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We also provide links to information on events scheduled for the week ahead.

This Week in Review

(1) NACAA Comments on EPA's Draft "Begin Actual Construction" Guidance for NSR Permitting (May 11, 2020) – NACAA submitted comments on EPA's draft guidance document, *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations*. In the draft guidance, EPA introduces a new interpretation of language in the New Source Review (NSR) regulations providing that no owner or operator shall "begin actual construction" of a new major stationary source or major modification before obtaining an NSR permit. Under EPA's new interpretation of "begin actual construction," 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 the NSR rules. 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 before the owner or operator obtains an NSR permit. NACAA's comments emphasize four concerns with the draft guidance: 1) the new interpretation does not comport with the full regulatory definition of

“begin actual construction”; 2) EPA’s failure to include information or criteria to help state and local permitting authorities delineate what types of construction do and do not constitute construction on an “emissions unit” makes the guidance difficult to implement; 3) the revised interpretation undermines stakeholder participation in the preconstruction permitting process; and 4) state and local agencies remain concerned that owners and operators may become less willing and/or able to make design changes to a facility to implement NSR requirements once they have placed significant “equity in the ground.” For further information: http://www.4cleanair.org/sites/default/files/Documents/FINAL-NACAA-Begin-Actual-Construction-Comments_051120.pdf

(2) EPA to Propose Additional Time for Sale of Step 1 Residential Wood Heaters (May 15, 2020) – On April 30, 2020, EPA sent a proposed rule, “Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces Amendment,” to the Office of Management and Budget for interagency review. NACAA has learned that OMB will sign off on and return the proposal to EPA imminently and it is expected that EPA will sign and release it today with a 45-day public comment period. It is our understanding that the proposal will provide residential wood heater (RWH) retailers an additional 60 days, from October 1 through November 30, 2020, to sell Step 1 units, despite the May 15, 2020 deadline to sell such devices (see related article below, titled “Senator Carper Questions EPA Administrator About Forthcoming Proposal to Amend Residential Wood Heater NSPS”). The agency is proposing additional time for Step 1 sales at the request of the RWH industry, which claims that retailers lost time to sell off their Step 1 stock by May 15, 2020 when they were forced to shut down in mid-March due to COVID-19. We further understand that EPA will state in the proposal that between now and October 1 enforcement of the May 15 deadline will be a “low priority.” We will provide additional information as it becomes available.

(3) Senator Carper Questions EPA Administrator About Forthcoming Proposal to Amend Residential Wood Heater NSPS (May 8, 2020) – Senator Tom Carper, Ranking Member of the Senate Environment and Public Works Committee, sent a letter to EPA Administrator Andrew Wheeler inquiring about the agency’s recent submittal to the Office of Management and Budget (OMB) of a proposed rule, “Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces Amendment.” OMB’s Office of Information and Regulatory Affairs accepted the proposal for interagency review on April 30, 2020. In his letter, Carper cites press reports stating that EPA is pursuing this proposal to provide relief requested by residential wood heater (RWH) retailers who shut down in mid-March due to COVID-19 and, therefore, were unable to sell off their remaining Step 1 units by the May 15, 2020 deadline established five years ago in the RWH New Source Performance Standards (NSPS) finalized by EPA in April 2015. Following an intense lobbying campaign by the RWH industry, EPA proposed in late 2018 to extend by two years the May 15, 2020 deadline for the sale of Step 1 units; on April 2, 2020 the agency published a final rule amending some provisions of the 2015 NSPS but not

providing any sell-through period for Step 1 units, announcing instead that the deadline would remain May 15, 2020. In his letter, Carper writes, “EPA is considering using the COVID-19 pandemic as a pretext to continue to allow retailers to sell residential wood heating systems that fail to meet the latest clean air standards (known as Step 1 wood heaters). The press accounts state that EPA is considering allowing the sale of these Step 1 heaters for six additional months and possibly allowing manufacturers to continue to make these dirtier wood heaters for an extended amount of time. I am not insensitive to the unique time in which we are living, but I find it concerning that EPA is considering this action despite the agency’s determination a month ago, during the COVID-19 pandemic, that such extensions were not warranted. If these press reports are true, EPA’s actions could result in increased air pollution. Worse, that additional pollution would come at a time when Americans are facing a respiratory pandemic that is likely exacerbated by air pollution. Moreover, allowing continued sale of older dirtier wood heaters could adversely impact manufacturers that have already made investments to manufacture products that meet cleaner standards.” After recounting the background of the RWH NSPS, the benefits of the Step 2 standards that become effective on May 15, 2020, industry’s efforts to secure a sell-through period for Step 1 units and EPA’s final decision against such an action, Carper expresses concerns about EPA’s apparent “180-degree reversal of its April decision to keep the wood heater Step 2 deadline intact with no apparent justification for doing so” and states further that “[t]his reversal is made even more mystifying in light of industry testimony before the U.S. Senate Environment and Public Works Committee observing that the peak selling time for wood heater retailers is from September to March. This raises questions as to how EPA could have concluded that COVID-19 has resulted in ‘commercial disruption’ and severely impacted retailers’ ability to meet the new standards set to be implemented next week. Manufacturers and retailers have had five years to comply with these new standards, and many in the industry took steps years ago to meet the new standards. Delays in the Step 2 standards could disadvantage retailers and manufactures that took seriously the 5-year time period to meet the tighter standard.” Given these concerns, Carper poses seven requests and questions seeking information, explanations and documentation related to the proposal. The Senator asks that the Administrator respond by May 15, 2020. For further information: <https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E4488288-1A66-4156-9872-2C149FE18121>

