

# Clean Air Act Legal Update

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*AAPCA Fall Meeting 2017*

# What's in the Air?

**Clean Power Plan (Section 111(d) Emission Guidelines)**

**National Ambient Air Quality Standard (NAAQS) for Ozone**

**Startup, Shutdown, Malfunction State Implementation Plan (SIP) Call**

**Oil & Gas New Source Performance Standards (NSPS)**

**MSW Landfill NSPS & Emission Guidelines**

**Regional Haze Rule Revisions**

**Risk Management Program Revisions (RMP)**

**Refrigerants / Ozone Depleting Substances (Title VI)**

**Cross-State Air Pollution Rule (CSAPR) Update Rule**

**... and many more ...**



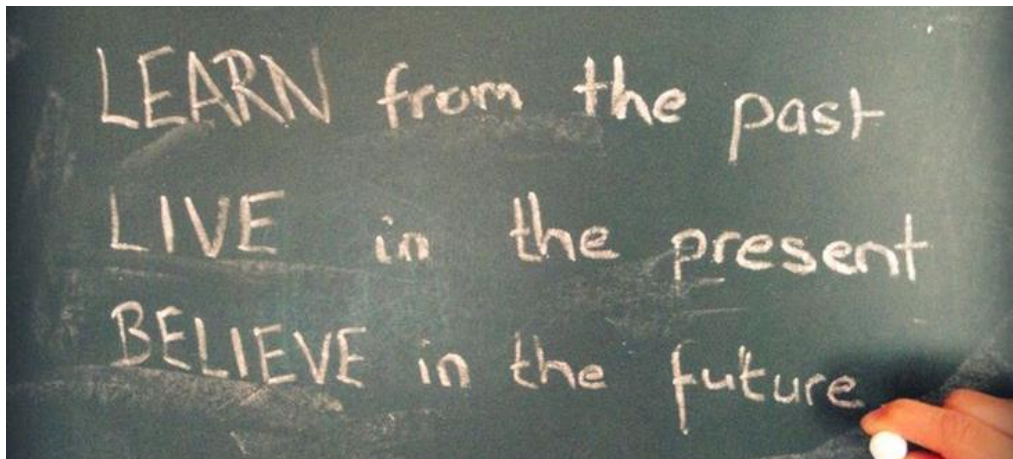
# Taking a SIP from the Firehose ...

## Recent EPA Actions:

1. 90-day Stay of Oil & Gas NSPS
2. Notice & Comment Stay of RMP Rule

## Future EPA Actions?

1. Revise the Regional Haze Rule
2. Withdraw the SSM SIP Call



# EPA's 90-Day Stay of the Oil & Gas New Source Performance Standards

- **June 2016**: EPA issues first-ever standards for new sources in the oil & gas sector to reduce methane emissions.
- **August 2016**: The Oil & Gas NSPS takes effect; first compliance deadlines set for June 2017.
- **August 2016**: API and others request administrative reconsideration of the rule.
- **April 2017**: EPA convenes reconsideration proceeding under Section 307(d)(7)(B) of the Clean Air Act
- **June 5, 2017**: EPA publishes a notice of reconsideration and “partial stay” for 90 days, pursuant to Section 307(d)(7)(B).





## EPA's 90-Day Stay under Section 307(d)(7)(B):

- **Based on decision to reconsider four issues:**
  1. Low-production wells
  2. Alternative means of compliance
  3. PE certification for vent systems
  4. Exemption for pneumatic pumps
- **Section 307(d)(7)(B):**
  1. "impracticable to raise" an objection during the public comment period
  2. the objection is "of central relevance to the outcome of the rule"
- **June 16, 2017: Notice of Proposed Rulemaking for a 2-year stay extension to allow for reconsideration**

# EPA's 90-Day Stay of the Oil & Gas New Source Performance Standards

## Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017)

### 1. Stays are “Final Actions”

Arguing a stay is non-final “is akin to saying that incurring a debt has legal consequences, but forgiving one does not. A debtor would beg to differ.”

