Clean Air Act Policy

CIBO Presentation

March 7, 2023

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PM 2.5 - NAAQS

PM2.5

- January 27, 2023, EPA published proposal (88 Fed Reg 5558) to:
  - lower the level from 12.0 $\mu g/m^3$ to within the range of 9.0 to 10.0 $\mu g/m^3$, while taking comment on alternative annual standard levels down to 8.0 $\mu g/m^3$ and up to 11.0 $\mu g/m^3$;
  - to retain the current primary 24-hour PM2.5 standard (at a level of 35 $\mu g/m^3$) while taking comment on revising the level as low as 25 $\mu g/m^3$;
  - to retain the primary 24-hour PM10 standard, without revision; and,
  - not to change the secondary PM standards at this time, while taking comment on revising the level of the secondary 24-hour PM2.5 standard as low as 25 $\mu g/m^3$.
- Comments must be received on or before March 28, 2023
- Virtual public hearings were scheduled February 21 and 22, 2023

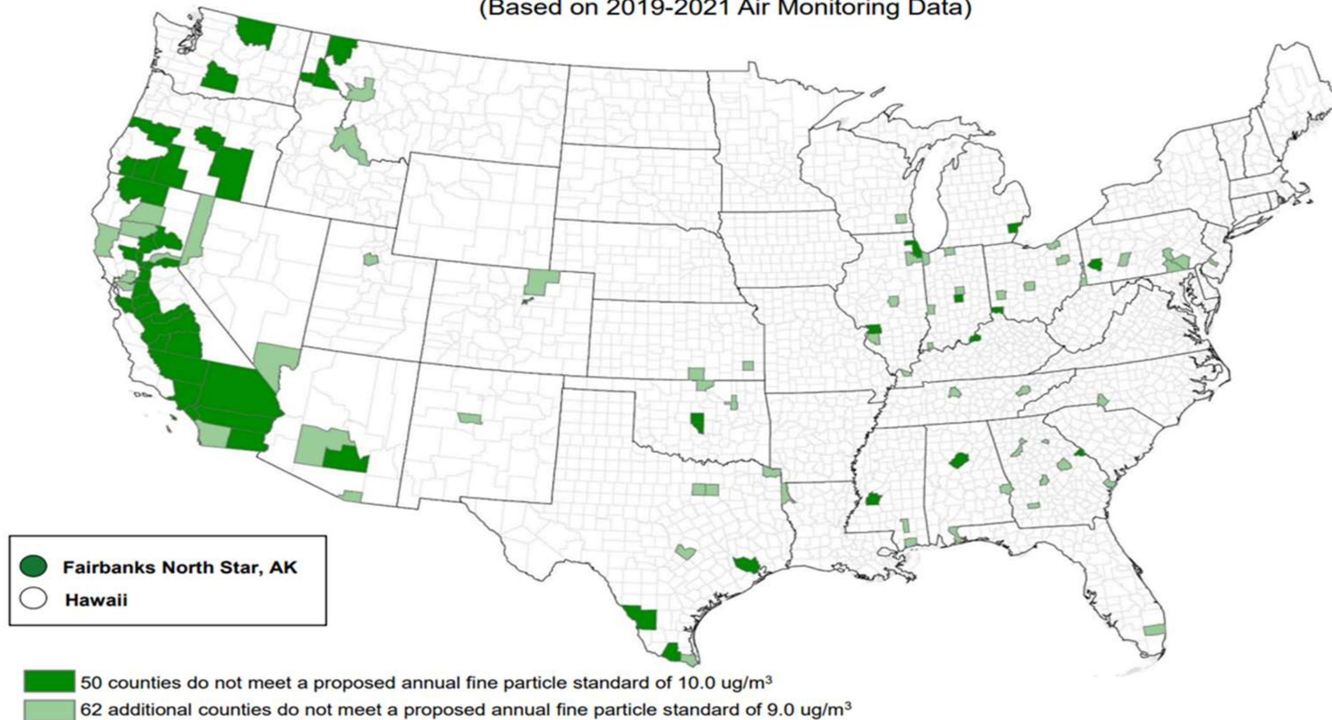
PM2.5

- EPA solicits comments on:
  1. the uncertainties in the reported associations between daily or annual average PM2.5 exposures and mortality or morbidity in the epidemiologic studies
  2. the significance of the 25th percentile of ambient concentrations reported in studies
  3. the relevance and limitations of international studies
  4. the appropriate primary standard level within the range of 9.0-10.0 $\mu g/m^3$
  5. Primary standard levels down to 8 $\mu g/m^3$ and up to 11 $\mu g/ m^3$

