

The Association of Air Pollution Control Agencies' 2021 Virtual Meeting Series

Clean Air Act Updates

June 24, 2021

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Pres. Biden's “Whole of Government” Approach

- During the first week of President Biden's administration, he wasted no time in kicking off his “whole of government” effort to achieve the ambitious environmental and climate goals set during his campaign.



- He signed multiple executive orders and presidential memoranda, launching a flurry of activity across federal agencies.

<https://eelp.law.harvard.edu/portfolios/environmental-governance/bidens-week-one-mapping-ambitious-climate-action/>

Executive Orders: 1, 2 Punch

- Two of Pres. Biden's Executive Orders take direct aim at undoing the Trump Administration's environmental legacy and ramping up proactive climate efforts:
 - Executive Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Public Health and the Environment EO) signed on inauguration day; and
 - Executive Order 14008 on Tackling the Climate Crisis at Home and Abroad signed one week later on January 27.



Presidential Memo: Modernizing Reg Review

- Also of interest, a Presidential Memorandum was issued on January 26, 2021, entitled “Modernizing Regulatory Review”.



- It calls for recommendations to weed out “anti-regulatory or deregulatory” bias from the interagency review process.

Regulatory Reset

- Pres. Biden's January 20 Public Health & Environment EO directed all agencies to review actions taken during the Trump presidency for consistency with the policy objectives outlined by the order. (Sec. 2, EO 13990)
- This is a large undertaking requiring careful review of rulemakings at the Department of the Interior (DOI), Environmental Protection Agency (EPA), and elsewhere.

<https://eelp.law.harvard.edu/portfolios/environmental-governance/bidens-week-one-mapping-ambitious-climate-action/>

Executive Orders: List of Agency Actions for Review

- The Public Health and the Environment EO was accompanied by a non-inclusive list of agency actions the White House expects the following agencies to review:
 - Council on Environmental Quality (CEQ) (2)
 - US Dept. of Agriculture (1)
 - US Dept. of Commerce (5)
 - US Dept. of Defense (2)
 - US Dept of Energy (10)
 - **US EPA (48)**
 - US Dept. of Justice (1)
 - US Dept. of the Interior (31)
 - US Dept. of Labor (1)
 - US Dept. of Transportation (3)

Executive Orders: List of Agency Actions for Review (2)

List of Agency Actions for Review

(FACT SHEET of Jan 20, 2021)

- Lists 48 EPA actions, including approximately 18 actions related to regulating criteria pollutants and air toxics, including:
- Review of Ozone and PM NAAQS (from December 2020)
- Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources (from September 2020)
- Dallas-Fort Worth and Houston-Galveston-Brazoria Area Redesignation and Maintenance Plans for Revoked Ozone NAAQS (from February and April 2020)
- SAFE Vehicle Rules MY2021-2026 (from September 2019 and April 2020)
- Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (from November 2020)
- Memo: Provisions Governing Periods of Startup, Shutdown, and Malfunctions in SIPs (signed October 2020)
- EPA Guidance; Administrative Procedures for Issuance and Public Petitions (from October 2020)



Freeze!