(4) House Science Committee Staff Prepares Memo Highlighting Implementation Plans and Gaps Related to Supplemental Proposed Science Transparency Rule (May 14, 2020) – In a letter to Democratic members of the House Committee on Science and Technology, Committee Chairwoman Eddie Bernice Johnson (D-TX) highlights new information provided to Committee staff regarding the implementation plans, and gaps, related to the “Strengthening Transparency in Regulatory Science” supplemental notice of proposed rulemaking (SNPRM) issued by EPA on March 18, 2020 (see related article in the March 14-20, 2020 *Washington Update*). Along with the letter, Johnson transmitted a memorandum in which the Committee staff summarizes responses given by EPA

during two congressional staff briefings, held on April 2 and April 14, 2020. First among the staff's observations is that "the rule's application to 'prospective rulemaking' includes statutorily mandated reviews of existing standards, such as the National Ambient Air Quality Standards." Additionally, the staff details, for the first time, the agency's vision of how it would implement a process ensuring "tiered access" as a mechanism to protect privacy of those participating in medical studies. The staff writes in the memo that "EPA told Committee staff that the burden of implementing this proposal would be on researchers" and that the EPA representatives were "inconsistent concerning how the data and models would be managed." The staff also flags numerous areas where EPA was unable to provide information about implementation and is relying instead on public comment to supply directions for implementation, including how conflicts between researchers and the agency would be resolved, the role of "re-analysis," plans for the management of large volumes of data, how the "weighted system" alternative approach would work, the need for a cost analysis and several aspects governing EPA's authority to issue and implement the proposal. In reviewing these gaps, the staff says that "on fundamental matters of structure and logic, the public comment period is no substitute for a well-reasoned, deliberative policymaking process. EPA's inability to answer basic questions about the rule's operation and implementation reflects the ill-conceived nature of the 'Strengthening Transparency' rule." For further information: http://4cleanair.org/sites/default/files/resources/epa2020_0798a.pdf

(5) States Sue EPA over COVID-19 Enforcement Discretion Policy (May 13, 2020) – Nine state attorneys general (AGs) filed a lawsuit challenging EPA's March 26, 2020 memorandum outlining the agency's policy for enforcement discretion during the coronavirus pandemic. The agency's March 26 policy (see related article in the March 21-27, 2020 *Washington Update*) suspends a wide range of monitoring and reporting requirements under federal environmental laws, and also faces separate lawsuits from environmental groups. The state AGs suit (Case No. 1:20-cv-03714), filed in the U.S. District Court for the Southern District of New York, is led by the New York AG, who is joined by her colleagues in California, Illinois, Maryland, Michigan, Minnesota, Oregon, Vermont and Virginia. In their complaint, they argue that "[t]he nonenforcement policy places the States between a rock and hard place: either incur increased burdens and attempt to fill EPA's enforcement shoes at a time when they are increasingly strapped for resources, or risk the health of our residents based on the unfounded assumption that the policy will not cause harm." The plaintiffs seek to vacate the policy, arguing that the memorandum was issued unlawfully, will result in environmental and public health effects that will be injurious to the citizens of those states and is effectively in force indefinitely. For further information: https://ag.ny.gov/sites/default/files/new_york_v._epa_complaint.filed_.pdf