### 2. §307 Stays Only Authorized if Reconsideration Mandatory

“Because it was thus not ‘impracticable’ for industry groups to have raised such objections during the notice and comment period, CAA section 307(d)(7)(B) did not require reconsideration and did not authorize the stay.”


### 3. Stays Must Be Supported by Law and Fact

“[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked and may not alter [such a rule] without notice and comment. ... EPA must point to something in either the [CAA] or the APA that gives it authority to stay”



# EPA's Notice and Comment Stay of the RMP Rule Amendments

- January 13, 2017: EPA publishes final amendments to the RMP regulations
- January 20, 2017: Priebus Memo ordering 60-day delay of effectiveness for all rules not yet effective
- Feb.-Mar. 2017: Reconsideration petitions filed by industry coalition and a coalition of states (AZ, AK, FL, KA, KY, OK, SC, TX, WI, VA)
- March 21, 2017: EPA issues 90-day §307 Stay
- April 3, 2017: EPA proposes, and requests comment, on extending the stay until February 2019
- June 14, 2017: EPA finalizes stay until 2019



### Elements of a Risk Management Program

- Management System
- Hazard Assessment
- Prevention Program
- Emergency Response Planning
- Risk Management Plan (RMP) - submit to EPA

May 2016 MECC Conference 8

# EPA's Notice and Comment Stay of the RMP Rule Amendments



**By providing notice and taking comment, EPA has avoided some challenges. However, environmental interest groups have alleged that the delay suffers from two legal flaws:**

- Because CAA § 307 grants only one, expressly limited means of issuing a stay based on an intent to reconsider, it precludes EPA from using its general rulemaking authority to do so.
- Like any rule, EPA must ensure its actions are not “arbitrary and capricious,” which means EPA must ground its actions in a final determination, not just an intent to reconsider.

**Unlike in *Clean Air Council*, the D.C. Circuit rejected the’ request for summary vacatur: “[t]he merits of the parties’ positions are not so clear as to warrant summary action.”**



# Other Related Efforts to Stay / Delay Rules Under Reconsideration

## What about Section 705 of the Administrative Procedures Act?

- Becerra v. DOI, No. 17-02376 (N.D. Cal. Aug. 30, 2017) (Order granting plaintiff's motion for summary judgement vacating use of §705 to stay effectiveness of an already effective rule).

## What about EPA's Proposed Stay Extension for the Oil & Gas NSPS?

- Comment period ended August 9, 2017, and no final action has been issued.
- API Comments: "EPA Should Extend the Relevant Compliance Deadlines (Rather Than Issue a Stay), Pursuant to Its Authority Under CAA § 111."

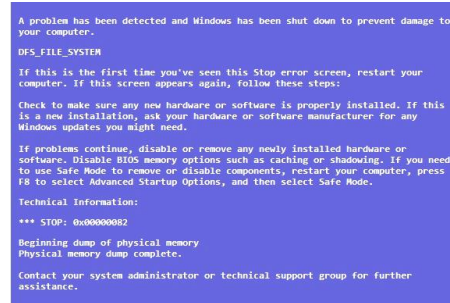
## Has EPA finalized any similar actions since Clean Air Council?

- Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (signed Sept. 12, 2017) (extending compliance deadlines for two requirements by two years and rescinding APA § 705 stay)

# In Need of Action: SSM SIP Call

During startup, shutdown, or malfunctions (SSM), many emission limitations designed for normal, steady-state operations may be unachievable.

- Some control devices cannot be engaged
- Efficient combustion cannot be achieved
- SSM events involve “transient” conditions
- Accurate measurement during SSM events is difficult, if not impossible



Without an SSM provision, these unavoidable emissions could be unavoidable violations.

- Some confirm that SSM emissions are not a “violation”
- Some provide an “affirmative defense”
- Some allow state authorities to determine “violations”
- Almost all are qualified or conditioned



# In Need of Action: SSM SIP Call

**1. FINAL ACTION:** Granting Sierra Club Petition; determining that certain SIP provisions as “substantially inadequate” in that they fail to comply with “other requirements” of the Clean Air Act (e.g., automatic exemptions, affirmative defenses, and director’s discretion provisions).