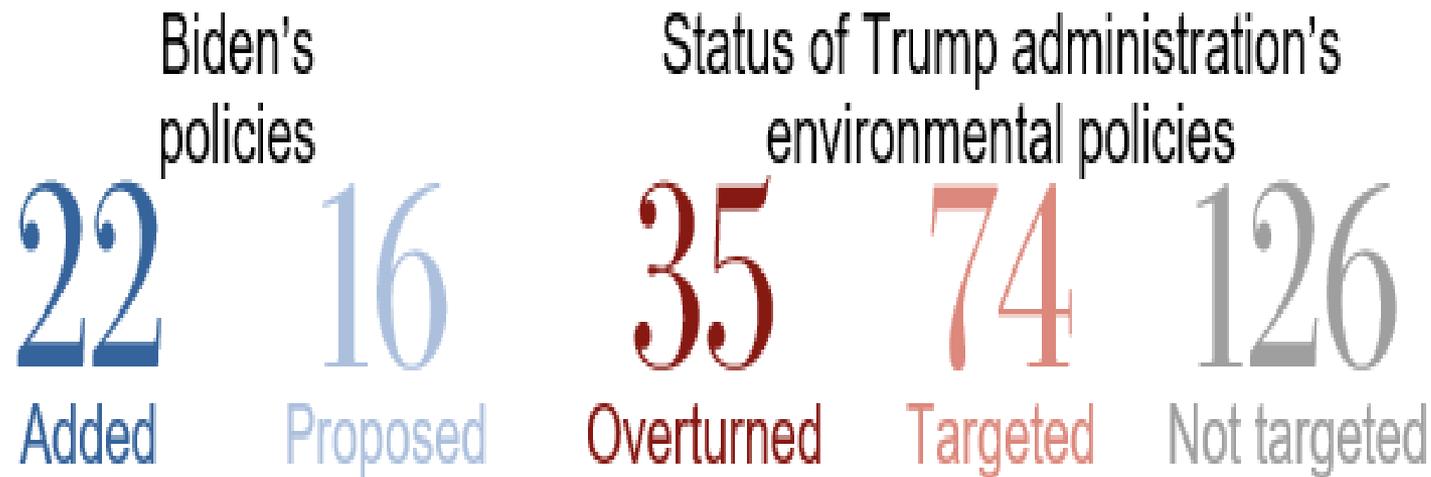
Regulatory Freeze Pending Review



- MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES FROM: Ronald A. Klain, Assistant to the President and Chief of Staff (January 20, 2021)
- Placed a hold on proposing or issuing rules not yet published until a department or agency head appointed or designated by President Biden reviews and approves the rule. Impacted actions included:
 - Numerous proposed and final SIP actions
 - Final SO₂ Designations Round 4 (signed December 21, 2020)
 - 2015 Ozone Designations Remand response (signed January 19, 2021)
 - Proposed Response to Maine CAA Sec. 176A Petition (signed January 11, 2021)

Tracking Biden's Environmental Actions*

*As of June 14, 2021



<https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions/>

Tracking Biden's Environmental Actions (2)*

*As of April 2021

		Added protections	Trump policy overturned	Targeted	Not yet targeted
	Air pollution and greenhouse gases	5	4	26	35
	Chemical safety	0	0	6	8
	Drilling and extraction	6	8	17	44
	Infrastructure and permitting	2	6	3	19
	Accountability	3	3	0	0
	Water pollution	0	0	7	7
	Wildlife	1	2	11	16

<https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions/>

Tracking Biden's Environmental Actions (2)*

*As of June 14, 2021



Air pollution and greenhouse gases

7 new policies added 7 proposed

Status of Trump's rollbacks: 9 overturned 25 targeted 35 not yet targeted

<https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions/>

Air in the Spotlight



American Electric Power's Mountaineer coal power plant in New Haven, W.Va.

Photographer: Saul Loeb/AFP/Getty Images

Clean Air Issues Take a Top Spot in Biden's Agency Priorities

<https://news.bloomberglaw.com/environment-and-energy/clean-air-issues-take-a-top-spot-in-bidens-agency-priorities>

Unified Agenda

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Agency Rule List - Spring 2021

Environmental Protection Agency

Agency	Agenda Stage of Rulemaking	Title	RIN
EPA/RODENVER	Proposed Rule Stage	Federal Implementation Plan to Establish a Market for Ozone-Precursor Emissions Reduction Credits From Existing Sources on Indian Country Lands Within the Uinta Basin Ozone Nonattainment Area	2008-AA04
EPA/RODENVER	Final Rule Stage	Federal Implementation Plan for Oil and Natural Gas Sources; Uintah and Ouray Indian Reservation in Utah	2008-AA03
EPA/ROSEATTLE	Proposed Rule Stage	Federal Implementation Plans Under the Clean Air Act for Indian Reservations in Idaho, Oregon and Washington	2012-AA02
EPA/OECA	Final Rule Stage	Revocation of On-site Civil Inspection Procedures Rule	2020-AA54
EPA/OEI	Proposed Rule Stage	Environmental Protection Agency Freedom of Information Act Regulations Update, Phase II	2025-AA38
EPA/OEI	Proposed Rule Stage	Revisions to the EPA's Privacy Act Regulations for Systems of Records Notices	2025-AA43
EPA/OMS	Final Rule Stage	Revisions to 2 CFR Part 1500	2030-AB01
EPA/OW	Prerule Stage	Clean Water Act Effluent Limitations Guidelines and Standards for the Organic Chemicals, Plastics and Synthetic Fibers Point Source Category	2040-AG10
EPA/OW	Proposed Rule Stage	Federal Baseline Water Quality Standards for Indian Reservations	2040-AF62
EPA/OW	Proposed Rule Stage	Clean Water Act 404 Assumption Update Regulation	2040-AF83
EPA/OW	Proposed Rule Stage	Compensatory Mitigation for Losses of Aquatic Resources--Review and Approval of Mitigation Banks and In-Lieu Fee Programs	2040-AF90
EPA/OW	Proposed Rule Stage	Market-Based Approaches under the National Pollutant Discharge Elimination System (NPDES) Program	2040-AG02
EPA/OW	Proposed Rule Stage	Federal Recreational Water Quality Criteria Applicable to Certain Waters in New York	2040-AG08
EPA/OW	Proposed Rule Stage	Clean Water Act Section 401: Water Quality Certification	2040-AG12
EPA/OW	Proposed Rule Stage	Water System Restructuring Assessment Rule	2040-AF96
EPA/OW	Proposed Rule Stage	Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights	2040-AG17
EPA/OW	Final Rule Stage	Federal Selenium Criteria for Aquatic Life and Aquatic-Dependent Wildlife Applicable to California	2040-AF79
EPA/OW	Final Rule Stage	Vessel Incidental Discharge National Standards of Performance	2040-AF92
EPA/OW	Final Rule Stage	Credit Assistance for Water Infrastructure Projects	2040-AF98
EPA/OW	Final Rule Stage	Criminal Negligence Standard for State Clean Water Act 402 and 404 Programs	2040-AG09
EPA/OW	Final Rule Stage	Unregulated Contaminant Monitoring Rule (UCMR 5) for Public Water Systems	2040-AF89
EPA/OW	Final Rule Stage	Final Lead and Copper Rule Revisions; Proposed Delay in the Effective and Compliance Dates	2040-AG15
EPA/OLEM	Proposed Rule Stage	Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations	2050-AH08
EPA/OLEM	Proposed Rule Stage	Integrating e-Manifest With Exports and Other Manifest-Related Reports, PCB Manifest Amendments, and Technical Corrections	2050-AH12
EPA/OLEM	Proposed Rule Stage	Response to Petition to Revise the Non-Hazardous Secondary Material Standards Under Part 241	2050-AH13
EPA/OLEM	Proposed Rule Stage	Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy Surface Impoundments	2050-AH14
EPA/OLEM	Proposed Rule Stage	Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulations	2050-AH17

