

The Association of Air Pollution Control Agencies'  
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# Clean Air Act Updates

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# Overview

- ▶ Climate change litigation
  - EPA regulation of greenhouse gases (GHG)
  - The Clean Power Plan (CPP)
  - The Affordable Clean Energy Rule (ACE)
  - The future of GHG regulation
  - Mobile source GHG regulation
  - Other climate change litigation
- ▶ Litigation over EPA rulemakings
  - Methane emissions standards for oil and gas industry
  - Refrigerants rulemaking
- ▶ National Compliance Initiatives (2020-2023)
- ▶ Recent Clean Air Act (CAA) enforcement actions

# Climate Change Litigation: Background

- ▶ **2007** – U.S. Supreme Court rules that GHGs are “air pollutants” under the CAA, and the CAA authorizes EPA to regulate GHGs if determined to be danger to human health. *Massachusetts v. EPA*, 549 U.S. 497.
- ▶ **2009** – EPA issues endangerment finding for GHGs. 74 F.R. 66496.
- ▶ **2011** – U.S. Supreme Court reaffirms *Massachusetts* and finds that CAA “provides a means to seek limits on emissions of carbon dioxide from domestic powerplants.” *AEP v. Connecticut*, 131 S. Ct. 2527.
- ▶ **Oct. 2015** – EPA establishes NSPS for power plants and reaffirms that GHGs “endanger public health, now and in the future” (80 F.R. 64510).
- ▶ EPA looks to CAA Section 111(d) to promulgate GHG regulations for existing power plants.

# Climate Change Litigation: CAA Section 111

- ▶ Directs EPA to regulate any new and existing stationary sources of air pollutants that “cause[], or contribute[] significantly to, air pollution” and that “may reasonably be anticipated to endanger public health or welfare.”
- ▶ For new sources, EPA develops standards of performance.
- ▶ For existing sources, process of cooperative federalism:
  - EPA identifies the “best system of emission reduction” (BSER) and sets emissions guidelines.
  - States issue standards of performance that comply with EPA emissions guidelines.
  - Regulated sources implement measures to comply with standards of performance.

# Climate Change Litigation: Clean Power Plan

- ▶ **2015** – Obama administration promulgates CPP under CAA Section 111(d) to set first federal GHG limits for existing power plants.
  - BSER = (1) improving efficiency (heat rate improvements) at power plants; (2) shifting generation to natural gas combined cycle units; and (3) shifting generation to renewables.
  - EPA sets interim and final CO<sub>2</sub> emissions guidelines.
  - States required to develop and implement plans to meet EPA performance rates.





# Legal Challenges Ensure...





# Climate Change Litigation: Clean Power Plan

- ▶ Key legal challenges to CPP:
  - Requiring an owner or operator of a source to construct, or to subsidize generation at other facilities is not a standard “for” that source at all.
  - CPP requires shift to new renewable energy facilities that do not emit a regulated pollutant and are not regulated under CAA.
  - EPA did not show that Congress clearly authorized the agency to restructure power markets under Section 111.
- ▶ **2016** – U.S. Supreme Court stays the CPP.
- ▶ **2017** – Trump signed E.O. directing EPA to review CPP.
- ▶ **2019** – D.C. Circuit dismissed the challenges to the CPP as moot in light of Trump administration’s replacement regulation, the Affordable Clean Energy Rule.

# Climate Change Litigation: Affordable Clean Energy Rule

## ► **2019** – ACE to replace CPP.

- CAA Section 111(d).
- BSER = heat rate improvement.
- Replace generation shifting of CPP with GHG reductions based on physical changes to existing power plants themselves.
- Seven candidate heat-rate improvement measures.
- States required to establish unit-specific standards of performance to meet emission limit achievable through application of technologies.
- No trading schemes, burning of biofuels, or carbon capture and storage technologies.





# Legal Challenges Ensure...

# Climate Change Litigation: Affordable Clean Energy Rule

- ▶ Key legal challenges to ACE in *Am. Lung Assoc. v. EPA*, No. 19-1140 (D.C. Cir. 2021):
  - Challenge to EPA's conclusion that Section 111 only permits emission reduction measures that can be implemented at and applied to the source.
  - No requisite endangerment finding for this source.
  - Mercury emission rules precluded regulation of GHGs.
  - NAAQS program, Sections 108-110, appropriate to regulate CO<sub>2</sub> emissions, not Section 111. D.C. Cir. held those petitioners lacked standing.
- ▶ **2021** – D.C. Circuit vacates ACE; agency not limited to identifying BSER consisting only of controls that can be applied at and to a stationary source.
  - Fundamental misconstruction of Section 111.
  - No major question presented.
  - Changes to Section 110 approval process was arbitrary & capricious.
  - No mandate on CPP until EPA responds to court's remand in new rulemaking.

