

In this week's Washington Update:

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We also provide links to events happening in the Week Ahead.

This Week in Review

(1) EPA Files Legal Defense of ACE Rule (June 16, 2020) – In a brief filed in the U.S. Court of Appeals for the District of Columbia Circuit, EPA has laid out its legal defense for the Affordable Clean Energy (ACE) Rule. The brief responds to numerous groups suing the agency over its July 2019 rule titled “Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations,” in cases consolidated under *American Lung Association v. EPA* (No. 19-1140). In its opening, EPA contends that it “is a statutory servant of the Clean Air Act (CAA). It wields no more authority than Congress granted there. EPA’s defined span of authority does not vary with the gravity of the environmental problem EPA is confronting, Petitioners’ preferred policy approach, or a perceived failure by Congress to act. In the simplest terms, the Clean Power Plan (CPP) exceeded the authority Congress granted to EPA. This required its repeal. Its replacement, the Affordable Clean Energy rule ... is consistent with the statute. The ACE Rule should be upheld.” In its response to Petitioners’ briefs, EPA makes several arguments. First, it asserts it is limited by the language of the Clean Air Act in how it can define terms including “standard of performance,” “existing source,” and “remaining useful life” to approaches reflected in the ACE Rule, while the CPP exceeded the authority given to EPA and ignored federalism provisions in the Act. Second, EPA argues that it was limited in how it could set the Best System of Emission Reduction, and that it properly selected and excluded technologies from the list of options. Finally, EPA denies Petitioners’ claims that the ACE Rule does little to meet the agency’s legal obligation to regulate greenhouse gases, saying it does so but within limits set by its authorities. “The issue before the Court is not whether generation shifting and trading across a power grid can serve to efficiently reduce greenhouse gas emissions,” EPA contends. “The issue here is whether Congress already

authorized EPA to mandate any of that.” The Petitioners challenging the ACE Rule have been consolidated into seven groups, which filed briefs in April 2020 (see April 18-24, 2020 *Washington Update*), including a State & Municipal Petitioners group that includes 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. Briefs for those intervening in support of EPA are due July 16, 2020, and in addition to a number of industrial, mining, and power company concerns, the states of Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia and Wyoming have intervened in support of the rule. The D.C. Circuit has yet to set a date for oral arguments. For further information: <http://4cleanair.org/sites/default/files/resources/ALA%20v.%20EPA%20-%20EPA%20brief%206-16-20.pdf>

(2) EPA Grants Petition to List n-Propyl Bromide under Section 112 – First Addition to the HAP List (June 18, 2020) – EPA has granted a petition to add n-Propyl Bromide (also known as n-PB, 1-bromopropane or 1-BP) to the list of hazardous air pollutants (HAPs) under Section 112 of the Clean Air Act (CAA). The notice announcing the granting of the petition was published in the *Federal Register* on June 18, 2020 (85 Fed. Reg. 36851). This will be the first time EPA adds a pollutant to the Section 112 HAP list contained in the 1990 Clean Air Act Amendments. The notice announced that the petition to list 1-BP was granted but it does not actually list the substance under Section 112 yet. The notice states, “[f]ollowing this action, the EPA will take a separate regulatory action to add 1-BP to the list of HAP under CAA section 112(b)(1).” Further, the notice states, “[e]ven following the granting of this petition to add 1-BP to the list, sources will remain under no regulatory or statutory obligation to reduce emissions of 1- BP until a separate regulatory action is taken.” After listing the pollutant, EPA must take such actions as modifying the source category list as needed and revising and/or issuing new standards related to the relevant source categories (e.g., the halogenated solvent cleaning and dry cleaning operations categories). The Halogenated Solvents Industry Alliance and the New York State Department of Environmental Conservation petitioned EPA to list n-PB in 2010 and 2011, respectively. EPA requested public comment on the petitions in 2015 and published a draft document containing the agency’s rationale for granting the petitions in 2017. NACAA submitted comments in support of the addition of n-PB to the HAP list. For further information: <https://www.govinfo.gov/content/pkg/FR-2020-06-18/pdf/2020-13145.pdf>, <https://www.epa.gov/haps/petitions-add-1-bp-npb-clean-air-act-list-hazardous-air-pollutants> and http://www.4cleanair.org/sites/default/files/Documents/n-PB_NACAA_Comments_on_Draft_Grant_Petition_Feb_2017.pdf

(3) EPA Announces Two Final Risk and Technology Review Standards (June 18, 2020) – EPA has issued final Risk and Technology Review standards for two

source categories of hazardous air pollutants (HAPs) – Taconite Iron Ore Processing and Miscellaneous Coating Manufacturing. For both source categories, EPA has determined that the risks that remain after the implementation of the Maximum Achievable Control Technology standards are acceptable and that there are no new developments in controls that warrant additional requirements. The rules clarify that the standards are applicable during periods of startup, shutdown and malfunction and include minor revisions to provisions related to electronic reporting of performance test results, notifications of compliance status, testing and monitoring. For further information: <https://www.epa.gov/stationary-sources-air-pollution/final-taconite-iron-ore-processing-risk-and-technology-review> and <https://www.epa.gov/stationary-sources-air-pollution/final-national-emission-standards-hazardous-air-pollutants>