Unified Agenda (2)

*The Biden Administration issued its Unified Agenda of Regulatory and Deregulatory Actions on 6-10-21.

*The agenda included 67 actions in the EPA Office of Air and Radiation

*These actions are in one of the following stages:

- Pre-rule
- Proposed rule
- Final rule

Unified Agenda (3)

- EPA's spring 2021 regulatory agenda lists several major air rulemakings it will pursue in the near future, such as steps to shore-up the legal foundation of its landmark **power plant air toxics rule (MATS)**, and to issue statutorily required **biofuels blending volumes under the renewable fuel standard (RFS)**.

Unified Agenda (4)

- But several major items are conspicuous by their absence from the list, including:
 - *ozone and particulate air limits;
 - *an expected interstate air pollution regulation update (CSAPR); and
 - *rules on industrial facility startup and shutdown exemptions (SSM).

Unified Agenda: NAAQS Attainment

- In July and August, EPA intends to propose findings on which areas are attaining or violating the agency's 2008 and 2015 ozone NAAQS, and finalize those findings in March 2022.

Ozone Designations Remand Background

- In *Clean Wisconsin v. EPA*, the D.C. Circuit remanded to EPA numerous area designations for the 2015 ozone NAAQS.
- As an initial matter, the court held that environmental groups had organizational standing to challenge the designations because of injuries to their members, and held that the governmental petitioners had standing because of injuries in their capacity as landowners of state and city parks (and not in their *parens patriae* capacity acting on behalf of injured state citizens).
- On the merits, the court held that some of the designations were arbitrary and capricious – often because of a lack of reasoned explanation – and for other areas accepted EPA’s request for a voluntary remand, treating those as “a concession [by EPA] that they are arbitrary and capricious.”

Unified Agenda: Section 126

- EPA says it intends in August to revise its prior decisions denying petitions by New York and Maryland that sought direct federal imposition of air pollution controls on power plants and other sources of ozone-forming air pollution in other states upwind, under Clean Air Act section 126.

Unified Agenda: Section 126

- Under Section 126 of the Clean Air Act, a downwind state can file a petition with the EPA to make a finding that upwind states are contributing to its inability to comply with “smog” standards.
- The EPA would then be required to take action against those upwind states.

Unified Agenda: Section 126 (2)

- EPA during the Trump administration lost several court battles over its methodology underlying interstate air transport policy, and it now says the petition denials require re-working to conform to those rulings.
- For example, the U.S. Court of Appeals for the District of Columbia Circuit faulted the agency for failing to ensure that CSAPR and related rules ensured NAAQS attainment by applicable air law deadlines (*New York v. EPA*).
- CSAPR in its current form addresses only the 2008 ozone limit of 75 parts per billion (ppb), not the tougher ozone limit of 70 ppb set in 2015. Environmentalists and states have pressed EPA to craft a new rule or policy to help meet the 2015 ozone limit.
- Without a new national rule, states are left alone to mitigate their “significant contribution” to other states’ ozone problems, crafting state implementation plans for that purpose.

