

In this week's Washington Update:

- (1) States, Cities, Counties Challenge EPA's and NHTSA's Final "SAFE" Rule Rolling Back Vehicle GHG and CAFE Standards; Public Health and Environmental Groups Also Sue and Automakers Move to Intervene
- (2) EPA Schedules June 8 Virtual Public Hearing on Residential Wood Heater Sell-Through Proposal; Register by June 4
- (3) EPA Publishes MATS Rule Rescinding "Appropriate and Necessary" Finding; Petition for Review Filed in D.C. Circuit
- (4) States File Petition for Review of COVID-19 Enforcement Discretion Policy in D.C. Circuit
- (5) Ninth Circuit: Climate Nuisance Suits Belong in State Court
- (6) U.S. District Court Remands "Climate Fraud" Lawsuit Against ExxonMobil to Massachusetts State Court
- (7) Report Finds Clean Power Plan's 2030 Emissions Goals Were Met in 2019
- (8) COP 26 Rescheduled

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

This Week in Review

(1) States, Cities, Counties Challenge EPA's and NHTSA's Final "SAFE" Rule Rolling Back Vehicle GHG and CAFE Standards; Public Health and Environmental Groups Also Sue and Automakers Move to Intervene (May 22 & 27, 2020) – Twenty-three states, the District of Columbia, four cities and two counties filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging EPA's and the National Highway Traffic Safety Administration's (NHTSA's) April 30, 2020 final "Safer, Affordable, Fuel-Efficient ("SAFE") Vehicles Rule" rolling back light-duty vehicle greenhouse-gas and Corporate Average Fuel Economy standards. In a press release announcing the petition, California Attorney General Xavier Becerra said, "The underpinnings for the Trump Administration's so-called 'SAFE' rule are crumbling before the rule even hits the road. The Administration claims their new rule will save money and lives, but previously undisclosed internal documents reveal how far from the truth that is. Just read the text of the rule and you will discover that it is a job-killer and public health hazard. It will increase costs to consumers and allow the emission of dangerous pollutants that directly threaten the health of our families. President Trump should have listened to his own scientists. America's Clean Car Standards were doing the job. We're going to court to defend them." In addition to California, those joining the lawsuit are Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, the District of Columbia, the California Air Resources Board, the Cities of Los Angeles, New York, San

Francisco and Denver, and the Counties of San Francisco and Denver. A coalition of 12 environmental and public health groups also challenged the final “SAFE” Vehicles Rule in separate petitions against EPA and NHTSA. In a press release announcing the petitions for review, Ben Longstreth, Senior Attorney for the Natural Resources Defense Council (NRDC), said, “These illegal rollbacks mean more air pollution that harms our health and fuels the climate crisis, while sucking billions of dollars more out of Americans’ pockets at the pump.” In a separate press release, Fred Krupp, President of the Environmental Defense Fund (EDF), said, “The Trump administration’s rollback of America’s popular and successful Clean Car Standards would be disastrous. It would cause more than 18,000 more premature deaths, add one and a half billion metric tons of climate pollution to our air, and cost Americans \$244 billion more at the gas pump. That’s why I’m proud that we joined a large coalition of health, consumer and environmental advocates today in a lawsuit to stop the rollback.” In addition to NRDC and EDF, the coalition includes the Center for Biological Diversity, Chesapeake Bay Foundation, Communities for a Better Environment, Conservation Law Foundation, Consumer Federation of America, Environment America, Environmental Law and Policy Center, Public Citizen, Inc., Sierra Club and Union of Concerned Scientists. The state-municipal and environmental-public health-group petitions for review are being consolidated under lead case No. 20-1145, which was filed by the Competitive Enterprise Institute (CEI) on May 1, 2020 (see related article in the April 25-May 1, 2020 *Washington Update*). CEI officials said when they filed their petition that they oppose the final rule because it is too stringent, and that less stringent standards would result in more benefits than costs. In a press statement regarding the Alliance for Automotive Innovation’s (Auto Innovators’) motion to intervene in support of the respondents, Alliance President and CEO John Bozzella stated, “The auto industry remains united in its desire for yearly improvements in fuel economy and greenhouse gas reductions. Automakers continue to bring highly fuel-efficient and electric-drive vehicles to U.S. consumers and advocate for policies that increase the development of the electric vehicle market. Despite calls by interest groups for flat standards, our members are committed to increasing standards that support investment in vehicles that improve fuel efficiency, and that balance affordability, safety, and the environment.” Auto Innovators also noted, “The following automaker members of Auto Innovators are not participating in this action, and this motion is therefore not being brought on their behalf: American Honda Motor Co., Inc., BMW of North America, LLC, Ford Motor Company, Mercedes-Benz USA, LLC, Porsche Cars North America, Inc. and Volkswagen Group of America, Inc.” For further information:

http://www.4cleanair.org/sites/default/files/Documents/California_v_Wheeler_20-1167_PFR.pdf,

http://www.4cleanair.org/sites/default/files/Documents/NRDC_v_Wheeler_20-1168_PFR.pdf,

http://www.4cleanair.org/sites/default/files/Documents/EDF_v_Owens_20-1169_PFR.pdf,

http://www.4cleanair.org/sites/default/files/Documents/Litigation-SAFE2-Automakers_Petition_to_Intervene-052220.pdf,