(6) States, DC, NYC Challenge Refrigerant Repair Rollback in Court (May 11, 2020) – Ten states and two cities filed a lawsuit against EPA seeking to vacate the agency's rollback of the 2016 Refrigerant Management Rule requiring industrial appliances that use hydrofluorocarbons, (HFCs) to be regularly monitored and

repaired. EPA took action to replace 2016 standards with the publication of “Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program’s Extension to Substitutes” in the *Federal Register* (85 Fed. Reg. 14,150) on March 11, 2020. The petition (Case #20-1151) was filed on May 11, 2020 in the U.S. Court of Appeals for District of Columbia Circuit by New York, Connecticut, Illinois, Maine, Maryland, Minnesota, New Jersey, Oregon, Virginia, Washington, the District of Columbia and the City of New York (Case No. 20-1151). Environmental groups filed a separate lawsuit challenging the EPA action on May 12, 2020. For further information: <http://4cleanair.org/sites/default/files/resources/HFCs%20lawsuit%2020-1151.pdf>

(7) EPA Proposes Adjustments to Tier 3 Vehicle Test Procedures to Smooth Transition to New Test Fuel; Includes Alternative That Would Increase CO₂ Emissions (May 13, 2020) – EPA published in the *Federal Register* (85 Fed. Reg. 28,564) a proposal to adjust certain emissions testing procedures and compliance calculations for cars, light trucks and heavy-duty pickup trucks and vans to allow for a smooth transition to a new light-duty vehicle test fuel that was finalized in EPA’s 2014 Tier 3 vehicles rule. The 2014 rule called for the replacement of test fuel containing 0 percent ethanol (E0) with test fuel containing 10 percent ethanol (E10) when auto manufacturers perform greenhouse gas and fuel economy testing, beginning with model year (MY) 2020. In this week’s proposal, EPA includes a shift in the timetable for the transition to Tier 3 test fuel to allow for a phase-in through MY 2024, with full compliance starting with MY 2025. EPA notes in the proposal that since changes in test fuel can result in changes in emissions results the agency committed in 2014 to a subsequent rulemaking to realign test results on the new Tier 3 test fuel (E10) so they are consistent with results from testing on Tier 2 test fuel (E0) “in order to avoid an effective change in the stringency of the GHG and CAFE standards.” However, EPA also seeks comment on an alternative approach under which carbon dioxide emissions would increase: “As discussed in Section III, EPA estimates that the impact on CO₂ emissions is a 1.6% difference, and thus without the test procedure adjustment proposed in this notice, a change from the Tier 2 gasoline certification fuel to the Tier 3 gasoline certification fuel would reduce the stringency of the EPA CO₂ standards by 1.6%. Thus, this action is predicated on a view of GHG and CAFE stringency as relating to vehicle efficiency rather than tailpipe emissions in a market representative fuel mix. EPA requests comment on whether the Agency should consider a regulatory approach where we require the use of Tier 3 gasoline certification fuel without any test procedure adjustment for CO₂. If the Agency were to consider such an approach, EPA also requests comment as to whether EPA would need to complete additional analysis, likely in the form of a Supplemental Notice of Proposed Rulemaking (SNPRM), or whether EPA could finalize a change in the gasoline certification fuel without any CO₂ adjustment factor and without issuing a SNPRM.” EPA will accept public comments on this proposal through August 11, 2020. If a public hearing is requested by May 20, 2020, the agency will convene one; information on a hearing would be published in a subsequent *Federal Register* notice. For further information: <https://www.govinfo.gov/content/pkg/FR-2020-05-13/pdf/2020-07202.pdf>

(8) EPA Publishes Proposed Fuels Streamlining Rule (May 14, 2020) – EPA published in the *Federal Register* (85 Fed. Reg. 29,034) a proposed “Fuels Regulatory Streamlining” rule intended to update the agency’s gasoline, diesel and other fuels programs “to improve overall compliance assurance and maintain environmental performance, while reducing compliance costs for industry and EPA.” Under the proposal, EPA would streamline existing fuel quality rules by removing expired provisions, eliminating duplicative compliance provisions (e.g., redundant registration requirements that are required by every EPA fuels program) and removing unnecessary and outdated requirements and replacing them with a single set of provisions and definitions that will apply across all gasoline, diesel and other fuels programs currently regulated under 40 CFR part 80, with the exception of the Renewable Fuel Standard program. Three key program components include 1) simplification of the Reformulated Gasoline summer volatile organic compound standards, 2) consolidation of regulatory requirements across part 80 fuel requirements and 3) improvement of oversight by leveraging third parties to ensure the quality of in-use fuel. EPA notes in the proposal that “[t]his action does not propose to change the stringency of the existing fuel quality standards” nor does it propose any new fuel standards. The agency further notes that the proposal does not seek to remove any requirements for fuels specified by the Clean Air Act. Although the pre-publication version of the proposal indicated there would be a 60-day comment period following publication in the *Federal Register*, EPA is providing 45 days for public comment with a deadline of June 29, 2020. EPA will hold a public hearing on this proposal, the date and location of which will be announced in a supplemental *Federal Register* notice. For further information: <https://www.govinfo.gov/content/pkg/FR-2020-05-14/pdf/2020-09337.pdf>