- LEGAL BASIS:

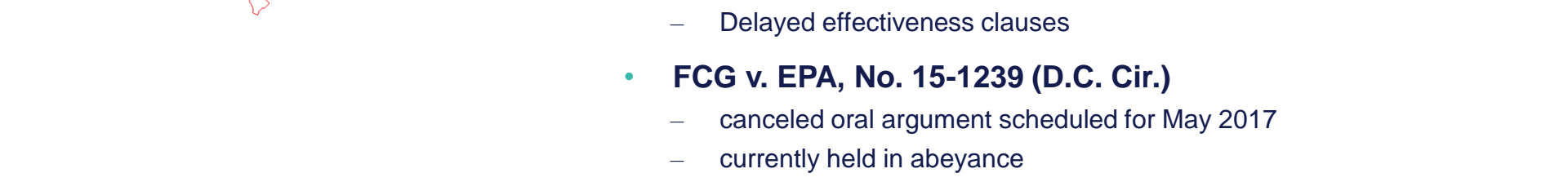
- “[T]he CAA requires that all ‘emission limitations’ must apply continuously and cannot contain exemptions, conditional or otherwise.”
- “EPA believes the reasoning of the court in the NRDC v. EPA decision indicates that states, like the EPA, have no authority in SIP provisions to alter the jurisdiction of federal courts to assess penalties for violations of CAA requirements through affirmative defense provisions.”

- NO FACTUAL BASIS: EPA asserted that proof of a threat to the NAAQS was not required for SIP Calls related to "legal deficiencies."

**2. NOT FINAL ACTION:** “This SSM Policy as of 2015 is a policy statement and thus constitutes guidance. As guidance, this SSM Policy as of 2015 does not bind states, the EPA or other parties.”

- Alternative emission limitations (i.e., work practice standards) allowed under certain conditions

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# In Need of Action: Regional Haze



# In Need of Action: Regional Haze

## ROUND 1: HIGHLIGHTS

- “BART” was highly controversial, expensive element; EPA disapproved many state BART determinations
- Many Circuit Court decisions (CA3, 5, 6, 8, 9, 10); EPA won most (but sometimes in a split decision)
- Power plants for half of the country benched under CAIR / CSAPR = BART policy



# In Need of Action: Regional Haze

## Round 1: “BART” Factors

1. Cost of compliance
2. Energy and non-air environmental impacts of compliance
3. Remaining useful life
4. Existing pollution control technology in use at the source
5. Degree of improvement in visibility

## Round 2: “Reasonable Progress” Factors

1. Cost of compliance
2. Energy and non-air environmental impacts of compliance
3. Remaining useful life
4. Time necessary for compliance



***“Reasonable progress” ... toward what?***



# In Need of Action: Regional Haze

- “[B]aseline visibility impacts and prospective **visibility benefits are not a ‘fifth factor’** that states must consider when determining reasonable progress. However, given that the goal of the regional haze program is to improve visibility, the EPA believes that **states may consider visibility ....**” (Proposed Guidance, at 14).
- “After the screening step, we recommend that states consider only the four statutory factors to determine whether control measures are necessary to achieve reasonable progress. ... **[W]e do not recommend that states model visibility benefits and weigh those benefits against the four statutory factors to identify appropriate control measures.**” (Proposed Guidance, at 15).





# In Need of Action: Regional Haze

## Oklahoma v. EPA, 723 F.3d 1201 (10th Cir. 2013)

Majority:

- The state “... failed to follow the EPA’s guidelines ...”
- “[W]e acknowledge that this is a close case [but] we must give deference to the EPA.”



Dissent:

- “The EPA deserves no such deference [ ] where it does not support a conclusion contradicting Oklahoma's first, reasonable, detailed technical conclusion.”

**42 U.S.C. § 7491 (CAA § 169A):** ... each major stationary source ... which, as determined by the state, ... may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate ... the best available retrofit technology, as determined by the State.

**Texas v. EPA, No. 17-1027 (filed Jan. 23, 2017)** (briefing formats due Sept. 22nd)

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