PM2.5

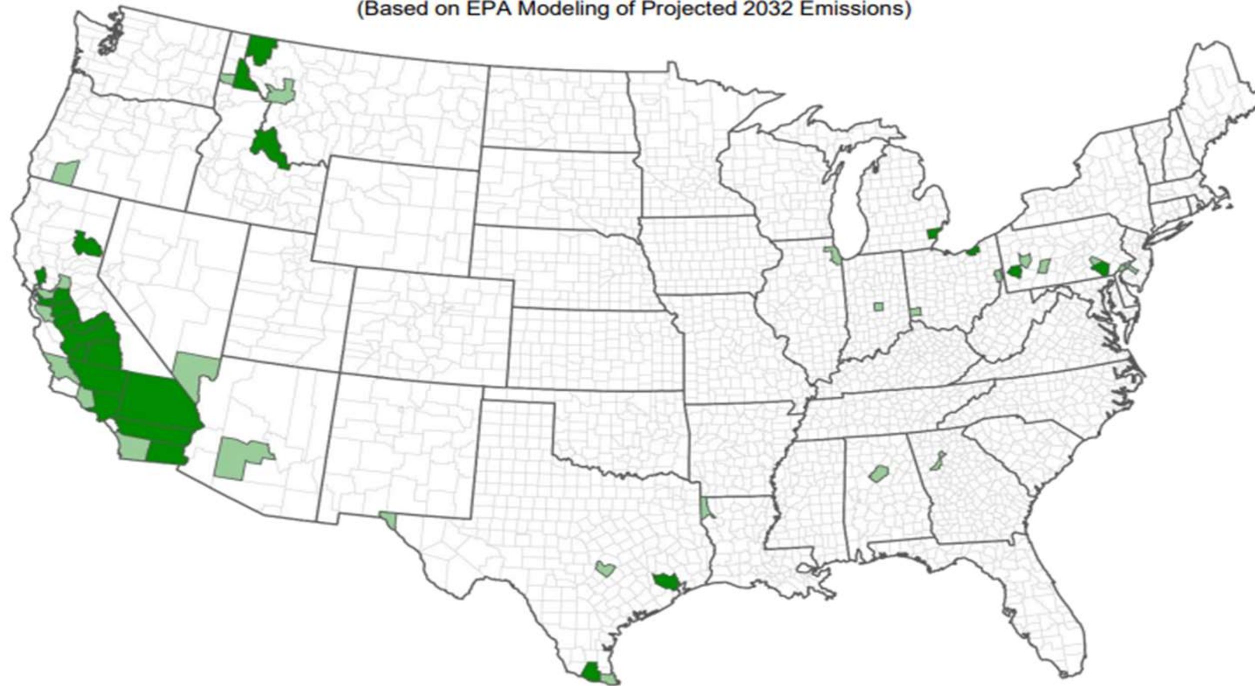
- EPA solicits comments on:
  6. maintaining the linear relationship approach used to set the upper AQI values in 1999 but using a different linear relationship (64 FR 42530, August 4, 1999)
  7. whether to use a linear approach for higher AQI breakpoints, the appropriate breakpoints to use for such an approach, and the appropriate values for breakpoints under other approaches, falling within the range of the current breakpoints and the breakpoints identified by these various approaches, as well as to retain and not change the existing breakpoints at this time.
  8. The Administrator's proposed conclusion not to change the current 24-hour and annual secondary PM2.5 standards and 24-hour PM10 standard at this time.
  9. whether less time is needed (e.g., 12 months from plan approval and/or January 1, 2026) for new or moved PM2.5 monitoring sites to be implemented and fully operational no later than 24 months from the date of approval of a plan or January 1, 2027

PM2.5



PM2.5

EPA Projections Show Most Counties Would Meet the Proposed Primary Fine Particle Standards in 2032



- 24 counties are projected not to meet a proposed annual fine particle standard of 10.0 ug/m³ in 2032
- 27 additional counties are projected not to meet a proposed annual fine particle standard of 9.0 ug/m³ in 2032

Note: Future fine particle pollution levels were projected only for counties with monitoring data and within the contiguous 48 states. See accompanying table for more detail. Modeled emissions are developed from a 2016 base year and used in projecting 2014-2018 monitoring data. Projected emissions reflect expected reductions from federal regulations that have been finalized as of Spring 2021. Some areas may have longer than 2032 to attain the $PM_{2.5}$ standards.

This information is provided for illustrative purposes only and is not intended to project or predict the outcome of any forthcoming designations process.

Draft Outline of PM 2.5 Comments

1. Air quality for PM has improved significantly in recent years resulting from a reduction in PM related emissions.
2. Support the Administrator's proposed conclusion not to change the current 24-hour and annual secondary PM2.5 standards and 24-hour PM10 standard.
3. Compliance with the current PM NAAQS should not provide a basis for a further tightening of the NAAQS.
4. EPA should delay promulgation of the rule until it releases the revised 2032 modeling platform so that future projections can be assessed and on the books controls have been included.
5. The use of the 25th percentile of ambient concentrations reported in studies is inappropriate.
6. International studies should be included in the reconsideration because they are relevant to the standard setting process under the CAA.

