucidate these observations by addressing potential confounders, including socioeconomic status, comorbidities, age, race, and differences between regional health regulations and their ICU capacities. Nonetheless, our study highlights the importance of continuous implementation of existing air pollution regulations for the protection of human health, both in relation to the COVID-19 pandemic and beyond.”

For further information:

<https://www.sciencedirect.com/science/article/pii/S0048969720321215> and  
[http://www.4cleanair.org/sites/default/files/Documents/NO2\\_and\\_COVID-19-Cambridge\\_Study-041720.pdf](http://www.4cleanair.org/sites/default/files/Documents/NO2_and_COVID-19-Cambridge_Study-041720.pdf)

#### **(6) Court Rules EPA Must Redo Pulp Mill Standards to Include All HAPs**

**(April 21, 2020)** – The U.S. Court of Appeals for the District of Columbia Circuit ruled that EPA’s air toxics standards for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills must include limits for all the listed hazardous air pollutants (HAPs) the source category emits (*Louisiana Environmental Action Network v. EPA*, No. 17-1257). The Maximum Achievable Control Technology (MACT) standard that EPA issued in 2001 for pulp mills did not cover certain pollutants. According to the litigants, the omitted pollutants included mercury, dioxins and acid gases such as hydrogen chloride and hydrogen fluoride. When EPA completed its Risk and Technology Review (RTR) in 2017, the agency did not add limits for the missing pollutants. The litigants argued that the Clean Air Act requires EPA to address all the HAPs the source category emits, while EPA contended that it was not obligated to include in



the RTR pollutants not addressed by the original MACT standard. Furthermore, the agency argued, it did not have time to add these pollutants due to the court-ordered schedule for completing the RTR. The court sided with the litigants, stating, “We... remand the 2017 Rule without vacatur, and direct EPA to set limits on the listed air toxics that pulp mill combustion sources are known to emit but that EPA has yet to control.” For further information: [http://www.4cleanair.org/sites/default/files/Documents/DC\\_Circuit\\_Decision-EPA\\_Pulp\\_Mill\\_Standards-042120.pdf](http://www.4cleanair.org/sites/default/files/Documents/DC_Circuit_Decision-EPA_Pulp_Mill_Standards-042120.pdf) and <https://www.epa.gov/stationary-sources-air-pollution/kraft-soda-sulfite-and-stand-alone-semichemical-pulp-mills-mact-ii>

**(7) DOJ Files New Arguments Opposing California-Quebec GHG Trading (April 21, 2020)** – For a second time, the U.S. Department of Justice (DOJ) petitioned the U.S. District Court for the Eastern District of California for summary judgement in its case against California over the greenhouse gas (GHG) emissions trading underway between the Golden State and the Canadian province of Quebec. DOJ initially filed its suit, *U.S. v. California et al.* (No. 2:19-cv-02142), in October 2019, arguing that the trading of CO<sub>2</sub> allowances facilitated by the Western Climate Initiative (WCI) constituted a compact or treaty that is an exclusive federal prerogative and would exceed a state’s constitutional authority. On March 12, 2020, the judge in the case dismissed those arguments. This week, DOJ filed a new petition for summary judgement asserting that the cap-and-trade arrangement with Quebec undercuts the Administration’s leverage in international policymaking and conflicts with its withdrawal of the U.S. from the Paris Agreement on climate change. California’s cap-and-trade program has been active since 2012 and, through the WCI, California agreed with Quebec in 2013 to hold joint auctions and make allowances in their individual cap-and trade programs interchangeable. The Paris Agreement was penned in 2016; President Trump announced that the U.S. withdrawal would be effective in November 2020. For further information: <http://www.4cleanair.org/sites/default/files/resources/second%20CAQC%20DOJ%20summary%20April%202020.pdf>