(9) EPA Proposes Technical Amendments to Heavy-Duty Engine and Vehicle Test Procedures (May 12, 2020) – EPA published in the *Federal Register* (85 Fed. Reg. 28,140) a proposal to amend existing heavy-duty engine and vehicle test procedures with the intended purpose of improving accuracy and reducing testing burden. Also included in the proposal are other regulatory amendments related to light-duty vehicles, heavy-duty vehicles, highway motorcycles, marine engines, locomotives, other nonroad engines and vehicles, stationary engines and portable fuel containers. According to EPA, the proposed amendments would “streamline” regulations, increase compliance flexibility, harmonize with other requirements, add clarity and correct errors. The agency says of this proposal, “Given the nature of the proposed changes, they would have neither significant environmental impacts nor significant economic impacts for any sector.” EPA will accept public comments on this proposal through June 26, 2020. If a public hearing is requested by May 19, 2020, the agency will convene one on May 27, 2020 in Ann Arbor beginning at 10 AM. For further information: <https://www.govinfo.gov/content/pkg/FR-2020-05-12/pdf/2020-05963.pdf>

(10) EPA Forms Multi-Disciplinary Research Team to Focus on PFAS (May 13, 2020) – EPA announced that it is expanding the agency’s research on

polyfluoroalkyl substances (PFAS) in the environment by launching the PFAS Innovative Treatment Team (PITT), which consists of full-time staff dedicated to multi-disciplinary research on the testing, removal and destruction of PFAS-contaminated media and waste. The PITT staff will use lean-management and other research and development philosophies “designed to break down administrative and procedural barriers in an effort to facilitate faster results.” The PITT’s initial efforts will focus on assessing destruction methods; exploring the efficacy of methods while considering how to avoid the creation of new environmental hazards; and evaluating the feasibility, performance and costs of these methods. EPA intends for the results to be available later this year, including to state, local and tribal governments. The PITT effort is part of EPA’s PFAS Action Plan, which was announced in February 2019. For further information: <https://www.epa.gov/newsreleases/epa-aggressively-working-increase-research-and-understand-pfas>

(11) Researchers Estimate Air Pollution-Related Premature Deaths Decreased by 360 After One Month of COVID-19 Social Distancing (May 11, 2020) – The National Bureau of Economic Research (NBER) released a Working Paper, titled *Expected Health Effects of Reduced Air Pollution from COVID-19 Social Distancing*, in which it shares the results of its analysis of the emissions and health impacts associated with coronavirus-related stay-at-home policies and social distancing behaviors in the U.S. in spring 2020. Using daily cell phone mobility data for each county in the country NBER found that nationwide vehicle travel decreased by approximately 40 percent by mid-April, with slightly greater decreases in states that imposed stay-at-home policies before March 28; NBER notes that vehicle travel decreased “significantly” in all states. Studying hourly electricity consumption data by electricity region allowed NBER to conclude that electricity consumption dropped by approximately 6 percent on average by mid-April, but with “significant” diversity. Based on these findings, NBER estimates that, after a month of social distancing, expected premature deaths attributed to air pollution from personal vehicle travel and electricity consumption dropped by about 360 deaths, which is about 25 percent of the baseline 1,500 deaths. NBER also estimates that CO₂ emissions from vehicle use and electricity consumption decreased by about 19 percent, or 46 million metric tons. Founded in 1920, NBER describes itself as “a private, non-profit, non-partisan organization dedicated to conducting economic research and to disseminating research findings among academics, public policy makers, and business professionals. NBER-affiliated researchers study a wide range of topics and they employ many different methods in their work. Key focus areas include developing new statistical measurements, estimating quantitative models of economic behavior, and analyzing the effects of public policies.” For further information: <https://www.nber.org/papers/w27135.pdf>

The Week Ahead

- NACAA Virtual Spring Meeting – May 18-19, 2020

- [Senate Committee on Environment and Public Works Hearing, “Oversight of the Environmental Protection Agency,”](#) with Testimony by Administrator Andrew Wheeler, in Washington, DC – May 20, 2020
 - [U.S. EPA Spring 2020 Clean Air Act Advisory Committee Meeting \(Virtual\)](#) – May 20, 2020
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