Draft Outline of Comments

7. Revising the PM NAAQS results in significant implications for permitting sources and source sectors in the US economy that are already stressed.
8. Revising the PM NAAQS will have a significant negative impacts on the nation's economy raising questions about EPA's authority under the ruling of the Supreme Court in *WV v EPA*.
9. More time is needed (e.g., 12 months from plan approval and/or January 1, 2026) for new or moved PM2.5 monitoring sites to be implemented and fully operational no later than 24 months from the date of approval of a plan or January 1, 2027.
10. There are significant errors in the inventory used to project attainment based on EPA database used for projecting nonattainment for 9.0 and 10.0 primary PM2.5 standard.

Outline of Comments

11. The effect of international emissions on ambient air quality should be considered.
12. EPA has failed to include appropriate on-the-books controls in its modeling projections.
13. There are significant potential impacts from the proposed revisions to PM2.5 monitoring network design criteria related to the proposal to add a provision pertaining to sub-populations identified as at increased risk for PM2.5 exposures and health risks associated with PM2.5 (“at-risk communities”).
14. Significant potential impacts result from the proposed revised analytic approach to combine data collected from multiple PM10 monitors collocated at a site to obtain a single set of daily PM10 concentration data for that site (FEM v FRM).

Outline of Comments

15. There are significant potential impacts from the proposal to revise Section 9 of the current regulation to add polyvinylidene fluoride (PVDF), polytetrafluoroethylene (PTFE), and perfluoroalkoxy (PFA) to the list of approved materials for efficiently transporting gaseous criteria pollutants.
16. Even though supposedly "for information only," the RIA estimated compliance costs are erroneous.
17. The integration of the exceptional events exclusion process with lower PM NAAQS should be included in the reconsideration of the NAAQS.
18. EPA should provide guidance to states on addressing the Good Neighbor Provisions of the CAA to assure that the responsibilities of upwind and downwind state are balanced as required by judicial mandates.

2015 Ozone SIP Denials

2015 Ozone SIP Disapprovals Timeline

January 31, 2023	Release of final decision
February 13, 2023	Federal Register publication
February 13, 2023	1st day to appeal
	Motion to Stay (?)
April 14 , 2023	Last date to appeal (within 60 days of publication)

Petitions for Review Filed

- Utah – 10th Circuit
- PacificCorp, et al. – 10th Circuit
- Texas and utility groups – 5th Circuit
- Arkansas – 8th Circuit

SIP Disapproval Petitioners

Possible state petitioners:

- Kentucky
- West Virginia
- Utah
- Texas
- Others

Possible stakeholder petitioners

Regional Appellate Courts

Kentucky, Tennessee, Michigan	6th Circuit
Missouri, Arkansas, Minnesota, Ohio	8th Circuit
Alabama	11th Circuit
Mississippi, Louisiana, Texas	5th Circuit
Oklahoma	10th Circuit
Illinois, Indiana, Wisconsin	7th Circuit
New York. New Jersey	2nd Circuit
West Virginia, Maryland	4th Circuit
Utah, Wyoming	10th Circuit

SIP Disapproval Issues

Regional (AL, AR, KY, LA, MN, MS, MO, OK, TN, TX, UT, VA, WV, WY)

- No opportunity to address deficiencies, a mandate of the CAA;
- SIP submittal pending 3 ½ years without action
- Must approve / disapprove SIP before FIP; should have allowed SIP call
- Withdrawal of 2018 SIP removes any basis to disapprove that SIP
- NYMA issues
- Contrary to Cooperative Federalism
- 2016v2 modeling was not available during SIP development
- Disapproval is motivated by desire to include states in FIP

SIP Disapproval Limits

National (AL, AR, IN, KY, LA, MN, MS, MO, OH, OK, TN, TX, UT, VA,WI, WV, WY)

- Reliability concerns
- Major question
- Highest NOx emissions are mobile sources
- Model performance "within noise of model"
- 1 ppb significance level should be allowed
- EGU's already controlled beyond required levels
- Erroneous cost estimates and budgets

D.C. Circuit Court of Appeals?

FIP/Transport Rule - Timeline

March 15, 2023?	Release of final decision
April 14, 2023?	Federal Register publication
April 17, 2023?	1st day to appeal
April 18, 2023?	Motion to Stay
June 13, 2023?	Last day to appeal to D. C. Circuit
May 1, 2023?	Effective date

FIP/Transport Rule – Leading Issues

1. The scope of the rule concerning EGUs and non-EGUs represents significant cost impacts and threatens to disrupt the electric power system and the economy. These factors are beyond the authority of EPA as defined by the Clean Air Act and set forth in WV v EPA. There is no concise congressional statement handing to EPA such power or responsibility.
2. EPA's selection of 2023 as the analytical year for the Good Neighbor rule combined with its failure to acknowledge delays in downwind SIP controls creates an inconsistency for NAAQS strategy among the states. The Clean Air Act does not support imbalance among the state relative to objective NAAQS implementation obligations. In short, EPA is failing to provide for balance to eliminate disparities among the states.
3. EPA's assessment of control costs failed to account for the useful life of the sources involved and was not based on available and cost effective controls.
4. EPA's failure to consider VOC emissions as a contributor to ozone nonattainment is arbitrary and capricious.
5. EPA failed to justify the appropriateness of the very small air quality improvement upon which the rule was based using air quality modeling and relied instead on a comparison of various calibration factors as justification for their conclusion that the simplified AQAT supports the final rule.
6. Others

Stay Elements

- Four factors considered for a stay:
  1. The likelihood that the moving party will prevail on the merits
  2. The prospect of irreparable injury to the moving party if relief is withheld
  3. The possibility of substantial harm
  4. The public interest

Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977).