<https://oag.ca.gov/news/press-releases/attorney-general-becerra-files-lawsuit->

[challenging-trump-administration%E2%80%99s-2](https://www.edf.org/media/edf-allies-states-sue-defend-clean-car-standards), <https://www.edf.org/media/edf-allies-states-sue-defend-clean-car-standards>, and <https://www.autosinnovate.org/press-release/auto-industry-supports-fuel-economy-improvements/>

(2) EPA Schedules June 8 Virtual Public Hearing on Residential Wood Heater Sell-Through Proposal; Register by June 4 (May 28, 2020) – EPA announced that it will hold a virtual public hearing (by teleconference) on June 8, 2020 to hear testimony on the agency’s May 22, 2020 proposal (85 Fed. Reg. 31,124) entitled, “Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces” – an action the agency says is to help make up for “significant losses in retail sales” of residential wood heaters (RWHs) due to COVID-19. If the proposal is promulgated, RWH retailers would be allowed to sell Step 1 units from the date of *Federal Register* publication of the final rule until November 30, 2020. Between now and the date on which EPA publishes a final action on this proposal the agency says it will place a low priority on enforcement of the May 15, 2020 deadline for selling Step 1 units (see related article in the May 16-22, 2020 *Washington Update*). Those wishing to testify at or listen to the hearing must register online (using the link below) by Thursday, June 4, 2020. The hearing will run from 9:00 AM to 3:00 PM Eastern Time with a lunch break from 12:00 PM to 1:00 PM Eastern Time. For further information: <https://www.epa.gov/residential-wood-heaters/proposed-amendments-new-source-performance-standards-residential-wood-0> and <https://www.epa.gov/residential-wood-heaters/public-hearing-proposed-amendments-2015-standards-performance-new>

(3) EPA Publishes MATS Rule Rescinding “Appropriate and Necessary” Finding; Petition for Review Filed in D.C. Circuit (May 22, 2020) – EPA published in the *Federal Register* the final rule withdrawing the Mercury and Air Toxics Standards (MATS) “Appropriate and Necessary” finding that the agency announced on April 16, 2020. The rule rescinds EPA’s previous finding that it is “appropriate and necessary” to regulate emissions of hazardous air pollutants (HAPs) under Section 112 of the Clean Air Act. It includes changes to the valuation of co-benefits in the rule’s cost-benefit analysis (i.e., considering only direct benefits from reducing mercury and HAPs and not from decreasing particulate matter). While the rule withdraws the “appropriate and necessary” finding, it does not delist the source category or rescind the MATS requirements. The final rule also promulgates the Risk and Technology Review (RTR) standard for the source category, finding that the risk remaining after the implementation of MATS is “acceptable” and that there are no new developments in emission controls, therefore, additional requirements are not warranted. On the same day it was published, Westmoreland Mining Holdings LLC filed a petition for review of the final rule in the U.S. Court of Appeals for the District of Columbia Circuit. For further information: <https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-08607.pdf>, <https://www.epa.gov/mats/regulatory-actions-final-mercury-and-air-toxics-standards-mats-power-plants> and

http://www.4cleanair.org/sites/default/files/Documents/Westmoreland_Mining_v_EPA_20-1160_PFR.pdf

(4) States File Petition for Review of COVID-19 Enforcement Discretion Policy in D.C. Circuit (May 26, 2020) – Eight states filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging EPA’s March 26, 2020 memorandum outlining the agency’s policy for enforcement discretion during the coronavirus pandemic. The petitioners are led by the State of New York, joined by California, Maryland, Michigan, Minnesota, Oregon, Vermont and Virginia. The states assert that the petition for review is “protective” in nature; they believe that venue is appropriate in U.S. district court. Accordingly, the same eight states (along with a ninth, Illinois), filed suit challenging EPA’s action in the U.S. District Court for the Southern District of New York on May 13, 2020 (see related article in the May 9-15, 2020 *Washington Update*). The petitioners say they believe EPA will move to dismiss the district court action on grounds that judicial review of the memorandum, if available, is within the jurisdiction of the D.C. Circuit. In their district court complaint, the states asserted that the memorandum should be vacated because it 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: http://www.4cleanair.org/sites/default/files/Documents/New_York_v_EPA_20-1164_PFR.pdf