# Climate Change Litigation: Where Are We Now?

- ▶ ACE saga continues: two petitions for writ of certiorari filed in U.S. Supreme Court seeking review of D.C. Circuit's decision.
  - United States' response is due July 6.
- ▶ **2021** – Biden Administration and a clean energy standard?
  - E.O. 13990 and return to Obama era method of calculating social cost of carbon, methane, and nitrogen oxide. Challenged by coalition of states.
  - Targets to reduce GHG emissions by 50-52% by 2030, 100% carbon-free electricity by 2035, and net zero emissions economy-wide by 2050.
  - National clean energy standard similar to state renewable portfolio standards?
  - Who would regulate, EPA or DOE?
- ▶ Unified Agenda: timing for NPRM and final rule on emission guidelines for GHG emissions from power plants "TBD"

# Mobile Source GHG Regulation: SAFE and CAFE Standards

- ▶ **Sept. 2019** – EPA and NHTSA issue Part 1 of Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule.
  - NHTSA determination that State programs to regulate tailpipe GHG emissions or establish zero-emission vehicle (ZEV) mandates are preempted to set stage for national GHG and fuel economy standards under Energy Policy and Conservation Act (EPCA).
  - In light of NHTSA preemption determination, EPA withdraws prior waiver to CA for the State's GHG and ZEV programs under CAA Section 209 as null and void.
- ▶ **Apr. 2020** – EPA and NHTSA issue Part 2 of SAFE Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks.
  - EPA amends CO<sub>2</sub> standards for model years 2021+.
  - NHTSA amends corporate average fuel economy (CAFE) standards for model year 2021 and sets new standards for model years 2022-2026.



# Legal Challenges Ensnue...



# Mobile Source GHG Regulation: SAFE and CAFE Standards

- ▶ ***Union of Concerned Scientists v. NHTSA* (D.C. Cir.) (consolidated case)**
  - Did EPA lack authority for its waiver withdrawal?
  - Did EPA lack authority to determine which CA emission standards States may adopt or enforce?
  - Did NHTSA exceed its authority in issuing regulations respecting preemption under the EPCA?
- ▶ **Jan. 2021** – Biden administration issues E.O. 13990 and directs EPA to review SAFE Rule Parts 1 and 2.
- ▶ **Feb. 2021** – D.C. Circuit grants Biden administration's motion to hold case in abeyance while agencies EPA and NHTSA conduct their review of the Trump-era rulemakings.

# Mobile Source GHG Regulation: SAFE and CAFE Standards

## ► Status of SAFE Rule Part 1

- **May 2021** –NHTSA proposes repeal of SAFE Rule Part 1
- **May 2021** – EPA publishes Notice of Opportunity for Public Hearing and Comment on agency's reconsideration of prior withdrawal of CA waiver.

## ► Status of SAFE Rule Part 2

- Unified Agenda: EPA expects to issue NPRM in July 2021 and final rule in Dec. 2021.
- Unified Agenda: NHTSA expects to issue NPRM in July 2021.

# Mobile Source GHG Regulation: Local Programs

- ▶ **May 2021** – California South Coast Air Quality Management District adopts Warehouse Actions and Investments to Reduce Emissions (WAIRE) program.
  - Requires warehouses more than 100k square feet to reduce NO<sub>x</sub> and diesel PM emissions from heavy-duty trucks and other sources (e.g., cargo handling equipment).
  - Requires warehouse operators to earn a specified number of points annually (calculated based on weighted annual number of truck trips to warehouse and stringency factor based on warehouse size and compliance year).
  - Points can be earned by:
    - ▶ Taking certain actions (e.g., acquire and use natural gas, near-zero emissions, and/or zero-emissions on-road trucks; zero-emission cargo handling equipment; solar panels or zero-emission charging and fueling infrastructure); or
    - ▶ Paying \$1,000 mitigation fee per WAIRE Point.

# Other Climate Change Litigation

## ***Juliana v. United States***

21 young people, environmental organization, and “presentative of future generations” sue to hold U.S. government liable for climate change.