Likely to Prevail

- The CAA creates a presumption of state-level regulation generally.
  - EPA is attempting to usurp the States' role.
  - EPA has completely ignored the clear mandates of the CAA.
  - §110(c) is a "tool[] for direct federal action to address *serious* failures of state action[;] Congress' clear preference . . .is that states are to decide and plan how they will control their sources of air pollution, and the mechanism for imposing those controls at the state level is SIPs".
  - 110(k)(5) provides that "[EPA] shall require the state to revise the plan as necessary" upon a finding of substantial inadequacy.
  - The States had no meaningful opportunity to respond to EPA's SIP denial.
  - There was no opportunity to correct deficiencies. EPA changed the program after SIP submittals and then announced deficiencies.
  - EPA has abused its discretion, acted arbitrarily and capriciously, and contrary to law.

Irreparable Injury

- Specific examples will be needed of injury to regulated entities and/or states.
- Abrogation of States' cooperative federalism rights of CAA. Intrusion on state authorities enacted by representatives of the people.
- Courts have long recognized that a stay pending review is appropriate where economic and other harms that would result from the need to comply with a changed rule will be substantial and unrecoverable.
- Complying with a regulation later held to be invalid almost always produces irreparable harm.

Balance of Harms and Public Interest

- Assessment of whether there would be material impact on EPA's interests.
- Assessment of whether there would be material impact on the environment.
- Assessment of public interest favoring a stay, imposition of an unauthorized rule.

WV v. EPA Updates

Hold in Abeyance Pending Challenges to ACE

- ". . .given that EPA is presently undertaking a rulemaking process to replace the ACE Rule with a new rule governing greenhouse gas emissions from fossil-fuel-fired power plants, the undersigned parties agree that the pending challenges to the ACE rule should be placed in abeyance pending completion of that process. At this time, it is expected that EPA will issue a proposed rule by March 2023.
- Signatories:
  - US DOJ, AG Morrisey (WV),
  - America's Power (Brownell and Lin),
  - U.S. Chamber of Commerce (Wood, Kelly and Maltz),
  - National Rural Electric Cooperative Assn. (Schon),
  - Appalachian Power and AEP Companies (Flannery, Beckett, Kropp and Smith),
  - Indiana Energy (Flannery, Beckett, Kropp and Smith),
  - International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers; International Brotherhood of Electrical Workers; United Mine Workers (Trisko);
  - Power South Energy Cooperative (Moore and Barber);
  - North American Coal Corporation (Wehland and Ubersax);
  - Westmoreland Land Mining Holdings LLC (DeLaquil, Gorssman, Booher, Wilson);
  - Consolidated Edison, Exelon Corporation, National Grid USA, New York Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, and Sacramento Municipal Utility District (Polocarz)

WV v. EPA (Gorsuch Concurring Opinion, Alito Joined)

- **Major Question Doctrine Application:**
- The doctrine applies when an agency claims the power to resolve a matter of great "political significance," or end an "earnest and profound debate across the country."
- The agency must point to clear congressional authorization when it seeks to regulate "'a significant portion of the American economy,'" ante, at 18 (quoting Utility Air, 573 U.S., at 324) or require "billions of dollars in spending" by private persons or entities, King v. Burwell, 576 U.S. 473, 485 (2015).
- The doctrine may apply when an agency seeks to intrude into an area that is the particular domain of state law.
- Concurrence, pp 9 – 11.

- **What qualifies as a clear congressional statement?**
- First, courts must look to the legislative provisions on which the agency seeks to rely "'with a view to their place in the overall statutory scheme.'" Brown & Williamson, 529 U.S. at 133.
- Nor may agencies seek to hide "elephants in mouseholes," Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001), or rely on 'gap filler' provisions, ante, at 20.
- Second, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address.
- Third, courts may examine the agency's past interpretation of the relevant statute.
- Fourth, skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise.
  - Concurrence, pp 13 – 14.
- The agency officials have sought to resolve a major policy question without clear legislative authorization to do so. Concurrence, p. 16.

EPA Statements on *WV v. EPA*

- USEPA Administrator Regan commented on July 29, 2022 that the Court's ruling would mean that a rule the EPA hopes to unveil next year to tackle carbon emissions from power plants will be narrower. Other rules are being developed to target power plants, to include coal ash and enhancements of the NAAQS for ozone.
- USEPA Deputy Administrator Janet McCabe on Jan. 18, 2023 commented that *WV. v. EPA* is not a major barrier and that the doctrine – which hold that Congress must speak clearly when granting agencies broad authority to issue policies that have significant political or economic effected – as only "applying in extraordinary cases." Source: InsideEPA, January 19, 2023, Dawn Reeves.

