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

**(1) D.C. Circuit Orders One National Program Rule (SAFE Vehicles Rule Part 1) Litigation Held in Abeyance (February 8, 2021)** – The U.S. Court of Appeals for the District of Columbia Circuit issued an order granting EPA's and NHTSA's February 1, 2021 motion to hold in abeyance litigation regarding the September 27, 2019 One National Program Rule (also known as the SAFE Vehicles Rule Part 1), preempting and revoking California's waivers for the state's light-duty vehicle greenhouse gas emission standards and Zero-Emission Vehicle program, pending further order of the court. EPA and NHTSA moved to hold the consolidated cases in abeyance while they implement President Biden's January 20, 2021 directive to immediately review federal agency actions taken between January 20, 2017 and January 20, 2021 (see related article in the January 30-February 5, 2021 *Washington Update*). In the February 8 order, the court directs EPA and NHTSA to file status reports every 90 days during the abeyance and to notify the court within seven days of any action they take as a result of their review of the rule or of a determination that no action will be taken. Once such notification is filed, the parties are to file motions to govern further proceedings within 30 days. On Friday, February 5, 2021, EPA and NHTSA filed a reply in support of their motion to hold

the case in abeyance; the reply was in response to state respondent-intervenors' February 3, 2021 opposition to abeyance (see related article in the January 30-February 5, 2021 *Washington Update*). For further information:

<http://www.4cleanair.org/sites/default/files/Documents/Litigation-Court Order to Hold SAFE1 Case in Abeyance-020821.pdf> and <http://www.4cleanair.org/sites/default/files/Documents/Litigation-Respondent Reply in Support of Holding SAFE1 Case in Abeyance-020521.pdf>

**(2) NACAA Recommends that EPA Establish Certification Program for Aftermarket Catalysts (February 11, 2021)** – In a letter to EPA's Office of Enforcement and Compliance Assurance (OECA), NACAA recommends that the agency recall its August 1986 policy, titled "Sale and Use of Aftermarket Catalytic Converters" (1986 Catalyst Policy), and establish, under the new EPA Tampering Policy (issued in December 2020), a federal certification program for aftermarket catalytic converters used on gasoline-fueled light-duty vehicles that are beyond their emissions warranty. The letter was sent in response to EPA OECA's December 14, 2020 solicitation of input to inform a future decision on whether and how to update or withdraw the 1986 Catalyst Policy. The sale and use of aftermarket catalytic converters for the nation's light-duty fleet is a long-standing issue of concern of state and local air agencies and organizations, including NACAA, which seek an updated policy for aftermarket catalyst replacements. In the letter, NACAA highlights the importance of effective aftermarket catalytic converters to state and local air agencies across the country due to their role in maintaining the emissions performance of vehicles, noting that "[s]tates and localities are counting on these parts to control emissions so they can achieve a variety of clean air goals including, among others, attaining and maintaining compliance (upwind and downwind) with health-based National Ambient Air Quality Standards for ozone and fine particulate matter (PM) and continuing to reduce levels of hazardous air pollutants." NACAA goes on to say that "[f]ederal regulations and enforcement policies and adequate enforcement mechanisms are necessary to ensure that aftermarket catalytic converters entering the marketplace consistently provide the same level of emission control as provided by the [original equipment manufacturer] converters they replace. Otherwise, the benefits of the clean cars program will be severely compromised and substantial emission reductions will be lost." The association also notes in its letter that effective aftermarket catalysts are essential to ameliorating adverse air quality impacts in overburdened communities. In addition to recommending establishment by EPA of a certification program for aftermarket catalysts under the 2020 Tampering Policy, NACAA recommends, among other things, that EPA recall the 1986 Catalyst Policy after first setting a phase-in plan and schedule to ensure rapid transition from the 1986 policy to compliance with the new Tampering Policy. For further information: <http://www.4cleanair.org/sites/default/files/Documents/NACAA Response to EPA OECA Request for Info on 1986 Catalyst%20Policy-021121lh.pdf>

**(3) Emissions from Fossil Fuel Combustion Responsible for Nearly One in Five Total Global Deaths in 2018 (February 9, 2021)** – Researchers released a

