National Mining Association

Environment Committee Priorities

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PSD & NONATTAINMENT NSR: FUGITIVE EMISSIONS

PRIORITY A – EPA

Background:

In 2003, Newmont Mining Corporation filed a petition for reconsideration arguing that the Dec. 31, 2002, NSR reform rule (67 Fed. Reg. 80,185) unlawfully included fugitive emissions in the assessment of whether a facility had undergone a major modification. EPA reconsidered this issue and published its final rule on Dec. 19, 2008, adopting the interpretation urged by Newmont that only source categories that have been listed pursuant to a CAA Section 302(j) rulemaking must consider fugitive emissions in making threshold determinations of whether a facility has undergone a "major" modification and is thus subject to PSD/NSR review.

By letter dated April 24, 2009, EPA granted reconsideration of the 2008 rule on a petition submitted by Natural Resources Defense Council (NRDC) and issued an administrative stay of the 2008 rule. While the CAA only allows a 3-month stay, EPA extended the initial 3-month stay for 18 months (75 Fed. Reg. 16012 (Mar. 31, 2010)) and then extended the stay indefinitely pending reconsideration of the rule (76 Fed. Reg. 17,548 (Mar. 30, 2011)). NMA submitted comments objecting to EPA's illegal stay of the rule. In a January 2014 guidance document regarding inclusion of fugitive emissions in GHG permitting, EPA stated that the rule was indefinitely stayed and claimed that all sources—both listed and unlisted—must include fugitives in a threshold calculation for a modification.

Today, the current regulations require sources to account for fugitive emissions in an initial (Step 1) threshold accounting in determining whether a project is a "major modification," only for the project to then be exempted from all substantive requirements in a subsequent (Step 2) determination (also known as the sub-vii exemption), if the planned project belongs to a non-listed source category and the project would only trigger PSD if fugitive emissions are counted. Note, most states, including Nevada, effectively apply the sub-vii exemption such that there is no Step 1 accounting of fugitive emissions.

Status:

On Oct. 14, 2022, EPA published a proposed rule "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Reconsideration of Fugitive Emissions Rule." 87 Fed. Reg. 62,322. The rule would require all existing major stationary sources to include fugitive emissions in determining whether a physical or operational change constitutes a "major modification," requiring a permit under the PSD or NNSR programs. EPA's proposed rule resurrects an important regulatory matter for the mining industry that has been dormant since 2011. EPA also asserts a new interpretation regarding its definition of fugitive emissions. Additional information on this rule is available here. Comments were originally due on Dec. 14, 2022. However, EPA granted NMA's request for a 60-day extension of the comment period.

On Feb. 14, 2023, NMA filed extensive comments on the proposed rule. The NMA asks EPA to abandon its proposed rule because EPA has not properly characterized the history or current state of the law, EPA has not properly interpreted the requirements of the Clean Air Act, EPA has not provided a clear legal basis for its proposal, and EPA has failed to consider the dramatic impacts that its proposal would have on numerous industries, but especially mining. The NMA urges EPA to retain the regulatory status quo until the agency conducts an analysis of how fugitive emissions might be regulated under PSD and the potential impacts of such regulation.

The regulatory status quo, in place since 1980, recognizes that the challenges associated with fugitive emissions are industry-specific and require evaluation prior to regulation. More specifically for mines, that status quo recognizes that (1) fugitive dust from mining operations is already well-controlled under other law and does not pose a serious health risk, and (2) applying PSD to fugitive dust from mining operations would likely make compliance impossible, without providing any real environmental benefit. The NMA's comment letter is supplemented by a white paper that discusses the potential impact on critical minerals production with a focus on lithium production, as well as hypothetical mining project examples that would require PSD permitting due to the proposed rule's regulatory changes. Finally, NMA objects to EPA's new interpretation of the definition of "fugitive emissions," which excludes control costs from consideration.

The NMA also organized an industry coalition letter that echoes the major concerns raised in NMA's comments.

EPA's Fall semi-annual regulatory agenda targets November 2023 for a final rule.

CROSS STATE AIR POLLUTION RULE (CSAPR) & OZONE TRANSPORT RULE

PRIORITY A – EPA

Background:

CSAPR established a cap-and-trade program for attainment and maintenance of the 1997 ozone and fine particle NAAQS and the 2006 fine particle NAAQS. The rule required a total of 28 states to reduce annual SO_2 emissions, annual NO_X emissions and/or ozone season NO_X emissions. The rule led to two stages of litigation. In the first stage, on April 24, 2014, the Supreme Court in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) reversed the D.C. Circuit's vacatur of CSAPR in a 6-2 decision and remanded the case for further proceedings. The D.C. Circuit then lifted the stay of CSAPR on October 23, 2014. Accordingly, the implementation of Phase 1 of CSAPR began in 2015. Phase Two was scheduled to go into effect on Jan. 1, 2017. In the second stage of the litigation, in *EME Homer City Generation, L.P v. EPA*, 795 F.3d 118, (D.C. Cir. 2015), the D.C. Circuit remanded the NO_x and SO_2 budgets for several states back to EPA for further action because it found that they resulted in overcontrol.