Section 126: Maryland v EPA

- In *Maryland v. EPA*, the District of Columbia Circuit Court of Appeals (D.C. Circuit) granted in part and denied in part a challenge to EPA's denial of several petitions filed under section 126(b) of the Clean Air Act (CAA).
- Those petitions had sought a formal finding from EPA that specific sources upwind of Maryland and Delaware were emitting ozone in violation of the Good Neighbor Provision.
- In a win for the petitioners, the court applied its section 110 holding from *Wisconsin v. EPA* to the section 126 context, holding that EPA was required to evaluate the 126 petition with respect to the next applicable downwind attainment deadline.

Section 126: Maryland v. EPA (2)

- The court also held that a 126 petition could apply to receptors located outside of a petitioning state if the receptors were within a multistate nonattainment area that included the petitioning state.
- In most other significant matters, the court upheld EPA's denial of the petitions.
- Delaware, the court held, had failed to identify any in-state receptor showing current or future nonattainment under the relevant NAAQS.
- The court also deferred to EPA's reasoned view regarding the sufficiency of emission limitations achieved by those sources using selective catalytic reduction controls, but remanded to the agency for a reasoned explanation regarding whether non-catalytic controls were cost-effective.

Section 126: New York v. EPA

- In *New York v. EPA*, the D.C. Circuit Court vacated and remanded EPA's denial of a petition from New York that specific facilities in nine upwind states were violating the CAA's Good Neighbor provision.
- EPA had denied New York's petition, in part, because according to EPA, New York carried the burden of proof under section 126(b) and its failure to sufficiently assess the availability of cost-effective controls at the upwind sources meant the State failed to meet its burden.
- The court held that EPA (including during oral argument) had not provided a coherent explanation for why New York failed to meet its burden, calling it a "shifting explanation."

Section 126: New York v. EPA (2)

- The court also noted that EPA had used 2023 as the reference year in determining whether sources were contributing to nonattainment in New York even though 2021 was the attainment deadline.
- Similarly, as in the previously mentioned case of *Maryland v. EPA*, the court further faulted EPA for shutting the door on consideration of receptors outside of New York that were nevertheless located in a New York-inclusive multistate nonattainment area.

Regional Haze



Regional Haze Program Update



- Regional Haze Program focus is on planning associated with the second planning period SIPs due by July 31, 2021.
 - EPA HQ and Regional Offices continue to engage on issues associated with states' Regional Haze analyses and plan development.
 - Continue to engage with Federal Land Managers.
- EPA has received final second planning period SIPs from a few states.
 - A couple of other states have completed their state public comment process.
 - Numerous other draft SIPs are under review by FLMs and as part of the early engagement process with EPA.
- Working to resolve remaining first planning period SIP/FIPs for 8 states.

Regional Haze (2)

- At the close of the Trump Administration, EPA was in the final stages of implementing an April 12, 2018 presidential directive to review all existing regional haze Federal Implementation Plans (FIPs) and to develop options to replace those plans with State Implementation Plans (SIPs).
- EPA has also been involved in ongoing litigation with multiple states and regulated industries regarding the adequacy of the states' SIPs and the consequent FIPs that EPA promulgated.
- Through these legal challenges, several states and industry sought alternative technology standards for subject facilities.

Regional Haze (2)

- In many cases, the litigation and the FIP involved only a portion of the state's plan, including pollution controls for specific power plants.
- Five states that were recently engaged in legal challenges to EPA's actions on their Regional Haze SIPs are:
 - Arizona
 - Arkansas
 - Texas
 - Utah
 - Wyoming

Regional Haze: Arizona

- **Dec. 5, 2012** EPA publishes a final rule that partially disapproves one section of Arizona's SIP and promulgated a FIP to require certain NOx controls for the Cholla Power Plant, a coal-burning plant in Arizona.
- **Sep. 3, 2014** EPA publishes a final rule completing the 2012 FIP for certain disapproved sections of Arizona's SIP. The FIP promulgates control technologies for five facilities in Arizona and addresses the short-term progress goals for two facilities in the state.
- **Oct. 13, 2014** Arizona files a petition for review of EPA's FIP in the 9th Circuit Court of Appeals. In November, three of the facilities regulated by the FIP file separate petitions for review in the 9th Circuit. The four cases are consolidated as Arizona ex rel Henry Darwin v. USEPA, et al, Docket No. 14-73368.

Regional Haze: Arizona (2)

- **Jan. 27, 2015** Industry files a motion to stay the final rule.
- **June 21, 2016** Oral argument is held in *Arizona ex rel Henry Darwin v. EPA*.
- **March 27, 2017** EPA publishes a final rule approving a source-specific SIP revision for the Cholla Power Plant in northeastern Arizona. The SIP requires that two units at the plant eventually stop burning coal but allows for alternative NOx controls rather than those that had been included under the previous FIP promulgated by the Obama administration.

Regional Haze: Arizona (3)

April 3, 2017 The 9th Circuit upholds the legality of EPA's FIP for Arizona as it relates to the emissions controls imposed on the three facilities that filed petitions for review in Arizona ex rel Henry Darwin v. EPA. The court also dismisses some claims brought by the state and industry.

