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Climate Change in Colorado: Part 2 – Federal Agency Initiatives

This is the second installment of a four-part series dealing with climate change in Colorado. The first in the series provided a summary of recent scientific studies and reports focused on climate change worldwide and in the U.S. and addressed the Biden administration's executive orders and recent federal legislation that establish federal policy. This second article highlights some of the most significant federal agencies' initiatives addressing greenhouse gas emissions, corporate climate change disclosures, and rulemakings that implement federal policy.

Vehicle Emissions – The California Waiver and *Ohio v. EPA*

On March 14, 2022, the U.S. Environmental Protection Agency (EPA) issued a notice of decision to reinstate California's Clean Air Act (CAA) waiver for its Advanced Clean Car program. With a convoluted history that dates to 1968 when California was granted it first waiver, the notice restored California's authority to set and enforce more stringent vehicle emission standards than the federal government. The state standards include California's greenhouse gas emission standards and zero emission vehicle requirements.

After receiving over 100 waivers since 1968, the Bush administration was the first to deny a waiver, the Obama administration reversed that decision, and the Trump administration reversed that decision in 2019 withdrawing the waiver for the state's greenhouse gases (GHG) and zero-emission vehicle programs that had been approved in 2013. The Biden administration's notice of decision reinstating the waiver was followed by the *Ohio v. EPA* decision.

An article prepared by the Environmental Defense Fund outlines the history of the waiver battles which led to the April 9, 2024, decision of a three-judge panel of the D.C. Circuit Court of Appeals in *Ohio v. EPA* that rejected a challenge of the waiver authority. In that case, the Attorneys General of Ohio and other states, and entities representing oil, gas, and ethanol interests had challenged the waiver authority. Another group of states and other parties intervened in support of the waiver authority.

Of particular note is that the parties that intervened in opposition to the challenge and that successfully defended the California waiver was a coalition of car manufacturers and energy companies (together with 23 states and several environmental organizations). The automobile manufacturer and energy company intervenors that supported the waiver included Ford Motor Company, Volkswagen Group of America, BMW of North America, American Honda Motor Co., Volvo Car USA, the National Coalition for Advanced Transportation, Advanced Energy Economy, Calpine Corporation, National Grid USA, the New York Power Authority, and the Power Companies Climate Coalition.

In dismissing the challenges to the waiver, the D.C. Circuit Court addressed both "standing" and "constitutional" issues holding that:

> Fuel Petitioners lack standing to raise their statutory claim, and that State Petitioners lack standing to raise their preemption claim, because neither set of petitioners has demonstrated that their claimed injuries would be redressed by a favorable decision by this court. While we hold that State Petitioners have standing to raise their constitutional claim, we reject it on the merits.

For those interested, I highly recommend the opinion for the court's thorough review of the history of the waiver, its exposition of the requisites of standing, and even more fundamentally the discussion of the constitutional claims brought by the State Petitioners based on the "equal sovereignty principle." The court summarizes its holding:

> State Petitioners also argue that the EPA's 2022 decision is "contrary to constitutional right" under 5 U.S.C. § 706(2)(B) because Section 209(b) of the Clean Air Act is unconstitutional. They rely on the equal sovereignty principle,

which the Supreme Court applied in *Shelby County v. Holder*[1] to hold that Fifteenth Amendment legislation that disparately impacts states' control over voting procedures must be "sufficiently related to the problem it targets." State Petitioners argue that this principle also categorically prohibits Congress from using its[2] Commerce Clause power in a way that withdraws sovereign authority from some states but not others. And, Section 209(b), they say, violates that principle by preempting the authority of every state but California to regulate motor vehicle emissions.

We conclude that State Petitioners have standing to raise this constitutional claim, but we join the two other circuits to have considered the issue in rejecting State Petitioners' request to extend the equal sovereignty principle in this fashion. See *NCAA v. Governor of New Jersey*[3] abrogated on other grounds by *Murphy v. NCAA*[4] ; and *Mayhew v. Burwell*[5] .

Several states, including Colorado, pursuant to section 177 of the Clean Air Act, have adopted California's more stringent vehicle emission standards. The California Air Resources Board provides an interactive map showing which states have adopted some or all of California's standards.