CSAPR Update Rule for the 2008 Ozone NAAQS:

On Nov. 16, 2015, EPA proposed the CSAPR Update Rule. The rule was proposed to address three things: (1) the remand in the CSAPR stage two case; (2) EPA's 2008 adoption of new and more stringent ozone NAAQS; and (3) certain unresolved issues regarding the ozone-season NOx budgets for 11 states under the 1997 ozone NAAQS. The proposal did not address the remand of the CSAPR Phase 2 SO_2 annual emissions budgets for four states; EPA addressed those remands on a state-by-state basis.

EPA finalized the CSAPR Update Rule on Oct. 26, 2016. 81 Fed. Reg. 74,504. The rule was subsequently challenged in *State of Wisconsin v. EPA,* No. 16-1406. NMA participated in the litigation via its membership in the Utility Air Regulatory Group. Petitioners opening briefs were filed on Sept. 18, 2017. Briefing concluded on April 9, 2018. Oral argument was held on Oct. 3, 2018. On Dec. 17, 2018, EPA filed a letter alerting the court to the agency's decision on the

CSAPR Update Close-Out and that this decision may effectively moot certain claims made by petitioners in the litigation.

CSAPR Update Close-Out for the 2008 Ozone NAAQS:

On June 29, 2018, former EPA Administrator Scott Pruitt signed a proposed rule in which the agency proposed to determine that the CSAPR Update Rule for the 2008 ozone NAAQS fully addressed the 20 covered states' interstate pollution transport obligations and therefore additional upwind reductions were not required. Two of the 22 states that are subject to the CSAPR Update Rule (i.e., Kentucky and Tennessee) were not subject to the proposed EPA determination, leaving 20 covered states. On July 10, 2018, EPA published the proposed rule in the *Federal Register*. 83 Fed. Reg. 31,915. EPA accepted public comment until Aug. 31, 2018. NMA participated in this rulemaking through the Utility Air Regulatory Group, which filed comments supporting EPA's proposal.

On Dec. 21, 2018, EPA published its final determination that the 2016 CSAPR Update fully addresses interstate pollution transport (commonly known as "good neighbor") obligations under the 2008 NAAQS for ozone in 20 eastern states. 83 Fed. Reg. 65,878. At the time, this was a significant and positive development for the mining industry given petitions filed by states, such as Maryland and Delaware, under Section 126 of the CAA, alleging significant contribution to nonattainment and interference with maintenance of the 2008 ozone NAAQS from coal-fired electric generating units (EGUs). While EPA denied these petitions, legal challenges were ongoing at the time. EPA's final determination further supported the denial of these petitions and removed immediate threats against coal-fired EGUs to take on new obligations to reduce ozone transport to neighboring states. However, because of the D.C. Circuit's adverse opinion in the case against the CSAPR Update Rule (see below), ripple effects occurred in these cases.

Based upon EPA's analysis of the latest data and modeling (at the time), the agency projected that by 2023 there would be no remaining nonattainment or maintenance receptors in the eastern United States. Accordingly, states in the CSAPR Update region were not expected to contribute significantly to nonattainment in, or interference with maintenance of, any other state with regard to the 2008 ozone NAAQS. This finding confirmed that states would not need to submit SIPs establishing additional control requirements beyond the CSAPR Update to address transported ozone pollution with respect to the 2008 ozone NAAQS. Importantly, states would not be required to impose additional obligations on sources to further reduce transported ozone pollution to meet this standard. With this final determination, EPA also had no obligation to establish additional control requirements for sources in these states. The final determination applied to states that were subject to CSAPR Update FIPs and any states that EPA approved replacement of CSAPR Update FIPs with CSAPR Update SIPs.

Interstate Transport SIPs for the 2015 Ozone NAAQS:

On Mar. 27, 2018, EPA provided projected air quality modeling results for ozone in 2023 including projected ozone concentrations at potential nonattainment and maintenance sites for the 2015 ozone NAAQS and projected upwind state contribution data. According to EPA, states could use this data to develop their implementation plans to assure that emissions within their jurisdictions do not contribute significantly to nonattainment or interfere with maintenance of the 2015 ozone standards in other states. In May 2018, EPA revised the contribution metric spreadsheet to include the most recent design values (e.g., 2014-2016) and information regarding "home state" and upwind state collective contribution. Further information may be accessed here.

Litigation:

***State of Wisconsin v. EPA,* No. 16-1406 (challenge to the CSAPR Update Rule)**: On Sept. 13, 2019, the D.C. Circuit issued a per curium decision remanding one aspect of the CSAPR Update Rule back to EPA for reconsideration. The court took issue with the fact that the rule did not provide a deadline for fully addressing the interstate air quality impacts identified in the rule. Specifically, the D.C. Circuit held that the CSAPR Update Rule's "open-ended compliance timeframe exceeds the bounds of EPA's statutory authority by allowing upwind States to continue their significant contributions to downwind nonattainment well past the deadline for downwind areas to comply with the [National Ambient Air Quality Standards (NAAQS)]." Accordingly, EPA was required to address that deadline issue in a subsequent rulemaking. The D.C. Circuit did not vacate the rule, recognizing that doing so would "cause substantial disruption" to the regulatory program. Therefore, the CSAPR Update Rule remains in place pending the remand rulemaking.