McCabe EPA Statements on *WV v. EPA*

- "We are confident it doesn't preclude EPA from carrying out our statutory responsibility to protect public health and the environment," which is the agency's "number one responsibility," she said, while vowing that the agency would "look carefully at our regulatory work going forward to ensure we're operating in a manner that's consistent with [the West Virginia] decision and all others."
- EPA is also due to finalize its Good Neighbor plan under its Cross-State Air Pollution Rule (CSAPR) program, which McCabe called a rule that builds on past regulations dealing with cross-boundary air pollution.

- Source: InsideEPA, January 19, 2023, Dawn Reeves.

McCabe EPA Statements on *WV v. EPA*

- McCabe added that EPA is working on incorporating the IRA into EPA rules to make sure baselines "take into account the changes we expect to see from the IRA" and said to expect to start seeing those assumptions included in pending individual rule packages.
- Finally, McCabe addressed a new social cost of greenhouse gas (SCGHG) metric it floated as part of its November supplemental methane proposal that raised the central estimate to $190 per ton, up from an interim value of $51 per ton.
- "If you're going to do policy right, you need to have this kind of information and these kinds of analytic tools. Everybody might not agree down to the penny on this kind of thing, but you have to have the tools out there to have the conversation." She added that the SCGHG had not had "an evidence-based update in more than a decade" and it was "high time for it." -- Source: InsideEPA, January 19, 2023, Dawn Reeves dreeves@iwpnews.com

Legal Questions Presented for FIP Informed by *WV v. EPA*

- Does the FIP conflict with or undermine Congress's design?
- Is EPA exercising an authority that Congress had not enacted?
- Did Congress mean to confer on EPA the authority to decline to manage infrastructure SIPs and good neighbor SIPs with parity?
- Is the FIP inconsistent with the overall statutory scheme?
- Is the FIP a mismatch between EPA's action and its congressionally assigned mission and expertise?

WV and KY Attorneys General Joint FIP Comment Letter – 11/29/22

- "The Proposed Rule uses vague language in the Clean Air Act designed to regulate National Ambient Air Quality Standards to give the agency substantial governing authority over American energy production. Such a drastic change runs afoul of the Supreme Court's "major questions" doctrine. *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022). The doctrine requires that for "agency decisions of vast economic and political significance," *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (cleaned up) ("UARG"), Congress must clearly confer the authority to take such action—a "merely plausible textual basis" is not enough, *West Virginia*, 142 S. Ct. at 2609."
- "Just like EPA's past efforts to commandeer America's electricity grids using "vague" language, *West Virginia*, 142 S. Ct. at 2610, EPA's authorizing statutes do not give the agency the clear authority it needs to move forward with this Rule. The Good Neighbor provision was authored to help EPA facilitate interstate emissions reductions, 42 U.S.C. § 7410(a)(2)(D)(i)(I), not to reshape America's energy production and other vital, national industries. Particularly in light of the Supreme Court's holding in *West Virginia*, we urge EPA not to finalize the Proposed Rule."

WV and KY Attorneys General
Joint FIP Comment Letter – 11/29/22

- *"First*, the Good Neighbor provision's text does not give EPA power to regulate the nation's energy sector or power grids. To determine whether a statute "confer[s] authority" upon an agency to promulgate a particular rule, the inquiry starts with what the plain language of the relevant statute says. *See West Virginia*, 142 S. Ct. at 2607-08."
- "The plain text gives no "colorable textual basis" that Congress meant for EPA to set standards that effectively dictate what sources can and cannot participate in the energy-production or other national economic sectors. West Virginia, 142 S. Ct. at 2609."

WV and KY Attorneys General Joint FIP Comment Letter – 11/29/22

- "Second, the Proposed Rule seeks to implement policy in an area of "vast economic and political significance" without clear congressional authorization. *West Virginia*, 142 S. Ct. at 2605. As the West Virginia decision confirms, the major questions canon voids administrative action when the agency asserts power Congress did not clearly delegate to resolve issues of major "economic and political significance." Id. at 2608."

WV and KY Attorneys General Joint FIP Comment Letter – 11/29/22

- "And make no mistake, the Proposed Rule's "vast economic" effects would raise serious concern under the major questions canon. UARG, 573 U.S. at 324 (cleaned up). Like the now-rejected Clean Power Plan, it will require some coal-fired electricity generating plants not simply to buy credits or alter operations as the statute contemplates, but to "retire"—that is, shut down. *West Virginia*, 142 S. Ct. at 2604; see also 87 Fed. Reg. at 20,122. Similarly, the proposal will force an "aggressive transformation of the electricity sector," *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring) (cleaned up), through generation shifting and by "necessarily reduc[ing] the [production] flexibility" of affected sources, 87 Fed. Reg. at 20,081, 20,105. Overall, the Proposed Rule will negatively affect electricity customers and workers throughout the country by creating tens of billions in new costs, id. at 20,160, for minimal environmental benefit, id.at 20,097."