Oct. 10, 2017 EPA issues a final rule approving Arizona's SIP for the Coronado Generating Station. The rule allows Arizona to require alternative technology controls that will require temporary shutdown of the facility in order to meet the regional haze goals. This is different than using control technology for NOx, which the Obama administration had proposed.

June 11, 2018 EPA approves Arizona's SIP for Maricopa County.

July 11, 2019 EPA approves Arizona's five-year status report and a determination by Arizona that the state's existing regional haze plans are adequate and do not require revisions. Arizona submitted the status report on November 12, 2015.

Regional Haze: Arkansas

- **Sep. 27, 2016** EPA publishes a final rule that issued a FIP for Arkansas and includes pollution limits for NO_x, SO₂, and particulate matter for six facilities, as well as SO₂ and NO_x limits for an additional facility. The FIP also establishes short-term progress goals for reducing haze over Arkansas' protected areas. The FIP gives power plants 18 months to comply with the rule.
- **Nov. 22, 2016** The state of Arkansas files a petition for review of the FIP in the 8th Circuit Court of Appeals. Industry and conservation groups join the suit later that month and file individual petitions for review. The court later consolidates the cases as *State of Arkansas v. EPA, Docket No. 16-4270*.

Regional Haze: Arkansas (2)

- **Feb. 7, 2017** Arkansas asks for a stay of the FIP. Industry files a motion for a stay on February 8, 2017.
- **March 7, 2017** EPA files an unopposed motion to hold the case in abeyance. The court grants this motion on March 8, 2017. The court has continued to hold the case in abeyance.
- **April 14, 2017** EPA agrees to reconsider certain aspects of the final rule. On April 25, 2017, EPA extends the 18-month compliance deadline for certain facilities by 90 days.
- **July 12, 2017** Arkansas proposes revisions to the SIP regarding NOx controls for power plants. The proposed SIP states that no additional controls are needed beyond the CSAPR interstate trading provisions.

Regional Haze: Arkansas (3)

Dec. 15, 2017 Arkansas files a motion for a stay of the final rule. EPA does not oppose Arkansas' motion, and industry supports it. Environmental groups oppose the stay.

Feb. 12, 2018 EPA publishes a final rule approving Arkansas' July 12 SIP and rescinding the portions of the FIP requiring more stringent NOx controls for the affected power plants.

March 7, 2018 The court grants industry's motion for a stay on the SO₂ emission limits, allowing three facilities in Arkansas to delay installation of FIP-required controls while the state finalizes its SIP revisions.

March 21, 2018 The conservation groups file a motion for reconsideration of the stay.

Regional Haze: Arkansas (4)

July 13, 2018 and September 13, 2018 The court denies the conservation groups' motions to lift the abeyance. The court has not yet responded to the motion to reconsider the stay on the SO₂ emission limits.

Nov. 30, 2018 EPA proposes to approve Arkansas' final revisions to the 2008 Regional Haze SIP. Arkansas submitted the revisions to EPA on Aug. 8, 2018.

Sep. 27, 2019 EPA finalizes its approval of Arkansas' SIP revisions, including revisions to the SO₂ limits, and withdraws the corresponding, more-stringent FIP provisions.

Oct. 1, 2019 EPA approves Arkansas' five-year status report and a determination by Arkansas that the state's existing regional haze plans are adequate and do not require revisions. Arkansas originally submitted the status report on June 2, 2015.

Regional Haze: Arkansas (5)

Nov. 25, 2019 Sierra Club and the National parks Conservation Association file a petition for review of EPA's Sept. 27 approval of Arkansas' SIP revisions.

Dec. 18, 2019 The 8th Circuit grants a joint motion to hold in abeyance *Sierra Club v. EPA*, No. 19-3526. The case is paused pending the District Court's entry of a settlement agreement between the Sierra Club and Entergy Arkansas that would resolve the issues in the case. That settlement agreement is part of a separate lawsuit – *Sierra Club v. Entergy Arkansas*, Case No. *4:18-cv-00854-KGB (E.D. Ark.)*.

Regional Haze: Texas

- **Jan. 5, 2016** EPA partially disapproves Texas' revised SIP and promulgates a FIP, which includes SO₂ controls for eight coal-fired power plants.
- **March 1, 2016** Texas and industry groups file petitions for review of EPA's actions in the 5th Circuit Court of Appeals, *State of Texas, et al v. EPA*, Docket No. 16-60118.
- **March 3, 2016** Industry files a motion to stay the final rule. Texas files an additional motion to stay on March 17, 2016. The court grants the motion to stay the rule on July 15, 2016.