Importantly, the court identified several pathways in the Title I statutory framework that provide EPA flexibility in addressing upwind states' Good Neighbor obligations and deadlines for reductions including: (1) defining which upwind contribution "amounts" count as "significant;" (2) assessing the cost of making reductions (and feasibility for that matter); (3) extending attainment deadlines for downwind states, which the court notes is commonly done; and (4) and making an "impossibility" demonstration in regards to making reductions by the attainment deadlines. These pathways (if adopted) could have given EPA flexibility in responding to the remand.

On a separate matter, the D.C. Circuit rejected all remaining industry, state, and environmental petitioner challenges to the rule, upholding the CSAPR Update Rule in all other respects. In particular, the court dismissed an argument put forth by industry petitioners that the CSAPR Update Rule resulted in overcontrol of states emissions. For example, industry petitioners reasoned that "'many' downwind problem receptors would have attained the NAAQS had the Rule excluded emissions attributable to international sources." The court firmly disagreed: "That logic incorrectly assumes that an upwind State 'contributes significantly' to downwind nonattainment only when its emissions are the *sole cause* of downwind nonattainment. But an upwind State can 'contribute' to downwind nonattainment even if its emissions are not the but-for cause."

***State of New York v, EPA*, No. 19-1019 (challenge to the CSAPR Close-Out Rule)**: On Jan. 30, 2019, the State of New York, along with Connecticut, Delaware, Maryland, Massachusetts, New Jersey, and the City of New York, filed a petition for review in the D.C. Circuit challenging EPA's final determination on the CSAPR Update Close-Out for the 2008 Ozone NAAQS. *State of New York v. EPA*, No. 19-1019. Several environmental organizations also filed a petition for review the same day. On Feb. 19, 2019, the Texas Environmental Justice Advocacy Services, Air Alliance Houston, and Clean Wisconsin also filed a petition for review. On Feb. 28, 2019, the Utility Air Regulatory Group filed a motion to intervene in support of the government. On Mar. 1, 2019, the State of Texas and Texas Commission on Environmental Quality, as well as Homer City Generation, L.P., filed a motion to intervene in support of the government.

Following the decision in *Wisconsin* (discussed above), EPA requested that the D.C. Circuit postpone oral argument scheduled for Sept. 20, 2019. In requesting this delay, EPA explained to the court that the agency "relied upon a common interpretation of the Good Neighbor Provision regarding the timing of emission reductions from 'upwind' states" that the *Wisconsin* court rejected. According to EPA, the *Wisconsin* decision would likely require the agency to

"reassess the legal basis" of the CSAPR "Close-Out" Rule's reliance on the year 2023 as the year for assessing "significant contribution." EPA committed to providing a status report by Oct. 29, 2019, on its plans to address the *Wisconsin* decision. The D.C. Circuit granted EPA's request.

Before EPA could file a status report, the D.C. Circuit on Oct. 1, 2019, issued its decision without oral argument, vacating the rule because the agency admitted that the rule relies on the same statutory interpretation relied on in the CSAPR Update rule and rejected by the court in *Wisconsin v. EPA.* The D.C. Circuit noted again that the statute gives EPA some flexibility in addressing interstate transport, but the court found that EPA did not justify the Close-Out rule using any of those mechanisms.

Note: On June 29, 2019, the Utility Air Regulatory Group filed a motion to withdraw from the litigation as part of its formal dissolution process. On June 29, 2019, the National Rural Electric Cooperative Association filed a motion to substitute in place of the Utility Air Regulatory Group, or in the alternative, to intervene in litigation as a respondent in support of the rule. On Aug. 13, 2019, the D.C. Circuit granted NRECA's motion to intervene.

***Downwinders at Risk v. Wheeler*, No. 1:20-cv-00349 (DDC) ("good neighbor" FIPs litigation on 2008 ozone NAAQS)**: On Feb. 7, 2020, Earthjustice filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Columbia. Earthjustice filed on behalf of Downwinders At Risk, Appalachian Mountain Club, Sierra Club, Texas Environmental Justice Advocacy Services, and Clean Wisconsin. The complaint asks the court to set a deadline for EPA to adopt federal "good neighbor" plans for the 2008 ozone standards for Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Texas, Virginia, West Virginia, and Wisconsin. EPA moved to stay this case pending promulgation of FIPs that fulfill the CAA's "Good Neighbor" requirements as ordered in a separate case (below) in the United States District Court for the Southern District of New York (SDNY). On Sept. 24, 2020, the D.C. District Court granted EPA's stay until Mar. 15, 2021, when the final rule is issued.

***New Jersey v. Wheeler*, No. 1:20-cv-01425 (SDNY) ("good neighbor" FIPs litigation on 2008 ozone NAAQS)**: On Jan. 16, 2020, New York and Connecticut filed a similar lawsuit in the United States District Court for the Southern District of New York asking the court to set a deadline for EPA to adopt federal "good neighbor" plans for the 2008 ozone standards. Their lawsuit targets Illinois, Michigan, Pennsylvania, Virginia, and West Virginia. This lawsuit was expanded on Feb. 19, 2020, when New York, New Jersey, Connecticut, Delaware, Massachusetts, and the City of New York filed another complaint in the Southern District of New York seeking similar relief and targeting the same states above with the addition of Indiana and Ohio. On July 28, 2020, the Southern District of New York granted petitioners' summary judgment and ordered EPA to resolve the agency's statutory duty to promulgate FIPs fully addressing the "good neighbor" obligations of the upwind states with respect to the 2008 ozone NAAQS through a final rulemaking issued by Mar. 15, 2021. According to the court, "issued" means a final rule signed by the EPA Administrator, to be submitted no later than Mar. 19, 2021 for publication in the *Federal Register*.