WV and KY Attorneys General
Joint FIP Comment Letter – 11/29/22

- "The major questions canon takes a hard look at an agency's statutory authorization when the agency asserts power outside its expected "toolbox." *West Virginia*, 142 S. Ct. at 2613. Courts are rightly skeptical, for example, when an agency departs from established practice and uses old statutes to claim vast new power. Id. at 2610. Here, EPA seeks to regulate beyond the energy sector even though it abandoned the practice decades ago after one failed attempt. See 63 Fed. Reg. 57, 356 (Oct. 27, 1998). The Proposed Rule encompasses magnitudes more additional sources—regulated with considerably more rigor—than even that initial try. 87 Fed. Reg. at 20,046."

WV and KY Attorneys General Joint FIP Comment Letter – 11/29/22

- "The Proposed Rule's attempt "to deploy an old statute focused on" NAAQS to address "new and different" problems of climate, energy production, and environmental justice is a "warning sign" that EPA lacks statutory authority to move forward. *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring); 87 Fed. Reg. at 20,052, 20,081-82, 20,153-55."
- "Where agencies exert purported authority can also be telling. Setting limits on NOx emissions is EPA's "bread and butter"—regulating the electricity grid is not. *West Virginia*, 142 S. Ct. at 2613."

WV and KY Attorneys General Joint FIP Comment Letter – 11/29/22

- "Because "Congress presumably would not" task an agency with making judgments on energy regulation where it lacks "comparative expertise," the Proposed Rule, again, lacks congressional authorization. *West Virginia*, 142 S. Ct. at 2613 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019))."
- So Congress must also speak clearly before delegating power to an agency to invade "an area that is the particular domain of state law." Ala. *Ass'n of Realtors v. Dep't of Health and Hum. Servs*., 141 S. Ct. 2485, 2489 (2021) (per curiam). In fact, the major questions and federalism canons often "travel together." *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring). Yet here, the Proposed Rule sinks itself into electricity-generation regulation, one of "the most important of functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. P.S.C.*, 461 U.S. 375, 377 (1983).

Democratic Attorneys General Request to EPA to Develop a New NAAQS for CO2

(OR, MN, DE, IO, ME, MI, NM, Guam) (July 28, 2022)

- CAA Sections 108 and 110
  - "In *WV v. EPA*, the U.S. Supreme Court limited the use of Section 111(d) of the Clean Air Act (the Act) to address greenhouse gas emissions from power plants, calling it an "ancillary" and "gap-filler" provision of the Act, and saying the Congress could not have intended such a provision to bestow broad powers on the EPA. We urge you to consider a different section of the Act and approach - NAAQS - to protect our air, and thus, our planet."
  - Section 108 of the Act is explicit: If a pollutant "may reasonably be anticipated to endanger public health or welfare," and its "presence . . in the ambient air results from numerous or diverse mobile or stationary sources," the EPA is authorized to establish NAAQS."

Democratic Attorneys General Request to EPA to Develop a New NAAQS for CO_2

(OR, MN, DE, IO, ME, MI, NM, Guam) (July 28, 2022)

- The AGs quote the Court in *WV v. EPA as follows*, "It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion, such as the NAAQS. It is quite another to simply authorize EPA to set a cap itself wherever the Agency sees fit."
- The AGs proffer that, ". . .the Court's invocation of the "major questions doctrine" would not apply to the NAAQS and that the NAAQS was intended to have "vast economic and political significance," including generation-shifting, facility closures, and more.

Republican Attorneys General Response to Request to Develop a New NAAQS for CO_2

WV, KY, AL, AK, AR, GA, ID, IN, KS, LA, MS, MO, MT, NE, OH, OK, SC, TX, VA and WY (August 9, 2022)

- The request letter for a new NAAQS suggests EPA wield "newly discovered authority" under the Clean Air Act.
- "The [*WV v. EPA*] Court's opinion is a warning: Federal agency "asserti[ons] [of] highly consequential power beyond what Congress could reasonably be understood to have granted" will not be tolerated."
- "To list CO_2 as a "criteria pollutant," EPA must plan[] to issue [certain] air quality criteria" based on "the latest scientific knowledge useful in indicating the kind of extent of all identifiable effects on public health or welfare which may be expected from the presence of" CO_2 "in the ambient air, in varying quantities."

Republican Attorneys General Response to Request to Develop a New NAAQS for CO_2

WV, KY, AL, AK, AR, GA, ID, IN, KS, LA, MS, MO, MT, NE, OH, OK, SC, TX, VA and WY (August 9, 2022)

We have yet to find a way for a NAAQS for CO_2 to protect public welfare or health from climate change without devastating the U.S. economy.

The Supreme Court's decision this summer marks the second time the Court has rebuked EPA for novel interpretations of the CAA specifically that would give the agency "unheralded" power to regulate "a significant portion of the American economy."

Note: The Response letter does not invoke "major question" doctrine.