Regional Haze: Texas (2)

- **Jan. 4, 2017** EPA publishes a new proposed rule to impose SO₂ limits on 14 power plants in Texas. The limits are expected to reduce emissions by approximately 194,000 tons annually. The FIP also allows Texas to meet its NO_x requirements by participating in CSAPR.
- **Feb. 23, 2017** The 5th Circuit grants EPA's motion to remand the case to the agency.
- **Oct. 17, 2017** EPA issues a final rule partially approving Texas' SIP and issuing a FIP, allowing Texas to meet requirements for SO₂ and NO_x emissions through an intrastate trading system.

Regional Haze: Texas (3)

- **Dec. 15, 2017** A coalition of conservation organizations files a petition for review of the final rule in the 5th Circuit, National Parks Conservation Association, et al v. EPA, Docket No. 17-60828. The groups also file a petition with EPA to reconsider the rule. Both petitions argue that the final rule published in October is unlawful because the intrastate trading system is unrelated to the proposed FIP that EPA published in January.
- **March 7, 2018** Following a joint motion by the conservation groups and EPA, the 5th Circuit stays the case pending EPA's reconsideration of the final rule.
- **Aug. 27, 2018** EPA publishes a proposed rule affirming its actions in October 2017 to partially approve Texas' SIP and to issue a FIP, enabling Texas to establish an intrastate trading program.

Regional Haze: Texas (4)

- **Nov. 14, 2019** EPA publishes a supplemental notice of proposed rulemaking to propose four revisions to the intrastate SO₂ trading program finalized in Oct. 2017. The proposed modifications include adding an “assurance level” – an annual emissions limit that triggers a penalty for units that exceed the limit.
- **June 29, 2020** EPA issues a final rule approving Texas’ intrastate SO₂ trading program. The final plan includes an “assurance level” – an annual emissions limit that triggers a penalty for units that exceed the limit. EPA sets the assurance level around 290,000 tons.

Regional Haze: Utah

- **July 5, 2016** EPA partially approves Utah's SIP and promulgates a FIP that would impose NOx emissions limits on two facilities in Utah.
- **Sep. 1, 2016** Utah files a petition for review in the 10th Circuit. Industry also files petitions for review in the 10th Circuit. The court later consolidates the three cases as State of Utah v. EPA, et al, Docket No. 16-09541.
- **Oct. 28, 2016** Utah and industry file separate motions to stay the rule. EPA opposes these motions on December 16, 2016.
- **Feb. 15, 2017** EPA files a motion to postpone deciding whether it will continue to oppose the motion for a stay. EPA files two motions in March and May further postponing this action.

Regional Haze: Utah (2)

- **July 18, 2017** EPA decides to reconsider the FIP and files a motion to abate the case in Utah.
- **Sep. 11, 2017** The court grants the motions for a stay and EPA's motion to abate the case. The court requires that EPA provide status reports every 90 days.
- **Dec. 13, 2017** EPA files a status report stating that it is investigating updated technical analysis to revise the rule.
- **March 12, 2018** EPA files a status report stating that the updated air quality model simulations are expected to be completed by May. Following evaluation of the simulations, EPA will move forward with publishing a new proposed rule for Utah.

Regional Haze: Utah (3)

- **Sep. 10, 2018** EPA files a status report stating that the updated modeling and technical analyses are still being developed. Per the 10th Circuit's order, the case remains on hold.
- **June 24, 2019** Utah's Air Quality Board adopts revised regional haze sections of the state's SIP.
- **Sep. 9, 2019** EPA's status report states that Utah submitted the draft SIP amendments to EPA for approval and is finalizing additional revisions to the state's regional haze SIP.

Regional Haze: Utah (4)

- **Jan. 22, 2020** EPA publishes a proposed rule to approve Utah's SIP revision related to the Hunter and Huntington power plants. This rule would withdraw the FIP that EPA put into place in 2016. The SIP imposes alternative NO_x emissions controls on the two plants and relies on the shutdown of a different power plant to achieve the required reasonable progress towards visibility improvement.
- **Oct. 28, 2020** EPA finalizes its approval of Utah's SIP and its withdrawal of the FIP.

Regional Haze: Wyoming

- **Jan. 30, 2014** EPA publishes a final rule that partially approved Wyoming's SIP and promulgated a FIP for Wyoming that establishes NOx controls for three facilities in the state.
- **March 28, 2014** Wyoming and conservation groups file opposing petitions for review of EPA's actions in the 10th Circuit Court of Appeals.
- **March 31, 2014** Industry groups also petition the court for review. These four cases are later consolidated under Basin Electric Power v. EPA, et al, Docket No.14-09533.

Regional Haze: Wyoming (2)

- **June 11, 2014** The state of Wyoming and industry file separate motions to stay the final rule.
- **Sept. 9, 2014** The 10th Circuit grants the motions for a stay.
- **April 24, 2017** EPA, Wyoming, and the Basin Electric Power Cooperative reach a settlement regarding the Laramie River Generating Station.
- **April 28, 2017** EPA, industry, and Wyoming file a motion to abate proceedings on all four petitions. The court grants this motion on May 17, 2017.