Remand Rulemaking:
On Oct. 15, 2020, EPA announced it was proposing revisions to the CSAPR Update Rule to fully address 21 states' outstanding interstate pollution transport obligations for the 2008 ozone NAAQS. EPA's proposal responded to the D.C. Circuit's decision in *Wisconsin v. EPA* remanding the CSAPR Update Rule. EPA's fact sheet is available here. EPA published the proposed rule on Oct. 30, 2020. EPA held a public hearing on Nov. 12, 2020.

The proposal relies on EPA's latest data and modeling to assess air quality nonattainment and maintenance for the 2008 ozone NAAQS. EPA analysis found that, for 9 out of the 21 states for which the CSAPR Update was previously found to be only a partial remedy (Alabama, Arkansas, Iowa, Kansas, Mississippi, Missouri, Oklahoma, Texas, and Wisconsin), their projected 2021 emissions do not significantly contribute to nonattainment and/or maintenance problems in downwind states. Thus, EPA proposes no further obligations for these states.

For the 12 remaining states (Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and West Virginia), EPA projected that their 2021 emissions contribute at or above a threshold of 1 percent of the NAAQS (0.75 ppb) to the identified nonattainment and/or maintenance problems in downwind states. Accordingly, EPA proposes to issue new or amended FIPs to revise state emission budgets that reflect additional emissions reductions from EGUs beginning with the 2021 ozone season. According to EPA, additional emissions reductions would be required at power plants in these 12 states based on optimization of existing, already-installed selective 2 catalytic reduction (SCR) controls for the 2021 ozone season and installation or upgrade of low NOX burners for the 2022 ozone season. The table of proposed state budgets is available here.

EPA's proposed FIPs would require power plants in the 12 linked states to participate in a new CSAPR NOx Ozone Season Group 3 Trading Program that largely replicates the existing CSAPR NOx Ozone Season Group 2 Trading Program, with the main differences being the geography and budget stringency. Finally, the proposal includes adjusting emissions budgets for each state for each ozone season for 2021 through 2024. After the 2024 ozone season, no further adjustments would be required under this proposed rulemaking.

EPA also reevaluated its separate finding that Kentucky need not cut its NOx emissions in order to meet good neighbor obligations, because that finding was based on compliance with the NAAQS in 2023 which was similarly struck down by the D.C. Circuit in the CSAPR Update Rule litigation. Consequently, EPA corrected its 2018 approval of the Kentucky good neighbor SIP by proposing to disapprove the SIP and identify additional emission reductions required to satisfy Kentucky's good neighbor obligations for the 2008 ozone standard.

Comments were due on Dec. 14, 2020. NMA members did not identify issues for comment by the NMA. Environmental organizations filed comments on the CSAPR Update remand proposal arguing that EPA should do more to reduce NO_x emissions through other methods such as requiring coal-fired power plants to operate less on high ozone days and encouraging generation-shifting to different fuels.

On Mar. 15, 2021, EPA announced the final rule, which was published on April 30, 2021. 86 Fed. Reg. 23,054. The final rule closely tracks the proposal. One of the biggest changes EPA made was to add optimization of existing selective non-catalytic reduction (SNCR) controls at an estimated cost of $1800/ton to the controls already identified in the proposed rule (optimization of existing SCR controls and installation of state-of-the-art combustion controls, with an estimated cost of $1600/ton) as the basis for the Group 3 emission budgets established under

the final rule. State budgets reflect optimization of SCR and SNCR by the 2021 ozone season and installation of combustion controls by the 2022 ozone season. Additionally, some, but not all, state budgets are slightly lower in the final rule than originally proposed, presumably due to the change in the controls upon which the budgets are based. On May 17, 2021, EPA published a notice of data availability on allowance allocations to existing EGUs from both the state emissions budgets and the supplemental allowances, as well as the data upon which the allocations are based.

Status:

Interstate Transport Rule for the 2015 Ozone NAAQS ("Ozone Transport Rule")

On Mar. 11, 2022, EPA announced a federal plan to reduce pollution from power plants and industrial sources that significantly contribute to downwind states' ground-level ozone. According to EPA's press release, "this action would help states fully resolve their Clean Air Act 'good neighbor' obligations for the 2015 ozone [NAAQS], enhancing public health and environmental protections regionally and for local communities." Notably, the proposed rule would double the number of covered states, set first-time limits on certain industrial source plant boilers, and require daily limits on emissions from large coal-fired power plants.

On Apr. 6, 2022, EPA published the Ozone Transport Rule. 87 Fed. Reg. 20036. EPA's fact sheet is available here. EPA's regulatory impact analysis is available here. A map showing the states covered under the power plant and other industrial sources "Good Neighbor" plan for the 2015 ozone NAAQS is available here, along with other technical support documents. Comments were due on June 21, 2022, following an extension of the comment period.