Infrastructure Investment and Jobs Act – the Two Year Anniversary

On November 15, 2023, the EPA issued a news release to "celebrate two years of progress" under the Infrastructure Investment and Jobs Act. The Two Year Anniversary Report identifies the projects that had received as of that date over $16 billion from the EPA which are designed to strengthen the country's infrastructure, improve the resilience of communities to climate changes, and protect human health and the environment

Information on where the EPA's Bipartisan Infrastructure Law funds are going, including location-specific project descriptions, can be found on the agency's updated interactive map.

BLM's Draft Programmatic EIS for Utility-Scale Solar Energy Development

On January 19, 2024, the Bureau of Land Management (BLM) published notice of the availability of its Draft Programmatic Environmental Impact Statement (EIS) for Utility-Scale Solar Energy Development and Associated Resource Management Plan Amendments. The draft programmatic EIS evaluates the potential environmental, cultural, and economic impacts of modifying the BLM's current solar energy program across the 11 western states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, an area encompassing approximately 162 million acres of BLM-administered public land.

Potential modifications to the BLM's resource management plans are being considered to improve management consistency regarding utility-scale solar energy development, advance national renewable energy development priorities and goals, and address changes in solar technologies that have occurred since the BLM's last solar energy planning effort in 2012. The BLM will determine whether to amend its land use plans in the 11 western states to identify areas more suitable for solar development while excluding solar energy development applications from areas where protection is warranted. Potential land use plan amendments may also involve updating design features and environmental evaluation processes and incorporating new information and additional environmental analysis.

Of six alternatives evaluated in the draft, including the no-action alternative, the agency identified Alternative 3 as the preferred alternative which would make approximately 22 million acres of public lands within 10 miles of existing and planned transmission lines over 100 kilovolts available for solar applications (unless otherwise excluded based on the resource-based exclusion criteria identified in the EIS).

Oil and Gas – New Air Emission Standards

Published on March 8, 2024, with a proposed effective date of May 7, 2024, the EPA is finalizing its Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review. As described by the EPA, the final rules implement multiple actions to reduce air pollution emissions from the crude oil and natural gas source category. The EPA

proposes to finalize:

1. Revisions to the new source performance standards regulating GHGs and volatile organic compounds emissions for the crude oil and natural gas source category pursuant to the CAA;
2. Emission guidelines under the CAA for states to follow in developing, submitting, and implementing state plans to establish performance standards to limit GHG emissions from existing sources (designated facilities) in the crude oil and natural gas source category;
3. Several related actions stemming from the joint resolution of Congress, adopted on June 30, 2021, under the Congressional Review Act, disapproving the EPA's final rule titled, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review,"' from September 14, 2020; and
4. A protocol under the general provisions for optical gas imaging.

More specifically, the rules:

1. Strengthen EPA methane emission regulations for new, modified, and reconstructed oil and gas operations, including:
    - Adding control requirements for certain oil and gas emissions sources;
    - Setting new fugitive emissions monitoring requirements for well sites and other emissions sources; and
    - Eliminating routine flaring of natural gas;
2. For the first time, regulates methane emissions from existing oil and gas infrastructure that pre-dates the EPA's oil and gas methane regulations; and
3. Includes a super-emitter program under which EPA-certified third parties may report large leaks and emission events to the EPA.

See EPA's summary presentation for the rules.

On March 8, 2024, the same day that the rules were published in the Federal Register , the Texas Railroad Commission filed its petition for review in the D.C. Court of Appeals challenging the regulations.

Separately and on March 12, 2024, several states attorneys general (together with the Arizona legislature) filed an additional petition seeking review of the rules in the

D.C. Circuit Court of Appeals.

The states challenging the rules in the second petition include Oklahoma, West Virginia, Arkansas, Alabama, Alaska, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, Tennessee, Utah, Virginia, and Wyoming. A month later, these parties filed a motion to stay the rules pending review.

Tailpipe Emissions – Model Years 2027 Through 2032 and Beyond

On March 20, 2024, the EPA announced final national pollution standards for tailpipe emissions from passenger cars, light-duty trucks, and medium-duty vehicles for model years 2027 through 2032 and beyond. As described by the EPA, the standards are designed to avoid more than 7 billion tons of carbon emissions and provide nearly $100 billion of annual net benefits to society, including $13 billion of annual public health benefits due to improved air quality, and $62 billion in reduced annual fuel costs, and maintenance and repair costs for drivers. The final standards require significant pollution reductions and accelerate the adoption of cleaner vehicle technologies.