Regional Haze: Wyoming (3)

- **June 2, 2017** The conservation groups file a motion to proceed separately with their case in Wyoming, as the settlement agreement only covers one facility and does not address many of the groups' challenges to the final rule.
- **June 12, 2017** EPA opposes the conservation groups' motion, arguing that the cases should not be severed, as the four petitions all challenge the same final rule.
- **June 19, 2017** The 10th Circuit denies the conservation groups' motion and keeps the proceedings on hold for all four consolidated cases. The court continues this hold on November 9, 2017 and again on May 8, 2018, awaiting the final implementation of the settlement agreement.

Regional Haze: Indiana

- **May 22, 2019** EPA proposes to fully approve Indiana's SIP and SIP revisions. If finalized, this action will withdraw the FIP that EPA previously promulgated.
- **Sep. 6, 2019** EPA finalizes its approval of Indiana's SIP and its withdrawal of the FIP.

Regional Haze: Montana

- **Sep. 12, 2017** EPA finalizes revisions to Montana's FIP, which EPA promulgated in 2012 after the state did not submit a regional haze SIP. EPA acknowledges that these revisions do not address portions of the FIP that the 9th circuit vacated in 2015.
- **Oct. 4, 2019** EPA approves Montana's five-year status report and a determination by Montana that the existing FIP is adequate and does not require revisions. Montana originally submitted the status report on November 7, 2017

Regional Haze: Montana (2)

- **Sep. 12, 2017** EPA finalizes revisions to Montana's FIP, which EPA promulgated in 2012 after the state did not submit a regional haze SIP. EPA acknowledges that these revisions do not address portions of the FIP that the 9th circuit vacated in 2015.
- **Oct. 4, 2019** EPA approves Montana's five-year status report and a determination by Montana that the existing FIP is adequate and does not require revisions. Montana originally submitted the status report on November 7, 2017

Regional Haze: Guidance Petition for Reconsideration

- National Parks Conservation Association, Sierra Club, the Coalition to Protect America’s National Parks, Appalachian Mountain Club, and Earthjustice filed a Petition for Reconsideration of Guidance on Regional Haze State Implementation Plans for the Second Implementation Period with EPA on May 8, 2020.
- The Petition for Reconsideration asks EPA to reconsider the “Guidance on Regional Haze State Implementation Plans for the Second Implementation Period” dated August 20, 2019 (“Final Guidance”) and replace it with guidance that comports with the Clean Air Act (“Act”) and the Regional Haze Rule to help states in making progress towards natural visibility conditions at all Class I areas.

Regional Haze: Guidance Petition for Reconsideration (2)

- The NGOs send a follow-up request to President Biden on 3-16-21.
- They assert that EPA should encourage states to explicitly consider the environmental justice impacts and potential co-benefits of pollution controls in their state regional haze plans for the second planning period.
- They also re-emphasize specific arguments for reconsideration.

Regional Haze: Guidance Petition for Reconsideration (3)

- The Uniform Rate of Progress is not an off-ramp for reasonable progress requirements.
- Screening thresholds must bring in most sources of visibility-impairing pollution.
- States must not use visibility as a “fifth factor” when evaluating reasonable progress.
- States cannot circumvent a four-factor analysis for sources that intend to retire.
- Prior control decisions, or separate regulatory requirements, do not excuse consideration of more stringent controls.
- States must include both “dominant” and “non-dominant” pollutants in their analyses of controls.
- States must ensure that Federal Land Manager concerns are considered by the state, and addressed in state plans.

Particulate Matter

- EPA announced in a June 10th news release that it will reconsider the Trump Administration's decision to retain the particulate matter ("PM") Clean Air Act National Ambient Air Quality Standards ("NAAQS").
- EPA stated it was reconsidering the December 2020 decision because:
- . . . available scientific evidence and technical information indicate that the current standards may not be adequate to protect public health and welfare, as required by the Clean Air Act.
- The PM standard includes both fine particles (PM_{2.5}) and coarse particles (PM₁₀).

<https://www.jdsupra.com/legalnews/particulate-matter-clean-air-act-3634241/>

EPA Guidance: Is it Final Agency Action?

- *Calif. Communities Against Toxics v. EPA*, 934 F.3d 627 (2019)
- Under CAA § 112, 42 U.S.C. § 7412 (hazardous air pollutants), “major” sources are subject to the most stringent type of regulation; “area” (= minor) sources may be subject to lesser or no controls. Statute defines in terms of potential to emit a certain weight of pollutant.
- 1995 EPA policy memo established “Once in, always in”: After first compliance date, a source cannot be reclassified as “area,” even if it is no longer physically capable of emitting enough to meet the “major” threshold.
- 2018 policy memo rescinds the 1995 memo and states that, under CAA’s plain language, that a source can be reclassified at any time.