The Ozone Transport Rule program changes include:

- Beginning in 2023, EPA is proposing to include power plants in 25 states in the Cross-State Air Pollution Rule (CSAPR) "NOx Ozone Season Group 3 Trading Program", which is being strengthened for the 2015 ozone NAAQS. The proposed state budgets are available here. Notably, EPA's proposed rule broadens the existing nitrogen oxides (NOx) power plant trading program from 12 states to 25 during the summertime ozone season, and ratchets down NOx caps for states over time, starting in 2023. Starting in 2026, the agency would set the budgets at levels achieved by the installation of selective catalytic reduction (SCR) controls at approximately 30 percent of large coal-fired power plants in the covered states that do not currently have them. A map of power plant emissions reductions in 2026 relative to 2021 (adjusted for known retirements and new builds) is available here. According to EPA, relative to current emission levels, SCR retrofits can deliver 64,000 tons of NOx emissions reductions (~70% of rule's EGU potential) in 2026. **For Coal (~42 GW): Between$6,500/ton and $20,900/ton, with an average of $11,000/ton.**

- Beginning in 2026, EPA is proposing emissions standard for certain new and existing industrial sources in 23 states that have a significant impact on downwind air quality. Of potential interest to the mining industry, new sources include boilers and furnaces in iron and steel mills and ferroalloy manufacturing, as well as high-emitting, large boilers in petroleum and coal products manufacturing. A map of industrial source emissions reductions in 2026 relative to pre-proposal levels is available here. A summary of proposed NOx emissions limits for industrial sources is available here.

- For power plants, EPA is proposing limits on NOx pollution by including additional features that the agency claims "promotes consistent operation of emission controls to enhance public health and environmental protection for the region and for local communities." Specifically, EPA is proposing to: (1) include backstop daily emissions rates of 0.14 lb/mmBtu for coal-fired steam units greater than or equal to 100 MW in covered states, which would take effect in 2024 for units with existing SCRs and in 2027 for units currently without SCRs; (2) limit the size of the emissions allowance bank; and (3) annual updates starting in 2025 to account for new retirements, new units, and changing operation.

On June 21, 2022, NMA filed comments on the proposed Ozone Transport Rule. The NMA's comments argue that: (1) the proposed rule illegally imposes disproportionate burdens relative to contributions and overrides the role of the states; (2) the emission budgets are infeasible, will cause generating shifting, and therefore exceeds EPA's authority; (3) the proposed rule will destabilize the grid; and (4) EPA may not and should not compel installation of SCR via a "backstop" daily emissions rate.

On Feb. 9, 2023, EPA sent the draft final rule to OMB for interagency review. According to EPA's Fall semi-annual regulatory agenda, it expects to issue a final rule in March 2023.

EPA Good Neighbor SIP Disapprovals (2015 Ozone NAAQS):

On Feb. 22, 2022, EPA proposed disapproval of the plans from 18 states to cut emissions of NOx that create downwind compliance problems with the agency's 2015 ozone NAAQS. The precise rationales for rejecting the states' plans vary, but the agency generally finds that they didn't go far enough to curb NOx releases and the agency signals that they want states to reduce these emissions from other industrial sources beyond coal-fired power plants. The disapprovals apply to: Alabama, Mississippi, Tennessee: here. Arkansas, Louisiana, Texas: here. Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin: here. Kentucky: here. Maryland: here. Missouri: here. New York, New Jersey: here. West Virginia: here. Iowa was approved: here. On June 22, 2022, EPA published a finding of failure to submit a SIP for Alabama with an effective date of July 22, 2022.

On Feb. 13, 2023, EPA issued a final rule disapproving 19 SIPs from: **Alabama, Arkansas, California, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, Ohio, Oklahoma, Texas, Utah, West Virginia, and Wisconsin**. Disapproving a SIP submission establishes a 2-year deadline for the EPA to promulgate FIPs to address the relevant requirements, unless the EPA approves a subsequent SIP submission that meets these requirements. EPA deferred final action on proposed disapprovals for Tennessee and Wyoming. EPA also rescinded its prior final action finding Alabama failed to submit a complete infrastructure SIP to satisfy the good neighbor requirements for the 2015 ozone NAAQS.

Remand Litigation:

***Midwest Ozone Group v. EPA*, (D.C. Cir. No 21-1146)**. On June 25, 2021, the Midwest Ozone Group filed a petition for review in the D.C. Circuit challenging the remand rulemaking. On July 28, 2021, the Midwest Ozone Group filed its statement of issues arguing, among other things, that EPA: (1) failed to show a sufficient link between emissions in "upwind" states and resulting ozone problems in "downwind" states; (2) set an "arbitrary and capricious" threshold for helping to determine such a link; (3) failed to take into account "on the books" pollution controls; (4)

wrongly targeted electric generating units, as opposed to other sources; and (5) wrongly imposed emissions controls that are not cost-effective. Downwinders at Risk, Texas Environmental Justice Advocacy Services, Appalachian Mountain Club, Sierra Club, Environmental Defense Fund, and Clean Wisconsin filed a motion to intervene in the case.