study in which they estimate that “exposure to particulate matter from the burning of fossil fuel accounted for 18 percent of total global deaths in 2018 – a little less than 1 out of 5.” In “Global mortality from outdoor fine particle pollution generated by fossil fuel combustion: Results from GEOS-Chem,” published in *Environmental Research*, researchers from Harvard and the three British institutions, the University of Birmingham, University of Leicester and University College of London, report on their use of the chemical transport model GEOS-Chem, a 3-D global model of atmospheric chemistry that has a high spatial resolution allowing for the globe to be divided into a grid with boxes as small as 50 kilometers (km) x 60 km so that air pollution levels can be viewed box by box. Among their findings are an estimated annual 8.7 million premature deaths globally; although the majority of these deaths were in China and India parts of the eastern U.S., Europe and Southeast Asia were also flagged. The researchers conclude that their study “demonstrates that the fossil fuel component of PM<sub>2.5</sub> contributes a large mortality burden. The steeper concentration-response function slope at lower concentrations leads to larger estimates than previously found in Europe and North America, and the slower drop-off in slope at higher concentrations results in larger estimates in Asia. Fossil fuel combustion can be more readily controlled than other sources and precursors of PM<sub>2.5</sub> such as dust or wildfire smoke, so this is a clear message to policymakers and stakeholders to further incentivize a shift to clean sources of energy.” For further information:

<https://www.sciencedirect.com/science/article/abs/pii/S0013935121000487> and <https://www.seas.harvard.edu/news/2021/02/deaths-fossil-fuel-emissions-higher-previously-thought>

**(4) EPA Pulls Back Recent PFAS-Related Toxicity Assessment Due to “Political Interference” (February 9, 2021)** – EPA has rescinded a January 19, 2021 agency Toxicity Assessment of perfluorobutanesulfonic acid (PFBS), which is a chemical in the per- and polyfluoroalkyl substances (PFAS) family, after making a determination that the conclusions in it were “compromised by political interference as well as infringement of authorship and the scientific independence of the authors’ conclusions.” The documents in the assessment have been removed from EPA’s website while the agency reviews them. EPA has stated that this action is necessary to protect scientific integrity. According to EPA’s announcement on January 19, the PFBS assessment is not a regulation, but it “provides toxicity values and information about the adverse effects of the chemical and the evidence on which the value is based, including the strengths and limitations of the data.” Among the criticisms of the assessment were that it replaced a reference dose number for PFBS with a range of values. For further information:

<https://www.epa.gov/newsreleases/epa-takes-action-protect-scientific-integrity>

**(5) D.C. Circuit Begins Granting Motions to Halt Cases While EPA Reviews Challenged Rules (February 5, 2021)** – Pursuant to an Executive Order (EO) issued by President Biden on his first day in office, EPA has filed a number of motions asking the U.S. Court of Appeals for the District of Columbia Circuit to halt ongoing litigation challenging Clean Air Act rules issued by the Trump Administration, to allow the agency time to review and potentially revise, repeal or

replace the challenged rules. Last Friday, the court granted two of those motions. First, in consolidated cases challenging EPA's September 2020 Oil and Gas NSPS Reconsideration Rule (*Environmental Defense Fund v. Nishida*, formerly *EDF v. Wheeler*), which made technical changes to the New Source Performance Standards for the oil and gas industry, the court granted EPA's unopposed motion to hold the litigation in abeyance until 30 days after the agency completes its review and any resulting rulemaking. EPA had noted in its motion that President Biden's EO 13990 on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" specifically identified the rule as potentially in conflict with new federal policy. Under the EO, EPA, "shall consider publishing for notice and comment a proposed rule suspending, revising, or rescinding" the rule by September 2021. Second, in cases challenging EPA's June 2019 E15 Rule (*American Fuel & Petrochemical Manufacturers v. EPA*), which generally allows gasoline blends with greater than 10% and up to 15% ethanol content to be more widely used throughout the year, the court granted EPA's motion for a 90-day stay of oral argument, which had previously been scheduled for February 19, 2021. The motion was granted over the objection of petitioners. Over the coming days and weeks, the D.C. Circuit will consider many similar motions filed by EPA in other cases challenging other Clean Air Act rules. For further information:

[http://www.4cleanair.org/sites/default/files/Documents/EDF\\_v\\_EPA\\_Motion\\_for\\_Abeyance\\_2-5-21.pdf](http://www.4cleanair.org/sites/default/files/Documents/EDF_v_EPA_Motion_for_Abeyance_2-5-21.pdf) (EPA motion to hold *EDF v. Nishida* in abeyance);

[http://www.4cleanair.org/sites/default/files/Documents/EDF\\_v\\_EPA-Order\\_2-5-21.pdf](http://www.4cleanair.org/sites/default/files/Documents/EDF_v_EPA-Order_2-5-21.pdf) (court order in *EDF*);

[http://www.4cleanair.org/sites/default/files/Documents/AF\\_PM\\_v\\_EPA-motion\\_to\\_stay\\_oral\\_argument\\_1-28-21.pdf](http://www.4cleanair.org/sites/default/files/Documents/AF_PM_v_EPA-motion_to_stay_oral_argument_1-28-21.pdf) (EPA motion for a 90-day stay of oral argument in *American Fuel & Petrochemical Manufacturers v. EPA*); and