(4) California AG Gives RWH Retailers Selling Step 1 Units One Week to Confirm They Will Cease and Desist (June 17, 2020) – The office of California Attorney General (AG) Xavier Becerra sent letters on behalf of the California Air Resources Board (CARB) to 16 home improvement stores, bog box stores and large internet retailers doing business in the state concerning the sale of Step 1 Residential Wood Heaters (RWHs) after the compliance date for the 2015 New Source Performance Standards (NSPS). The AG’s office also sent a letter to the Hearth, Patio, and Barbeque Association (HPBA) alerting the industry trade group to the correspondence. Noting that as of June 2020 the respective retailers’ websites are advertising for sale higher-emitting Step 1 RWHs – the sale of which is barred beginning on May 16, 2020 under the NSPS adopted by EPA in April 2015 – Deputy AG Matthew G. Bullock, for AG Becerra, tells the retailers that “[o]n behalf of the California Air Resources Board (CARB), I request your response by June 24, confirming you have ceased and desisted from advertising or selling Step 1 devices. Failure to do so may result in legal action against you.” The AG’s office goes on to state, “CARB understands that you may have incorrectly interpreted this recent announcement [that as EPA pursues a proposed two-month sell-through for Step 1 units beginning on October 1, 2020, compliance with the May 15, 2020 sales deadline will be a “low enforcement priority” for the agency] as effectively allowing a six-month sell-through, from May 16 through November 30, 2020. However, the NSPS remains in place unless and until U.S. EPA finalizes a sell-through. While U.S. EPA may not be prioritizing enforcement, CARB can pursue civil penalties for violations of the NSPS.” Writing to HPBA, Assistant AG Bullock, for AG Becerra, said, “CARB applauds HPBA for accurately informing your members, via blog post, that U.S. EPA must finalize NSPS amendments before any sell-through is certain. CARB encourages you to additionally alert your members (that did not receive letters directly from us today) to the serious penalties they may face, from entities other than U.S. EPA, for illegal Step 1 device sales in the interim.” For further information: <http://www.4cleanair.org/sites/default/files/Documents/2020-06-17-AG-HPBA-letter.pdf>

(5) EPA Inspector General Report Challenges COVID-19 Enforcement Discretion (June 18, 2020) – The Office of Inspector General (OIG) for the EPA

has released a report reviewing the Agency's actions during the pandemic and has raised concerns about the enforcement discretion policy announced by EPA in a March 26, 2020 memorandum (See March 21-27, 2020 *Washington Update*). The Inspector General report says that the "EPA must maintain a robust enforcement program to address environmental violations and promote deterrence. The OIG recently reported that the EPA's enforcement activities and its resources for conducting routine regulatory enforcement work have declined over time. Additional reduction in enforcement activity places the EPA's regulatory mission at greater risk and threatens the Agency's overall mission to protect human health and the environment." EPA's March 26 memorandum provides assurance to regulated entities that EPA will exercise "temporary" enforcement discretion over reporting and monitoring efforts delayed by the pandemic, but provides no end date or mechanism for revisiting or concluding the policy. It has already drawn scrutiny from lawmakers on Capitol Hill and several states are suing the agency over the policy including New York, California, Maryland, Michigan, Minnesota, Oregon, Vermont, and Virginia (see May 23-29, 2020 *Washington Update*). For further information: <http://4cleanair.org/sites/default/files/resources/EPA%20IG%20on%20Enforcement.pdf>

(6) Study Finds that Half the World's Population Exposed to Increased Levels of PM_{2.5} (June 17, 2020) – A new study has found that 55 percent of the world's population was exposed to increased levels of fine particulate matter (PM_{2.5}) between 2010 and 2016 and that these exposures were "substantially above [World Health Organization] Air Quality Guidelines" and constitute a major and increasing threat to public health. The study, "Half the World's Population Are Exposed to Increasing Air Pollution", was published in the journal *Nature Climate and Atmospheric Science*. According to the study, the exposures are not uniform in different parts of the world, with regions such as Central and Southern Asia and Sub-Saharan Africa experiencing disproportionate increases, while concentrations decreased in North America and Europe. The study notes that the lower exposures in those areas are a result of regulatory processes that began decades ago. The report states, "In high-income countries, the extent of air pollution from widespread coal and other solid-fuel burning, together with other toxic emissions from largely unregulated industrial processes, declined markedly with Clean Air Acts and similar 'smoke control' legislation introduced from the mid-20th century. However, these remain important sources of air pollution in other parts of the world." For further information: <https://www.nature.com/articles/s41612-020-0124-2>

The Week Ahead

- [The Atlantic Council: Sustainable Aviation Fuel Policy in the United States](#), via Zoom – June 22, 2020
- [Local Government Strategies for 100% Clean Energy](#), via Webex – June 23, 2020

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