The Midwest Ozone Group filed its opening brief on Nov. 3, 2021. EPA filed its reply brief on Feb. 11, 2022, stating: "The Revised Rule responds to this Court's command in *Wisconsin* to fully resolve by the next applicable downwind attainment date all remaining upwind emissions that 'contribute significantly' to downwind nonattainment or 'interfere with maintenance' of the 2008 ozone NAAQS. EPA struck a reasonable balance between necessary expedition and methodological precision, and thoroughly explained its choices." On Apr. 8, 2022, the Midwest Ozone Group filed its final reply brief. Oral argument was held on Sept. 28, 2022.

"Good Neighbor" Litigation:

***Downwinders at Risk v. Wheeler*, No. 1:20-cv-00349 (DDC) ("good neighbor" FIPs litigation on 2008 ozone NAAQS)**: EPA filed a status report with the court on Jan. 14, 2021, identifying the remand rulemaking was in progress and that it would be taking final action by Mar. 15, 2021. This case was dismissed on July 9, 2021.

***New Jersey v. Wheeler*, No. 1:20-cv-01425 (SDNY) ("good neighbor" FIPs litigation on 2008 ozone NAAQS)**: Court order stands for EPA to resolve the agency's statutory duty to promulgate FIPs fully addressing the "good neighbor" obligations of the upwind states with respect to the 2008 ozone NAAQS through a final rulemaking issued by Mar. 15, 2021. EPA signed that rule (see above). EPA gave notice of the final rule in April.

***New York v. EPA*, No. 1:21-cv-252 (SDNY) ("good neighbor" litigation on 2015 ozone NAAQS SIPs)**: On Jan. 12, 2021, the states of New York, Connecticut, Delaware, Massachusetts, New Jersey, and the City of New York filed a complaint in the Southern District Court of New York asking the court to order EPA to carry out the agency's mandatory statutory duty to approve or disapprove "good neighbor" SIPs submitted by **Indiana, Kentucky, Michigan, Ohio, Texas, and West Virginia for the 2015 ozone NAAQS**. Petitioners allege that EPA has not made the required determinations approving or disapproving these "good neighbor" SIPs within 12 months of being determined or deemed to be complete as required by the CAA.

The court granted EPA's motion for extension of time to file its answer, with a new deadline of July 30, 2021. On July 29, 2021, EPA published notice in the Federal Register of a public comment period on a proposed consent decree that would require EPA to act on these six SIP submissions by April 30, 2022. 86 Fed. Reg. 40,825. If, by Feb. 28, 2022, EPA signed a proposal of full or partial disapproval of any of the six good neighbor SIP submissions and a proposal for a FIP, EPA would have until Dec. 15, 2022, to sign a final action. The Midwest Ozone Group filed comments opposing the deadlines in this consent decree. The court ordered the parties to file a written status report no later than Nov. 12, 2021, or upon the government's completion of its review of comments, whichever was earlier. On Nov. 15, 2021, the court entered the consent decree. On Mar. 24, 2022, the DOJ filed a letter with the court providing an update on EPA's compliance with the consent decree, stating that "it has taken all the actions necessary . . . to qualify for the December 15, 2022, deadline for all six SIP submissions." On Dec. 8, 2022, the parties filed a notice with the court on their agreement to extend the deadline to **Jan. 31, 2023**.

***Downwinders at Risk v. EPA*, No. 4:21-cv-03551-DMR (N.D. Cali.) ("good neighbor" litigation on 2015 ozone NAAQS SIPs):** Separately, Air Alliance Houston, Clean Wisconsin, Downwinders at Risk, Texas Environmental Justice Advocacy Services, Appalachian Mountain Club, Earthworks, Sierra Club, Center for Biological Diversity, Natural Resources Defense Council, and Environmental Defense Fund notified EPA on Mar. 12, 2021, of their intent to sue EPA to compel the agency to approve or disapprove "good neighbor" SIPs for the 2015 ozone standard. They are targeting 32 states: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming.

On May 12, 2021, they filed a complaint for declaratory and injunctive relief in the U.S. District Court for the Northern District of California to compel the Administrator to approve or disapprove states' Good Neighbor plans as expeditiously as possible. On Oct. 15, 2021, EPA published a notice in the *Federal Register* seeking comment on a proposed consent decree, with comments due by Nov. 15, 2021. On Jan. 12, 2022, the decree was entered and the case closed on Jan. 18, 2022. Under the agreement, EPA must by April 30, 2022, approve or disapprove the interstate ozone SIPs of **21 states: Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Tennessee, Texas, West Virginia and Wisconsin**. If EPA by Feb. 28, 2022, proposes full or partial disapproval of a SIP from one of the 21 states, along with a proposed FIP to directly regulate interstate ozone emissions from that state, it must finalize its full or partial disapproval of the state's own plan by Dec. 15, 2022. Further, EPA must by Dec. 15, 2022, approve or deny the interstate SIPs of Arizona, California, Montana, Nevada, and Wyoming. Since the proposed consent decree, EPA has approved the interstate ozone SIPs of Connecticut, Florida, Georgia, Hawaii, North Carolina, and South Carolina, so were excluded from the final decree.