If the proposals work out the way regulators envision, two out of every three new cars and light trucks sold in the U.S. in 2032 will be electric – more than 10 times the current national sales rate. That projection includes 78 percent of sedans, 68 percent of pickups, and 62 percent of crossovers and SUVs that could be battery-powered just eight years from now. The EPA also projects that half of new "vocational" vehicles, *e.g.,* garbage trucks and school buses, will be electric in 2032, in addition to 25 percent of long-haul freight tractor trailers.

A pitched battle has already begun with several states suing to oppose the tailpipe emissions rules and others intervening in support of the new regulations. On April 18, 2024, the date the rules were published in the Federal Register, 25 states led by the Commonwealth of Kentucky filed a petition in the D.C. Circuit Court of Appeals challenging the rules. The states challenging the rules include Kentucky, West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Virginia, and Wyoming.

A separate group of 22 states led by California and five cities are backing the EPA's new rules. The parties filed a motion to intervene in the lawsuit saying they could be harmed if the EPA did not require future reductions in harmful vehicle emissions. The intervening parties include California, Arizona, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, Washington, D.C., the city and county of Denver, and the cities of Chicago, Los Angeles, and New York.

$20 Billion Awarded to Projects in the National Financing Network

On April 4, 2024, as part of its Investing in America agenda, the Biden administration announced selections for $20 billion in awards to establish a national financing network to fund tens of thousands of climate and clean energy projects across the country, with a significant focus on low-income and disadvantaged communities. The $20 billion in awards will be deployed through eight selected applicants across two separate and complementary programs under the EPA's Greenhouse Gas Reduction Fund – the $14 billion National Clean Investment Fund and the $6 billion Clean Communities Investment Accelerator. A few examples of the projects receiving funds include:

- **Climate United Fund ($6.97 billion award),** a nonprofit formed by Calvert Impact to partner with two U.S. Treasury-certified Community Development Financial Institutions (CDFIs), Self-Help Ventures Fund, and Community Preservation Corporation:
- **Coalition for Green Capital ($5 billion award),** a nonprofit with almost 15 years of experience helping establish and work with dozens of state, local, and nonprofit green banks:
- **Opportunity Finance Network ($2.29 billion award),** a 40-year-old nonprofit that provides capital and capacity building for a national network of 400+ community lenders – predominantly U.S. Treasury-certified CDFI Loan Funds, which collectively hold $42 billion in assets and serve all 50 states, Washington, D.C., and several U.S. territories.

Resource Conservation and Renewable Energy Development on Federal Lands

On April 10, 2024, the U.S. Department of the Interior, through the BLM, finalized its rules that had been proposed on November 30, 2022, concerning Waste Prevention, Production Subject to Royalties, and Resource Conservation. The final rule is designed to reduce the waste of natural gas from venting, flaring, and leaks during oil and gas production activities on federal and Indian leases. The final rule also ensures that, when federal or Indian gas is wasted, the public and Indian mineral owners are compensated for that wasted gas through royalty payments. With an effective date of June 10, 2024, the final rule will replace the BLM's current requirements governing venting and flaring, which are more than four decades old.

The next day, on April 11, 2024, the BLM updated its regulations to promote responsible development of solar and wind energy on public lands. As described by the agency, the final Renewable Energy Rule reduces acreage rents and capacity fees, improves the BLM's application process, and delivers greater predictability for how the BLM will administer future solar and wind project authorizations. These updates are consistent with the Biden administration's efforts to increase deployment of clean energy on public lands and the national goal of 100 percent carbon-free electricity by 2035.

Power Sector Emissions

According to the EPA's summary of the Sources of Greenhouse Gas Emissions, fossil fuel-fired Electric Utility Steam Generating Units (EGUs) are the nation's largest stationary source of GHG emissions, representing 25 percent of the U.S.'s total GHG emissions in 2021.

On April 25, 2024, to address those emissions and suggesting that the new standards could cut over 1 billion metric tons of greenhouse gas emissions by 2047, the Biden administration announced final rules that (1) establish new carbon pollution standards for existing coal plants (also known as the Clean Power Plan 2.0); (2) set stricter Mercury Air Toxics Standards; (3) strengthen Clean Water Act effluent limitations guidelines and standards; and (4) for the first time, set limits for legacy coal combustion residual surface impoundments.