**(8) EPA Publishes Technical Corrections to 2012 Light-Duty Vehicle GHG Program (April 23, 2020)** – EPA published in the *Federal Register* (85 Fed. Reg. 22,609) a final rule that makes two technical corrections to the light-duty vehicle greenhouse gas (GHG) emission standards adopted in 2012. The first technical correction relates to how automakers calculate credits for the GHG program’s optional advanced technology incentives and ensures that the manufacturers receive the appropriate amount of credits for electric vehicles, plug-in hybrid electric vehicles, fuel cell electric vehicles and natural gas-fueled vehicles. The second technical correction relates to how manufacturers must calculate certain types of off-cycle credits. EPA states in the final rule, “Both of these corrections allow the program to be implemented as originally intended. The corrections are not expected to result in any additional regulatory burdens or costs.” The provisions of the 2012 light-duty vehicle rule that are the focus of these final technical corrections carried over, unchanged, to the “SAFE” Vehicles Rule

announced on March 30, 2020; therefore, the technical corrections will apply to the corresponding provisions in that rule. For further information: <https://www.govinfo.gov/content/pkg/FR-2020-04-23/pdf/2020-07098.pdf>

**(9) ALA Releases *State of the Air 2020* (April 21, 2020)** – The American Lung Association (ALA) issued *State of the Air* (SOTA) 2020, the 21st release of the group’s annual “report card” on national air quality. To compile SOTA 2020, ALA reviewed ozone and particulate matter (PM) air pollution monitoring data collected by local, state, tribal and federal governments in 2016, 2017 and 2018; the grades assigned by ALA are based on an area’s monitored air quality not on the efforts of the state or local regulators. According to ALA, during the years reviewed, “nearly half of the nation’s population – 150 million people – lived with and breathed polluted air, placing their health and lives at risk.” The group also found “that climate change continues to make air pollution worse, with many western communities again experiencing record-breaking spikes in particle pollution due to wildfires. Amid the COVID-19 pandemic, the impact of air pollution on lung health is of heightened concern.” With respect to daily levels of fine particulate matter (PM<sub>2.5</sub>) ALA found that more cities experienced more days with PM<sub>2.5</sub> spikes. Nine western cities experienced more such days than ever reported, which ALA attributes, in large part, to smoke from the 2018 wildfires and, in some locations, to smoke from residential wood heating devices. Regarding annual levels of PM<sub>2.5</sub>, ALA reports that progress toward attainment continued in many areas with some experiencing their best-ever levels. However, 13 of the 26 cities with the highest annual levels of PM<sub>2.5</sub> experienced higher annual levels: “Some cities had so many days of short-term particle pollution spikes that the sheer number led to them having higher annual averages as well.” When it comes to smog, ALA reports that “significantly” more people were exposed to unhealthy levels of ozone from 2016 through 2018 than during the three-year periods studied for the past three SOTA reports: “This shows the changing climate’s impact on air quality, as ozone pollution worsened during the global record-breaking heat years tracked in the 2020 report.” Nonetheless, one area that is among the most ozone-polluted cities experienced its best ozone levels ever. ALA also includes in its report key threats and opportunities facing the nation with respect to making progress toward cleaner, more healthful air. The opportunity identified by ALA is congressional action on climate change to reduce emissions. The threats ALA identifies are more numerous: 1) weakening of the Clean Air Act, 2) failure to strengthen outdated ozone and PM standards, 3) impacts of weakened clean car standards, 4) undermining of the Mercury and Air Toxics Standards, 5) censoring of the science to be considered by EPA when making decisions, 6) “dangerously weak” standards due to replacement of the Clean Power Plan, 7) removal of limits on methane emissions from the oil and gas sector, 8) insufficient federal funding for cleaning up the air, including for state, local and tribal grants and 9) erosion of Clean Air Act enforcement and compliance requirements and New Source Review provisions. For further information: <http://www.stateoftheair.org/> and <http://www.stateoftheair.org/assets/SOTA-2020.pdf>

## ***The Week Ahead***

- Congress in Recess – Through May 4, 2020
  - [EPA Meeting of the Clean Air Scientific Advisory Committee and CASAC Secondary NAAQS Review Panel for Oxides of Nitrogen and Sulfur](#), via Public Teleconference – April 27, 2020
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