2020 – 9th Cir. holds that plaintiffs lack standing; case dismissed. 947 F.3d 1159.

## ***Aji P. v. Washington***

13 young people sued State of Washington and officials for infringing on “fundamental right” to a stable climate.

2021 – Wash. Court of Appeals affirmed dismissal of case. 16 Wash. App. 2d 177.

## ***Reynolds v. Florida***

8 young people sue State of Florida and state agencies and officials, claiming violation of “fundamental right” to stable climate under state constitution and common law.

2021 – 1st District Court of Appeal upholds dismissal. 2021 WL 1975179.

Circuit Court had found that “[t]he claims are inherently political questions that must be resolved by the political branches of government.”

# Other Climate Change Litigation

- ▶ Series of state and local government suits against petroleum companies stating various claims arising from damage caused by fossil fuels and alleging that companies have concealed the environmental impacts of the fossil fuels they promoted.
- ▶ U.S. Supreme Court upholds removal of these cases to federal courts; no decisions on the merits yet.
  - *BP LC v. Mayor and City Council of Baltimore*, No. 19-1189.
  - *Shell Oil Products Co. v. Rhode Island*, No. 20-900.
  - *Suncor Energy v. Board of Cnty Commrs. of Boulder Cty.*, No. 20-783.
  - *Chevron Corp. v. Cty. of San Mateo*, No. 20-884.
- ▶ *Connecticut v. Exxon Mobil Corp.*, No. 20-cv-01555 (D. Conn.): Connecticut sues Exxon under State's consumer protection law, arguing that Exxon hid climate research and promoted misinformation about role of fossil fuels in climate change.
  - On June 2, Court granted Connecticut's motion to remand case to state court.
  - Court granted temporary stay of remand order pending Exxon's appeal to 2d Cir.





# Other Climate Change Litigation

## ► *Chevron Corp. v. Oakland*

- **2017** – Cities of San Francisco and Oakland, California, sued oil companies (BP, Chevron, ConocoPhillips, ExxonMobil, Shell) in California state court.
    - Alleged that the companies maintained a public nuisance by promoting and selling fossil fuels while knowing that burning of fossil fuels would contribute to climate change.
    - Sought billions of dollars related to rising sea levels, asking court to order the companies to fund a climate adaptation program.
  - Oil companies removed case to federal court, arguing that cities' claims raise questions of interstate and international pollution that are federal in nature.
  - **2018** – district court grants oil companies' motion to dismiss.
  - **2020** – 9<sup>th</sup> Circuit rules in favor of the cities that cases do not raise issues of federal law and should proceed in state court.
  - **2020** – 9<sup>th</sup> Circuit denied rehearing of decision that federal question jurisdiction did not provide basis for removing the cases to federal court.
  - **June 2021** - U.S. Supreme Court denied petition for writ of certiorari.
  - Cases currently pending in federal district court.
- Unified Agenda: Oct. 2021, SEC to issue NPRM on climate change disclosures to enhance registrant disclosures re: issuers' climate-related risks and opportunities.
- June 16, 2021 – House passes bill that would mandate publicly traded companies to disclose financial risks related to climate change.



A photograph of an industrial flare stack with a large flame at the top, set against a blue sky with some clouds. The image is positioned on the left side of the slide, partially overlapping a blue diagonal design element.

# Litigation Over EPA Rulemakings

- ▶ Methane emissions rule litigation
  - **May 2016** – Obama administration issues 3 final rules (NSPS and permitting rules) to reduce emissions of methane, smog-forming VOCs, and toxic air pollutants from new, reconstructed, and modified oil and gas sources.
    - ▶ Updated NSPS for methane and VOC emissions.
    - ▶ Imposed new requirements for monitoring and repairing of “leaks” (i.e., fugitive emissions).
  - **April 2017** – Trump administration to reconsider the 2016 rules.
  - **Mar. 2018** – EPA amends portions of 2016 NSPS rule related to two fugitive emission requirements:
    - ▶ Requirement that leaking components be repaired during unplanned or emergency shutdowns.
    - ▶ Monitoring survey requirements for well sites located on the Alaskan North Slope.