[http://www.4cleanair.org/sites/default/files/Documents/AF\\_PM\\_v\\_EPA-Order\\_2-5-21.pdf](http://www.4cleanair.org/sites/default/files/Documents/AF_PM_v_EPA-Order_2-5-21.pdf) (court order in *AF&PM*)

**(6) EPA Inspector General to Examine Grant Flexibilities Provided During COVID-19 (February 8, 2021)** – The EPA Office of Inspector General (OIG) has announced that it will examine EPA's implementation of grant flexibilities that the Office of Management and Budget (OMB) provided to address COVID-19-related issues. OIG will begin fieldwork for this audit working with the EPA Office of Mission Support. Specifically, the audit will assess the extent to which EPA modified workplans, adjusted budgets and extended periods of performance for grants; provided administrative relief or continued to compensate grant recipients whose work was interrupted by the pandemic; and provided exceptions to regulations on a case-by-case basis. Additionally, OIG will assess whether flexibilities delayed or otherwise affected a grantee's completion of work that was intended to address environmental problems or concerns. For further information: <https://www.epa.gov/office-inspector-general/notification-epas-grant-flexibilities-due-coronavirus-pandemic>

**(7) Ninth Circuit Declines to Rehear Kids' Climate Suit (February 10, 2021)** – The U.S. Court of Appeals for the Ninth Circuit denied a petition by 21 youths and environmental groups for rehearing *en banc* of its January 2020 panel decision

dismissing their lawsuit that sought to compel federal action to combat global climate change. The plaintiffs claimed in their lawsuit, *Juliana v. United States*, that by continuing to “permit, authorize, and subsidize” the use of fossil fuels, the government has violated their constitutional rights, including a claimed right under the Due Process Clause of the Fifth Amendment to a “climate system capable of sustaining human life,” as well as the Ninth Amendment and the public trust doctrine. They sought declaratory relief and an injunction ordering the government to implement a plan to phase out fossil fuel emissions and reduce excess atmospheric carbon dioxide. In its 2-1 panel decision of 2020, the court held on an interlocutory appeal that the plaintiffs did not have Article III standing to sue because their injuries are not redressable by a federal court. It is beyond the power of a federal court to “order, design, supervise, or implement the plaintiffs’ requested remedial plan,” the court found. “[A]ny effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the legislative and executive branches.” Thus, the court “reluctantly” concluded that the plaintiffs’ case “must be made to the political branches or the electorate at large. ... That the other branches may have abdicated their responsibility to remediate the problem does not confer Article III courts, no matter how well-intentioned, the ability to step into their shoes.” With the Ninth’s Circuit’s rejection this week of the petition for its full slate of judges to rehear their case, the plaintiffs’ one remaining option is to file a petition for a writ of certiorari asking the U.S. Supreme Court to review the decision. For further information:

<http://www.4cleanair.org/sites/default/files/Documents/Juliana-v-United-States-9th-Cir-Order-2-10-21.pdf> (2/10/21 order denying plaintiffs’ rehearing petition) and <http://www.4cleanair.org/sites/default/files/Documents/Juliana v United States-9th Cir Op 1-17-20.pdf> (1/17/20 opinion ordering dismissal of the case)

**(8) Environmental and Public Health Organizations Challenge EPA’s Retention of 70-ppb Ozone NAAQS (February 11, 2021)** – A coalition of 14 environmental and public health organizations filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit challenging EPA’s December 31, 2020 final action, “Review of the Ozone National Ambient Air Quality Standards” (85 Fed. Reg. 87,256), in which the agency announced its decision to retain, without revision, the 70-parts-per-billion (ppb) ozone NAAQS. Although petitioners do not state the basis of their challenge, in comments on EPA’s proposed decision to retain the 70-ppb NAAQS they enumerated the many flaws of the review process that led to the proposed and final decisions and argued that evidence suggests that the standard should be set at 60 ppb. Petitioners are the American Academy of Pediatrics, American Lung Association, American Public Health Association, Appalachian Mountain Club, Chesapeake Bay Foundation, Clean Air Council, Conservation Law Foundation, Environment America, Environmental Defense Fund, Environmental Law and Policy Center, National Parks Conservation Association, Natural Resources Council of Maine, Natural Resources Defense Council and Sierra Club. A coalition of 15 states, the District of Columbia and the City of New York has also challenged EPA’s retention of the ozone NAAQS, filing a petition in the D.C. Circuit on January 19, 2021 (see related article in the January 16-22, 2021 *Washington Update*). For further information:



[http://www.4cleanair.org/sites/default/files/Documents/Litigation-Enviro\\_PubHealthGroups-Petition\\_Challenging\\_Dec2020\\_Ozone\\_NAAQS-021121.pdf](http://www.4cleanair.org/sites/default/files/Documents/Litigation-Enviro_PubHealthGroups-Petition_Challenging_Dec2020_Ozone_NAAQS-021121.pdf)