On Mar. 25, 2022, DOJ filed a notice with the court stating that it signed notices to propose disapproval of the SIP submittals and therefore "triggered the continent deadline for final action by December 15, 2022." On Jan. 30, 2023, the parties filed a joint notice on their agreement to extend the consent decree deadline. According to the notice, EPA needs until **Dec. 15, 2023**, "to finalize action on the SIP submissions addressing the [Good Neighbor requirements for the 2015 ozone NAAQS] **from Arizona, Tennessee, and Wyoming** to allow EPA to fully consider the updated air quality information and comments received during the public comment periods following the proposed SIP actions for these states." The notice further provides: "[F]or these three states, further consideration of this information may result in EPA issuing a re-proposal of action, which would require another public notice and comment rulemaking."

***Sierra Club v. EPA*, No. 3:22-cv-01992-JD (N.D. Cali.) (filed Mar. 29, 2022) ("good neighbor" litigation on 2015 ozone NAAQS SIPs)**: The Sierra Club, Air Alliance Houston, Center for Biological Diversity, Citizens for Pennsylvania's Future, Clean Air Council and Texas Environmental Justice Advocacy Services filed a complaint for declaratory and injunctive relief against EPA in the Northern District Court of California, seeking federal good neighbor plans for **Pennsylvania, Utah, Virginia, and New Mexico**. Only New Mexico is not included in EPA's proposed interstate transport rule for the 2015 ozone NAAQS (summarized above). In January 2020, EPA found that the states had not submitted good neighbor plans triggering a two-year timetable for EPA to issue FIPs. Petitioners are seeking a deadline to do so. On Jan. 24, 2023, the court entered the consent decree requiring the EPA Administrator, no later than **Mar. 15, 2023**, to sign a final rule or rules taking one or more of the following actions with respect to

Pennsylvania, Utah, and Virginia: promulgate a FIP; approve a SIP; or approve in part a SIP in conjunction with promulgating a partial FIP. **No later than June 1, 2024, the EPA Administrator must do the same for New Mexico**.

SIP Denial Litigation (2015 ozone NAAQS SIPs)

10th Circuit (Utah): *Utah v. EPA*, No. 23-9509 (petition for review filed Feb. 13, 2023).

8th Circuit (Arkansas): *Arkansas v. EPA*, No. 23-1320 (petition for review filed Feb. 16, 2023)

5th Circuit (Texas): *Texas v. EPA*, No. 23-60069 (petition for review filed Feb. 14, 2023). Additional petition for review filed by: Luminant Generation Company, L.L.C., Coleto Creek Power, L.L.C., Ennis Power Company, L.L.C., Hays Energy, L.L.C., Midlothian Energy, L.L.C., Oak Grove Management Company, L.L.C. and Wise County Power Company, L.L.C.. NOA filed by Petitioners Wise County Power Company, L.L.C., Oak Grove Management Company, L.L.C., Midlothian Energy, L.L.C., Hays Energy, L.L.C., Ennis Power Company, L.L.C., Coleto Creek Power, L.L.C. and Luminant Generation Company, L.L.C. Additional petition for review filed by: Petitioners Association of Electric Companies of Texas, BCCA Appeal Group, Texas Chemical Council and Texas Oil & Gas Association. NOA filed by Petitioners Texas Oil & Gas Association, Texas Chemical Council, BCCA Appeal Group and Association of Electric Companies of Texas.

NEW SOURCE PERFORMANCE STANDARDS: CO_2 REGULATIONS FOR EXISTING POWER PLANTS UNDER CAA SECTION 111(d)

PRIORITY A – EPA

Background:

Obama Administration's Clean Power Plan (CPP):

On Oct. 23, 2015, EPA published a final rule regulating carbon dioxide (CO_2) emissions at existing electric generating units (EGUs). 80 Fed. Reg. 64,662. In response to concerns raised by several states and utilities, EPA extended the initial compliance date by 2 years; however, the target carbon reduction increased from 30 percent by 2030 to 32 percent. The compliance period would have begun within seven years (2022) with a deadline of 2030 to meet CO_2 emissions goals. EPA's final rule also included a revised approach that included only three of the four proposed building blocks. Building Block 1 assumed minimal heat rate improvements at existing coal-fired units. Building Block 2 assumed increased dispatch of gas-fired plants. and Building Block 3 assumed increases in renewable energy generation. In combination, the building blocks were designed to reduce coal as a fuel source for electric generation.

NMA filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), which was consolidated with other challenges in *State of West Virginia v. EPA,* No. 15-1363 (D.C. Cir.). In addition, NMA filed an emergency stay request. On Jan. 21, 2015, the D.C. Circuit denied the stay request. In response, NMA, member coal companies, states and utilities submitted petitions to the U.S. Supreme Court on Jan. 27, 2016, asking the Court to stay the rule while litigation was ongoing. On Feb. 9, 2016, the Supreme Court granted the

emergency stay application. While the D.C. Circuit denied the stay motions, the court granted expedited review of the legal challenge on the merits. Briefing was completed on April 22, 2016, and oral argument was held before the court *en banc* on Sept. 27, 2016. On March 28, 2017, the court issued an order holding the case in abeyance while the Trump Administration completed its reconsideration rulemaking. On Sept. 17, 2019 – following EPA's publication of the final Affordable Clean Energy Rule – the D.C. Circuit dismissed this case as moot.