(5) Ninth Circuit: Climate Nuisance Suits Belong in State Court (May 26, 2020) – In two separate opinions, the U.S. Court of Appeals for the Ninth Circuit ruled that California state court is the appropriate venue for lawsuits brought by cities and counties against major oil companies alleging nuisance and other causes of action arising from the role of fossil-fuel products in global warming. In *County of San Mateo v. Chevron Corp.*, San Mateo County and several other cities and counties filed six complaints in California state court against more than 30 energy companies. The defendants removed the cases to U.S. district court, but the court held that there was no subject-matter jurisdiction under the federal-officer removal statute. A three-judge panel of the Ninth Circuit unanimously affirmed the lower court’s decision. In *City of Oakland v. BP PLC*, the City of Oakland and County of San Francisco filed complaints in state court seeking an order requiring five energy-company defendants to fund a climate change adaptation program for the cities. The companies removed the case to the U.S. district court, which held that it had jurisdiction under 28 U.S.C. § 1331 because the cities’ public nuisance claim was governed by federal common law. On appeal to the Ninth Circuit, the same three-judge panel disagreed, holding unanimously that the plaintiffs’ state-law public-nuisance claim did not arise under federal law for purposes of § 1331, and no exceptions applied. The court remanded the case to the district court to determine if there was an alternative basis for federal jurisdiction. For further information: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/26/18-15499.pdf> and <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/26/18-16663.pdf>

(6) U.S. District Court Remands “Climate Fraud” Lawsuit Against ExxonMobil to Massachusetts State Court (May 28, 2020)

– The U.S. District Court for the District of Massachusetts granted a motion by the Commonwealth of Massachusetts to remand its lawsuit against Exxon Mobil Corporation to Massachusetts state court for lack of federal jurisdiction. Massachusetts alleges in its lawsuit that ExxonMobil defrauded consumers and investors over the risk that its products and activities pose to global climate change and the financial dangers of climate change to the corporation. The suit was originally brought by the state’s attorney general in state court, then removed to federal court by ExxonMobil. The U.S. district court’s opinion does not reach the merits of the state’s claims, and the court emphasizes at the outset that the motion before it is “about the well-pleaded complaint rule – nothing more and nothing less.” The court held that Massachusetts’ complaint “pleads only state-law claims, which are not completely preempted by federal law and do not harbor an embedded question.” Additionally, “the statutory grants of federal jurisdiction for cases involving federal officers or for class actions do not apply here.” Accordingly, the court disclaimed federal jurisdiction over the case and remanded it to state court. For further information: [http://www.4cleanair.org/sites/default/files/Documents/Massachusetts v Exxon Mobil-D Mass 5-28-20.pdf](http://www.4cleanair.org/sites/default/files/Documents/Massachusetts_v_Exxon_Mobil-D_Mass_5-28-20.pdf)

(7) Report Finds Clean Power Plan’s 2030 Emissions Goals Were Met in 2019 (May 27, 2020)

– A new analysis by the Carbon Tax Center, a think tank that supports the implementation of a national carbon tax, has found that the emission reductions called for in the now-repealed Clean Power Plan have been met a decade early. The report compared the dispatch of power plants in 2005 and in 2019, and calculated emissions reductions based on the number of hours increased or decreased for each energy resource type and the emissions factors of the fuel types modeled. The analysis finds that in 2019, the emissions of greenhouse gases (GHGs) from the power sector in the U.S. were 793 million tons lower than in 2005, a 33 percent decrease. It also notes that the Clean Power Plan required a 32-percent reduction in GHG emissions by 2030. The growth of renewables and energy efficiency was credited for much of the reduction: “We estimate that 62 percent of the electricity sector’s carbon reduction since 2005 has been due to clean electricity, with the other 38 percent due to substitution for coal by natural gas. This finding belies the prevailing narrative crediting fracked gas for the lion’s share of the reduction in coal burning and the resulting lowering of carbon emissions.” Moreover, the report finds that the reduction in emissions from coal-burning power plants accelerated under the Trump Administration, declining 7.4 percent between 2017-2019, and only 5.4 percent in the previous administration (2008-2016). The data evaluated does not include 2020, during which GHG emissions have fallen further with the pandemic-induced economic retreat. For further information: [http://www.komanoff.net/fossil/The Good News Trump Couldn't Kill.pdf](http://www.komanoff.net/fossil/The_Good_News_Trump_Couldn't_Kill.pdf)

(8) COP 26 Rescheduled (May 28, 2020) – The United Kingdom, host of the 26th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 26), has announced dates for the global meeting set for

Glasgow, Scotland. The meeting was suspended due to concerns about the COVID-19 pandemic on April 1, 2020, but the U.K. Government has announced the meeting will go ahead in Glasgow between November 1 and 12, 2020. For further information: <https://www.gov.uk/government/news/new-dates-agreed-for-cop26-united-nations-climate-change-conference>

The Week Ahead

- [House Committee on Energy and Commerce Oversight and Investigations Subcommittee Hearing entitled, "On the Front Lines: How Governors are Battling the COVID-19 Pandemic,"](#) via Cisco Webex – June 2, 2020
 - [Senate Committee on Commerce, Science, and Transportation Hearing entitled "The State of Transportation and Critical Infrastructure: Examining the Impact of the COVID-19 Pandemic,"](#) in Washington, DC – June 3, 2020
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