Criticism of the new rules came quickly. For example, the National Mining Association (NMA) issued a press release slamming the rules saying that they are specifically designed to "force the closure of well-operating coal plants – plants that are the primary source of generation in many states, and the source of grid-saving baseload power across the country – while conducting zero analysis of the collective impact of the rules on grid reliability." See the NMA's white paper ("As coal plant retirements accelerate due to the cumulative impact of EPA's agenda, new renewable energy and interstate transmission additions are not materializing to reliably meet existing or expected power demand.")

Mercury and Air Toxics Standards (MATS) for Power Plants

Also on April 25, 2024, the EPA announced final requirements to strengthen and update the National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-Fired EGUs, commonly known as the Mercury and Air Toxics Standards (MATS) for power plants. The agency's residual risk and technology review served as the basis for the rule changes based on recent developments in control technologies and the performance of the power plants.

Following its assessment of available control technologies, the EPA is limiting the emission of non-mercury hazardous air pollutants metals from existing coal-fired power plants. The EPA is also tightening the emission standard for mercury for existing lignite-fired power plants to a level that is aligned with the mercury standard that other coal-fired power plants have been achieving under the current MATS. The final rule strengthens emissions monitoring and compliance. In addition, EPA is revising the startup requirements in MATS to assure better emissions performance during startup. See the EPA's Fact Sheet on the rules.

Tax Rules for Electric Vehicles

On May 3, 2024, the U.S. Treasury Department finalized electric vehicle (EV) tax credit rules and the U.S. Department of Energy released its Final Guidance *designed to provide clarity on the Clean Vehicle Tax Credits and guidance that addresses growth of the domestic battery materials processing and manufacturing.*

Many argue that the rules will make it harder for vehicles to qualify for the full $7,500 federal electric vehicle tax credit if key components are sourced from China. Although the rules offer a two-year reprieve on some materials that are mostly sourced from China, there was no shortage of angst and trepidation about the impacts of the rules.

On one extreme, Senator Joe Manchin (D-WV), Chairman of the U.S. Senate Energy and Natural Resources Committee, was most vocal in his criticism of the final rule which was designed to implement the Inflation Reduction Act's 30D Clean Vehicle Credit stating that "It's outrageous and illegal." Further:

> The United States, the birthplace of the assembly line that revolutionized the automotive industry, has been the world leader in cutting-edge car manufacturing and technology for generations. But with this final rule for the consumer credit, their creation of loopholes in the commercial vehicle credit, and their EPA tailpipe rules, the Administration is effectively endorsing 'Made in China.'
>
> The Administration has made clear from Day 1 of implementing the consumer electric vehicle tax credit in the Inflation Reduction Act that they will break the law in pursuit of their goal to flood the market with electric vehicles as quickly as possible. For example, the law sets clear thresholds for sourcing the critical minerals and components necessary for EV batteries domestically and from our free trade partners which the Treasury has cut in half until 2027. It also prohibits vehicles containing materials sourced from foreign adversaries including China, Russia, Iran, or North Korea from being eligible for the tax credit after 2024, but now Treasury has provided a long-term pathway for these countries to remain in our supply chains.

On the other hand, the Sierra Club is supportive. In response to the final rule, Sierra Club Director of the Clean Transportation for All campaign Katherine García said:

> The Treasury rules finalized today will ensure more Americans have access to new and used clean vehicles through point-of-sale rebates while bolstering the U.S. auto industry. As we electrify vehicles, we must simultaneously ensure manufacturers are developing sustainable supply chains. The Treasury's rules are crucial for helping us spur EV adoption and promote the long-term growth of

American electric vehicle manufacturing.

SEC Disclosure Rules

With a proposed effective date of May 28, 2024, the U.S. Securities and Exchange Commission (SEC) finalized its climate-related risk disclosure rule, which requires public companies to disclose information in their annual filings about material climate-related risks to their business. Large companies will need to disclose their Scopes 1 and 2 greenhouse gas emissions, if material.