# Litigation Over EPA Rulemakings

- ▶ Methane emissions rule litigation
  - **Aug. 2020** – EPA issues 2 final rules to roll back requirements.
    - ▶ Removed transmission and storage segment of oil and gas industry from regulation.
    - ▶ Rescinded methane emission standards for production and processing segments.
    - ▶ Exempted low-production wells from monitoring fugitive emissions.
    - ▶ Decreased monitoring of fugitive emissions.
  - **2021** – Biden administration set to rescind Trump rules and consider reinstating or modifying 2016 rules.
    - ▶ EPA public listening sessions were held on June 15-17.
    - ▶ Unified Agenda: NPRM for methane emission guidelines in Oct. 2021; final rule in Oct. 2022.
  - **2021** – H.J. Resolution 34 (Mar. 26, 2021) - would rescind 2020 rule, 85 F.R. 57018, and reinstate Obama-era regulation. House to vote on Res. 34 this week.
- ▶ The Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2020 (PHMSA) – have an impact on releases to air

# Litigation Over EPA Rulemakings

- ▶ Hydrofluorocarbon (HFC) Regulation & Litigation
  - **1987** – U.S. and 22 other countries sign the Montreal Protocol.
  - **1988** – EPA issues final rule committing to reduce production and import of certain CFCs to 50% of 1986 levels by 1998.
  - **2015** – EPA issues new HFC rule. 80 F.R. 42870.
  - **2016** – Various countries sign Kigali Amendment to Montreal Protocol, adding HFCs to list of chemicals signatories promise to phase out.
  - **2017** – *Mexichem Fluor, Inc. v. EPA*, No. 15-1328: D.C. Circuit (then Cir. Judge Kavanaugh) vacates 2015 rule and holds that EPA lacks authority to regulate HFCs. CAA “Section 612 does not require (or give EPA authority to require) manufacturers to replace non-ozone-depleting substances such as HFCs.”

# Litigation Over EPA Rulemakings

## ► HFC Regulation & Litigation

**2020**

Congress passes Consolidated Appropriations Act of 2021, which directs EPA to phase down production and consumption of HFCs in the U.S. by 85% over next 15 years.

**Jan. 2021**

Biden signs E.O. directing his administration to sign onto Kigali Amendment.

**May 19, 2021**

EPA proposes HFCs regulation that would set HFC production and consumption baseline levels from which reductions will be made, establish initial methodology for allocating and trading HFC allowances for 2022 and 2023, and create compliance and enforcement system.

Public comment period closes on July 6.

Final rule expected Oct. 2021.



# National Compliance Initiatives (2020-2023)

- ▶ Two CAA enforcement initiatives for 2020-2023.
  - Stopping aftermarket defeat devices for vehicles and engines by stopping manufacture, sale, and installation of defeat devices on vehicles and engines used on public roads and on non-road vehicles and engines.
  - Creating cleaner air for communities by reducing excess emissions of HAP by addressing adverse health and environmental effects from exceedances of the NAAQS to which sources of VOCs contribute and VOC- and HAP-related health impacts on communities.
  - Not an NCI, but EPA says its enforcement program helps reduce childhood lead exposures as part of Federal Action Plan to Reduce Childhood Lead Exposure.
- ▶ New Source Review enforcement is waning.

# Aftermarket Defeat Devices

- ▶ **2015** – “Dieselgate” spurred CAA enforcement initiative.
- ▶ Basis: CAA Section 203(a)(3) prohibition on tampering with emission controls and the making or selling of anti-defeat devices
- ▶ Over 50 enforcement actions and settlements and counting...
- ▶ Targets include large manufacturers and distributors and “mom-and-pop” truck repair stations.
- ▶ **2020** – EPA issues “Tampering Policy” guidance.



# Recent CAA Enforcement Actions

- ▶ *United States v. Home Depot*, No. 20-cv-05112-MHC  
Nationwide settlement with Home Depot to resolve alleged violations of Lead Renovation, Repair and Painting (RRP) Rule.
- ▶ *United States v. DTE Energy Co.*, No. 10-cv-13101  
Settlement of CAA enforcement action against DTE for allegedly implementing major modifications at several coal-fired EGUs without obtaining necessary permits, without installing required emission controls, and without achieving the LAER.
  - Sierra Club and DTE entered into separate settlement agreement with SEP. Federal government objected to that settlement, but district court rejected that challenge.
- ▶ *United States v. Dow Chem. Company*, No. 21-cv-114  
Settlement reached with Dow Chemical and two of its subsidiaries for alleged violations of CAA requirements and Dow's flares that resulted in excess emissions of VOCs and HAPs.





# Thank You!



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