Caselaw Update: Arkansas Bar Association, Environmental Law Conference, April 22, 2021, Justin Schwab

EPA Guidance: Is it Final Agency Action? (2)

- Majority (Wilkins, J., joined by Silberman, J.): The 2018 memo is not final agency action. Meets the “culmination of agency’s decision-making process” prong of the test for finality, but does not meet the “direct and appreciable legal consequences” prong. It’s “all bark and no bite” – any actual change to any permit for any source will be subject to review in state and/or federal court, and the memo simply “forecasts EPA’s position...it has no independent legal authority.”
- Does not say whether it’s an interpretive rule (which doesn’t require notice and comment) or a legislative/substantive rule (which does).
- Dissent (Rogers, J.) would find finality/jurisdiction; EPA has “given states their marching orders” to allow reclassification. Would vacate as a legislative rule that lacked notice and comment.

Caselaw Update: Arkansas Bar Association, Environmental Law Conference, April 22, 2021, Justin Schwab

Guidance On the Chopping Block?

- EPA's **“New Source Review Preconstruction Permitting Requirements: Enforceability and Use of Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability.”**
- On Dec. 7, 2017, EPA issued an NSR guidance memorandum on how to project future air emissions after an existing facility is modified.
- Interpreting a 2002 rule, EPA said that, so long as a company complies with the procedural requirements used to forecast projected emissions, the EPA would not “second-guess” the permittee’s emission projections.
- If a company mistakenly projects an insignificant increase, EPA said it would not pursue enforcement unless the post-project actual emissions indicate a significant net increase did occur.

<https://www.natlawreview.com/article/transition-thoughts-what-clean-air-act-permittees-should-track-biden-administration>

Guidance On the Chopping Block? (2)

- EPA's "**Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program.**"
- Traditionally, in NSR applicability reviews, only project increases were considered in "Step 1" of the review used to determine if significant emission increases were expected to occur as a result of the project.
- Only after that Step 1 would other decreases and increases be considered.
- This memo stated that emissions decreases as well as increases can be considered in Step 1 and that decreases in Step 1 need not be creditable or enforceable.
- This approach allows for some projects to "net-out" of NSR at Step 1 and never reach Step 2.
- Environmental groups challenged the memo as final agency action, but the case was stayed because EPA began a rulemaking to codify the memo's approach.
- On Nov. 24, 2020, EPA published a final rule, at 85 Fed. Reg. 74890, that incorporates this approach, which may also be challenged in court.

<https://www.natlawreview.com/article/transition-thoughts-what-clean-air-act-permittees-should-track-biden-administration>

Guidance On the Chopping Block? (3)

- In 2018, EPA also issued a final interpretive rule, “**Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration,**” that addressed aggregation of projects to determine if they are part of one modification at the facility for purposes of NSR permitting.
- EPA concluded that the timing of the projects is not the only factor in determining whether projects should be aggregated and established a rebuttable presumption that projects more than three years apart should not be aggregated.
- There is some debate on how binding an interpretive rule is on the agency that issues it, and states with SIPs may have latitude to interpret their own programs.
- Therefore, facilities must continue to look carefully at which modification projects must be aggregated for purposes of NSR review.

Guidance On the Chopping Block? (4)

- Some other policy changes or reinterpretations that the EPA made during the last four years by issuing guidance memos include:
- EPA's Dec. 2, 2019, "**Revised Policy on Exclusions from 'Ambient Air'**" which revises the Agency's 1980 policy on the exclusion of certain areas from the scope of "ambient air" under the Clean Air Act and EPA's regulations;
- EPA's April 30, 2018, letter to Pennsylvania's Department of Environmental Protection and its Oct. 16, 2018, letter to the Wisconsin Department of Environmental Management re: the **interpretation of "common control" for purposes of determining whether two or more entities at a single location constitute a single source making for air permitting decisions;**
- and EPA's Nov. 26, 2019, guidance document, "**Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas.**"

How Bout Them Hogs?

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PETITION CALLS FOR EPA REGULATION OF LARGE DAIRY AND HOG FARMS

By [Chuck Abbott](#)

4/7/2021

Two dozen [environmental and consumer groups](#), including the Sierra Club and Government Accountability Project, petitioned the EPA on Tuesday to regulate large dairy and hog operations under federal air pollution laws. “The EPA has the duty and authority to regulate these methane super-emitters under the Clean Air Act as part of the administration’s larger strategy to prevent catastrophic and irreversible climate change,” said the groups.

Agriculture generally is exempt from air and water pollution laws. The petition said



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Questions?

For any follow-up questions or clarifications,
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