Nine lawsuits were filed spanning six appellate courts seeking to overturn the final rule. For example, ten states led by West Virginia and Georgia filed a petition in the Eleventh Circuit to review the rule, arguing the SEC lacks the authority to enact climate regulations because it is a financial regulator.

The SEC asked the U.S. Judicial Panel on Multidistrict Litigation to consolidate the legal challenges to a single federal court. In a lottery, the Eighth Circuit was randomly selected to review the consolidated lawsuit. Subsequently, the Fifth Circuit lifted the temporary stay of the final rule that it had issued on March 15, 2024.

Noting that between March 6 and March 14, 2024, petitions seeking review of the final rules were filed in multiple courts of appeals, the SEC stayed the rule while consolidated litigation proceeds in the Eighth Circuit.

CEQ's Permitting Reform Rule – NEPA Requirements

With an effective date of July 1, 2024, the Council on Environmental Quality (CEQ) on May 1, 2024, finalized its Bipartisan Permitting Reform Implementation Rule to simplify and modernize its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA), including the recent amendments to NEPA in the Fiscal Responsibility Act. CEQ recites its objectives:

> To provide for an effective environmental review process; to ensure full and fair public engagement; enhance efficiency and regulatory certainty; and promote sound Federal agency decision making that is grounded in science, including consideration of relevant environmental, climate change, and environmental

justice effects.

In CEQ's words, the review and revision of its 2022 regulations is "consistent with E.O. 13990 and E.O. 14008" such that the revised regulations provide for sound and efficient environmental review of Federal actions, "including those actions integral to tackling the climate crisis … [and that] disclose climate change-related effects … ."

Criticism was immediate. For example, the National Mining Association (NMA) commented:

> The administration has succeeded only in further complicating the permitting process, increasing the financial burden on project sponsors, compounding the potential for litigation delays on projects, ultimately delaying or even halting projects that are valuable to our economic and national security.

Adding:

> Notably, the final rule outlines that federal agencies should consider the effects of climate change in environmental review and encourage reasonable alternatives, including the identification of an environmentally preferrable alternative…This analysis must also include quantification of reasonably foreseeable greenhouse gas emissions to better understand climate impacts of a proposed project alternative by the federal agency that will mitigate impacts.

House Committee on Natural Resources Chairman Bruce Westerman (R-Ark.) didn't hold back and issued his own criticism of the rules stating, in part:

> CEQ is taking an imperfect process and somehow making it worse. … This new rule will … [make] it virtually impossible to develop our abundant domestic resources. . . CEQ has managed to ignore statutory changes, making an already convoluted process even more wrapped up in red tape. … This rule could have been a huge win for America had CEQ followed congressional intent. Instead, this rule furthers the administration's America-last agenda.

No surprise, others praised the rule. Rep. Raúl Grijalva (D-Ariz.), a ranking member on the House Natural Resources Committee said:

> Today's new rule corrects the previous administration's unlawful NEPA regulations that tried to exempt industry from basic environmental review requirements and put polluters over people. … I'm grateful to the Biden administration for working to restore legally durable environmental reviews while making the much-needed updates to address the climate crisis and environmental justice needs across our country.

Dan Hartinger of the Wilderness Society in his statement said:

> The Biden administration has taken bold agency actions this month that collectively show how national public lands can be a part of the climate solution, and NEPA is what ensures the public has a say in those land-management outcomes. CEQ's new rule will help ensure that NEPA, a law passed more than 50 years ago, better meets the environmental challenges of today. This rule improves public transparency, ensures climate change is part of government decision-making and keeps communities at the forefront of decisions that affect them."

The Center for Biological Diversity's Brett Hartl said the new rule amounts to "the most significant improvements in decades to the NEPA process that analyzes gas pipelines, power plants and other polluting projects."

Next Steps

We will move on in Parts 3 and 4 of this series to discuss statewide and local initiatives in Colorado that focus on the existential challenges we face related to climate change.

This post was drafted by John L. Watson, an attorney in the Denver, Colorado office of Spencer Fane LLP. For more information, visit www.spencerfane.com.

1 570 U.S. 529 (2013)

2 Id. at 542 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009))

3 730 F.3d 208, 239 (3d Cir. 2013)

4 138 S. Ct. 1461 (2018)

5 772 F.3d 80, 95 (1st Cir. 2014)

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