Morrisey, et al Letter to SEC citing *WV v EPA* (August 16, 2022)

C. Major Questions Doctrine

- Even if the relevant statutes were ambiguous, the SEC's view of its authority in the Proposed Rule would violate the major questions doctrine. An unelected body like the SEC cannot answer major questions like those in the Proposed Rule.
- The major-questions doctrine recognizes that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make [courts] reluctant to read into ambiguous statutory text the delegation [to an agency] claimed to be lurking there." West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (cleaned up). "To overcome that skepticism, the Government must … point to clear congressional authorization to regulate in that manner." Id. at 2614 (cleaned up).
  - Newfound Power. This clear statement must be something more than a "merely Vanessa A. Countryman plausible textual basis" to allow the SEC to enact a "radical or fundamental change to a statutory scheme." Id. at 2609 (cleaned up). Determining whether the Proposed Rule reaches the realm of major questions starts with "the nature of the question." Brown & Williamson, 529 U.S. at 159. The first relevant indicator is that the SEC has located "newfound power" in a decades-old statute. West Virginia, 142 S. Ct. at 2610. And with the Proposed Rule, the SEC "claim[s] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) ("UARG"). The SEC no longer protects investors from mere fraud. Now, it has assumed the responsibility of fighting climate change and other social ills. It wishes to use mandatory disclosure to pressure companies and investors to change their behavior. And to advance that agenda, it means to impose tens of thousands of additional manhours on regulated investors. Until recently, the SEC had never used its power this way. And "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power … is equally significant in determining whether such power was actually conferred." FTC v. Bunte Brothers, Inc., 312 U.S. 349, 352 (1941).

Morrisey, et al Letter to SEC citing WV v EPA (August 16, 2022)

- Fundamental Revision of the Statute. The Proposed Rule is not only unprecedented, but it also represents a "fundamental revision of the statue, changing it from [one sort of] scheme of [] regulation" into a different one. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994). Before, the Commission protected the public against the "abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's." Cap. Gains Rsch. Bureau, 375 U.S. at 186. Now, the Commission has set out on a mission to solve new problems pressed by the powerful few. But if the Commission can mandate disclosures on anything it wants, "[i]t is hard to see what measures this interpretation would place outside [its] reach." Ala. Ass'n of Realtors, 141 S. Ct. at 2489.
- Congressional Assignment. Further, "[t]here is little reason to think Congress assigned" the Commission the power to solve issues such as social ills or climate change, so the Proposed Rule's attempt to do so is another indicator of a major question. West Virginia, 142 S. Ct. at 2612.
- SEC Expertise. The SEC's expertise is in the securities market. It is not in climate change, social consciousness, or any other supposed ESG factor. "Administrative knowledge and experience largely account for the presumption that Congress delegates interpretive lawmaking power to [an] agency." Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (cleaned up). So, "[w]hen [an] agency has no comparative expertise" in making certain policy judgments, "Congress presumably would not" task it with making them. Id. The agency seemingly admits that it is out of its depth by confessing that it is "not proposing to define 'ESG' or similar terms." 87 Fed. Reg. at 36,660. If the Commission cannot even define the thing it seeks to regulate, how could it possibly make a claim to having expertise over it?
- Work around legislative process. That the Commission is "attempting to work [a]round the legislative process to resolve for itself a question of great political significance" is another indicator of a major question. West Virginia, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up). Congress has specifically considered disclosures like those in the Proposed Rule before but has ultimately decided not to pass them. See, e.g., S. 1217, 117th Cong. (2021) ("Climate Risk Disclosure Act of 2021); 2570, 117th Cong. (2021) ("Climate Risk Disclosure Act of 2021"); H.R. 1187, 117th Cong. (2021) ("Corporate Governance Improvement and Investor Protection Act"). So the SEC is tackling a major question—but Congress has not given it the clear go-ahead to do so. Nothing in the relevant statutes constitutes a clear statement

Potential Follow-up Actions

1. Follow-up with Attorneys General to discuss impacts of WV v. EPA on FIP and NAAQS proposal.
2. Outreach to state agencies to discuss their perceptions of impacts of FIP, NAAQS proposal, etc.
3. Monitor EPA response to *WV v. EPA* to be sure they do not try to shift climate change to NAAQS program.

Ozone NAAQS

- March 1, 2023, EPA Staff revised draft Policy Assessment (PA) recommends no change to the NAAQS for ozone.
- “The evidence and exposure/risk information, including that related to the lowest exposures studies, lead us to conclude that the combined consideration of the body of evidence and the quantitative exposure assessments including the associated uncertainties, do not call into question the adequacy of the protection provided by the current standard.”