**(9) Researchers Find Rush Hour Levels of PM<sub>2.5</sub> in Northeastern Subway Stations Higher than Outdoors (February 10, 2021)** – New York University (NYU) Langone Health announced publication of a study in which researchers found that during the morning and afternoon rush hours concentrations of hazardous metals and organic particles in 71 metropolitan transit stations in the northeastern U.S. were higher, and in some cases exceptionally higher, than concurrent outdoor (aboveground) air samples. Among the specific findings are the following: 1) pollutant levels in the 13 New York City subway stations studied were higher than in any other metropolitan subway system, generally, from two to seven times greater than outdoor air samples; 2) pollutant levels in the Christopher Street Station of the Port Authority Trans-Hudson (PATH), which links New York and New Jersey, reached up to 77 times typical outdoor concentrations, which the study’s authors likened to levels reached during forest fires and building demolitions; and 3) air quality measured in 58 stations in Boston, Philadelphia and Washington, D.C. were at least two times the levels outdoors. According to David Luglio, doctoral student at NYU and co-author of the study, the “findings add evidence that subways expose millions of commuters and transit employees to air pollutants at levels known to pose serious health risks over time.” The study, titled “PM<sub>2.5</sub> Concentration and Composition in Subway Systems in the Northeastern United States,” was published in *Environmental Health Perspectives*. For further information: <https://ehp.niehs.nih.gov/doi/10.1289/EHP7202> and <https://nyulangone.org/news/pre-covid-19-subway-air-polluted-dc-boston-new-york-regions-worst-study-finds>

**(10) EPW Advances Regan to Full Senate Floor Vote (February 9, 2021)** - The U.S. Senate Environment and Public Works (EPW) Committee voted to advance the nomination of Michael S. Regan, North Carolina’s Secretary of the Department of Environmental Quality, to be EPA Administrator. A bipartisan majority of Committee members forwarded his confirmation by a vote of 14 to 6. His nomination will receive a vote by the full Senate, although this will be delayed by the Senate impeachment trial proceedings. For further information: <https://www.epw.senate.gov/public/index.cfm/2021/2/environment-and-public-works-committee-sends-nomination-of-michael-regan-for-epa-administrator-to-the-senate-floor>

**(11) Oregon Senator Merkley to Chair Appropriations Subcommittee on Interior and Environment (Friday, February 12, 2021)** – The Senate Appropriations Committee announced that Jeff Merkley (D-OR) will become Chair of the Subcommittee on Interior, Environment, and Related Agencies, the portfolio of which includes funding for EPA and state and local air agencies. Former Chair, Lisa Murkowski (R-AK), will become the Ranking Member. Other Democrats on the Subcommittee include Senators Dianne Feinstein (CA), Patrick Leahy (VT), Jack Reed (RI), Jon Tester (MT), Chris Van Hollen (MD) and Martin Heinrich (NM).

Rounding out the Subcommittee are Republicans Roy Blunt (MO), Mitch McConnell (KY), Shelley Moore Capito (WV), Cindy Hyde-Smith (MS), Bill Hagerty (TN) and Marco Rubio (FL).

**(12) White House Convenes First Climate Task Force Meeting (February 11, 2021)** - The National Climate Task Force established by Executive Order 13990 ("Executive Order on Tackling the Climate Crisis at Home and Abroad") held its first meeting virtually, chaired by National Climate Advisor Gina McCarthy and Vice President Kamala Harris, convening cabinet secretaries and the acting heads of 21 federal agencies. The Task Force is charged with charting progress on a series of administration goals including eliminating fossil fuel emissions from the electricity sector by 2035, creating jobs, and setting greenhouse gas (GHG) emissions reduction targets for the United States. The Biden administration plans to announce those goals on Earth Day, April 22, 2021. The meeting also marked the launch of a Climate Innovation Working Group that will convene the White House Office of Domestic Climate Policy, Office of Science and Technology Policy, and Office of Management and Budget. It also was the scene of the announcement of a proposed \$100 million grant program at the Department of Energy to be linked to the Biden Administration's proposal for an "Advanced Research Projects Agency-Climate." For further information: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/11/readout-of-the-first-national-climate-task-force-meeting/>

## ***The Week Ahead***

- President's Day – February 15, 2021
- [The Macdonald-Laurier Institute Discussion on "Building Across Borders: Energy Infrastructure, the Environment and Canada-U.S. Relations in the Biden Era"](#) – February 16, 2021
- [The Renewable Fuels Association Virtual 2021 National Ethanol Conference](#) – February 16-18, 2021
- [House Committee on Energy and Commerce Subcommittee on Energy Hearing on "A Smarter Investment: Pathways to a Clean Energy Future"](#) – February 18, 2021

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