Ozone

- December 31, 2020- Primary and secondary standards retained, without revision
- October 29, 2021: EPA announced that it "will reconsider the 2020 decision to retain 2015 standards, based on the existing scientific record.
- As with the reconsideration of the particulate matter National Ambient Air Quality (NAAQS), EPA will reconsider the decision to retain the ozone NAAQS in a manner that adheres to rigorous standards of scientific integrity and provides ample opportunities for public input and engagement.
- This action reflects the Agency's renewed commitment to a rigorous NAAQS review process, with a focus on protecting scientific integrity. EPA will ensure the Clean Air Scientific Advisory Committee (CASAC) is fully equipped to advise the Administrator and will reinstall an ozone CASAC panel to provide targeted expertise and advice, as requested by the CASAC itself.
- EPA is targeting the end of 2023 to complete this reconsideration."
- https://www.epa.gov/ground-level-ozone-pollution/epa-reconsider-previous-administrations-decision-retain-2015-ozone

Ozone NAAQS

- January 3, 2023, letter from EPA Administrator Michael Regan to CASAC
- Elizabeth A. Sheppard, Ph.D. Chair, Clean Air Scientific Advisory Committee
- I take note of the CASAC's consensus conclusion that "the existing scientific evidence summarized in the 2020 ISA provides a scientifically sound foundation for the agency's reconsideration of the 2020 Ozone NAAQS decision." This conclusion supports the agency's reliance on the 2020 ISA as the scientific foundation for the PA and for the EPA' s decisions in this reconsideration. The letter additionally conveys several more specific comments, including the ISA's approaches to weighing the scientific evidence and on the causality determinations that result from applying those approaches. Consistent with the CASAC's statements that it is not recommending reopening and revising the 2020 ISA, the EPA appreciates and intends to consider the specific advice received in this report in future NAAQS reviews.
- …the next step in the agency's reconsideration of the 2020 Ozone NAAQS decision is the CASAC's review of a draft PA. Considering the panel's comments related to the PA, colleagues in the Office of Air Quality Planning and Standards are developing a revised draft PA for review by the panel at a future public meeting.

Ozone NAAQS

- This action sets the stage for EPA to:
  - Rely on the 2020 ISA for NAAQS reconsideration
  - Revise only the Policy Assessment (PA) for the NAAQS reconsideration
  - Move forward to public hearing on the revised PA

Center for Biological Diversity v. EPA
3rd Circuit Cases No. 21-3023, No. 22-1012 (Consolidated Cases) No. 22-2956 (In Abeyance)

- Briefing Completed 9/22. Oral argument to be scheduled.
- EPA approved the SIP revisions without the statutorily required analysis of whether approval of the SIP would interfere with ozone NAAQS attainment, violating the obligations of § 7410(l).
- The EPA's interpretation lends itself to violations of the NAAQS resulting from a lack of analysis that ignores factors beyond emissions, as evidenced by EPA's admission of its error with the Roystone Compressor Station's thermal oxidizer.

Center for Biological Diversity v. EPA 3rd Circuit Cases No. 21-3023, No. 22-1012 (Consolidated Cases) No. 22-2956 (In Abeyance)

- Additionally, while the Center argues that the CAA requires some reasoned analysis on whether a SIP revision will interfere with attainment of NAAQS, the Center does not argue, that the Act requires specific analysis, such as modeling, or a guarantee of attainment.
- Furthermore, both Center's arguments that the SIP revisions increase emissions are fit for judicial review.
  - The first argument, that control technology itself may cause NOx emissions, was specifically raised in the Center's comments in the rulemakings.
  - The second argument, that EPA ignored presumptive RACT limits, is also available for judicial review because the EPA bears the burden of justifying its key assumption underlying the regulations.
  - Finally, presumptive RACT is the appropriate baseline which should be relied upon. The Presumptive RACT Rule required compliance by January 1, 2017 for all sources, including those that eventually received variances. Therefore, the presumptive RACT limits applied to all sources from January 1, 2017 unless a source received a variance before then, which the sources in this case did not.

Revised CSAPR Update Litigation

- MOG Petition for Review Denied, March 3, 2032.
- Opinion is narrow in its presentation, failing to address issues raised to include managing upwind and downwind obligations in parity with one another.

CSAPR Update Appellate Issues

- The following is a summary of MOG's arguments as provided to the Court:
- EPA deviated from its past practice of performing state-of-the-science photochemical air quality modeling for the analytical year of 2021 . . . in favor of using a linear interpolation technique.
- EPA chose to use "modeling [that] did not include legal emission reduction requirements in effect for downwind sources and failed to consider the impact of exceptional events on the impacted monitors."
- MOG asserts that to meet the New York District court's deadline, EPA used existing modeling data rather than conduct new modeling, shortened notice and/or comment periods, and would not allow a redefinition of nonattainment and maintenance receptors.

CSAPR Update Appellate Issues

- Eleven of the twelve states identified were considered significant pollution contributors based on flawed data.
- EPA's modeling failed to consider official regulatory programs and/or other emission reduction requirements applicable to sources in downwind states that could contribute to improving ambient air quality.
- EPA failed to account for the impact of exceptional events such as wildfires on the ozone design values of the air quality monitors.
- Wisconsin v. EPA did not require EPA to perform this task for the units involved.

Not only did the Court's ruling fail to acknowledge MOG's argument in favor of aligning the obligations of upwind and downwind states, but the ruling also failed to address the merit of any of MOG's arguments other than the issue related to the modeling shortcut that was taken by EPA to meet the March 15, 2021, deadline.

Thank You

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