Trump Administration:

- Executive Order on Energy Independence:

On March 31, 2017, President Trump issued Executive Order 13783, "Promoting Energy Independence and Economic Growth," which directed the EPA Administrator to "immediately take all steps necessary to review" the suite of rules and guidance that made up the Obama Administration's Clean Action Plan to ensure that they are consistent with the policies set forth in the Executive Order, and "as soon as practicable, suspend, revise, or rescind" such guidance and publish for notice and comment proposed rules "suspending, revising, or rescinding, those rules." 82 Fed. Reg. 16,093. On April 4, 2017, EPA published in the *Federal Register* a notice announcing that it was reviewing and, if appropriate, would initiate proceedings to suspend, revise, or rescind the CPP. 82 Fed. Reg. 16,329.

- CPP Repeal Rule:

On Oct. 16, 2017, EPA published a proposed rule "Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units." 82 Fed. Reg. 48,035. EPA held four public hearings in Charleston, WV; San Francisco, CA; Gillette, WY; and Kansas City, KS and extended the comment period until April 26, 2018 (comments were originally due on Nov. 15, 2017). NMA submitted comments highlighting the rule's legal and technical infirmities. NMA's comments focused on three primary arguments: (1) repeal is mandated because the CAA does not authorize the CPP; (2) repeal is required to avoid economic harm to the country arising from grid reliability and affordability considerations; and (3) repeal is required due to the lack of any real environmental benefits. Included as an appendix to NMA's comments was a report prepared for NMA by Energy Venture Analysis that analyzed the impact of the CPP on the power sector in general, and on coal-fired power generation specifically.

- Affordable Clean Energy (ACE) Rule:

On Dec. 28, 2017, EPA published an Advance Notice of Proposed Rulemaking (ANPRM), "State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units." 82 Fed. Reg. 61,507. The ANPRM solicited detailed information on a variety of subjects including available systems for greenhouse gas (GHG) emission reduction; carbon capture and storage (CCS); and the interaction of CAA Section 111(d) and New Source Review (NSR) requirements. On Feb. 26, 2018, NMA submitted comments on the ANPRM, which addressed the general principles that should guide EPA in promulgating a replacement rule. More specifically, the comments discussed: (1) the respective federal and state roles under CAA section 111(d); (2) the need for "best system of emission reduction" (BSER) to be limited to at-the-source technology or operational measures; and (3) the need for the agency to reform the NSR program to enhance the ability of coal units to undertake efficiency improvements and lower their CO_2 emissions rate.

On Aug. 31, 2018, EPA published in the *Federal Register* its anticipated proposed CPP replacement rule entitled, the "Affordable Clean Energy" (ACE) rule, 83 Fed. Reg. 44,746. EPA proposed to establish emission guidelines that states can utilize to develop plans to address GHG emissions from existing EGUs. The proposed ACE rule consisted of three overarching proposals: (1) replacing the CPP with a rule that utilizes heat rate improvement measures as BSER (an "inside the fence-line" approach to efficiency improvements at individual sources); (2) adopting new implementing regulations under section 111(d) of the CAA to clarify the roles of EPA and the states, including an extension of the deadline for state plans and EPA approvals; and (3) revising the NSR permitting program to provide EGUs the opportunity to make efficiency improvements without triggering NSR permit requirements. Notably, the proposal considered and rejected CCS as BSER because it was significantly more expensive than alternative options and would not be a feasible option for many individual facilities.

On Sept. 10, 2018, EPA published a notice of public hearing and extension of the comment period for the ACE rule. 83 Fed. Reg. 45,588. The public hearing was held on Oct. 1, 2018, in Chicago, Ill. NMA participated in the public hearing to support the proposed ACE rule.

On Oct. 31, 2018, NMA submitted extensive comments on the proposed ACE rule. NMA's comments provided legal and policy support for the agency's return to the historic interpretation of the CAA for setting performance standards based upon what is reasonably achievable at each power plant rather than the CPP's attempt to regulate the entire electric grid. Moreover, NMA explained why measures such as generation shifting, co-firing and emissions trading are not permissible measures since they are de-facto *non-performance* measures. NMA also provided EPA with a set of recommendations to improve the NSR program (discussed below) to remove barriers for projects that will increase the efficiency and performance of coal-fueled power plants.

On July 9, 2019, EPA published the final "Affordable Clean Energy" (ACE) rule, formally repealing and replacing the prior Administration's CPP. 84 Fed. Reg. at 32,520. The ACE rule finalized three separate and distinct rulemakings: (1) the repeal of the CPP; (2) the replacement ACE rule; and (3) revised implementing regulations. A detailed summary of the final rule may be accessed here. The ACE rule finalized emissions guidelines for GHG emissions from existing EGUs. These guidelines informed states on the development, submittal, and implementation of state plans to establish performance standards for GHG emissions from existing coal-fired EGUs.

Importantly, the ACE rule established heat rate improvement (HRI), or efficiency improvement, that can be applied at a designated facility as BSER for GHG (specifically CO_2) from existing coal-fired EGUs. EPA identified six HRI candidate technologies for consideration. EPA rejected CCS, repowering, and refueling and co-firing with gas or biomass as representing BSER. States were also allowed to consider the remaining useful life of an existing source and other source-specific factors in establishing standards of performance at the unit level. States were not, however, allowed to use averaging across designated facilities at a single plant or averaging or trading between designated facilities located at different plants when establishing standards of performance for existing sources.

The rule went into effect on Sept. 6, 2019. Per the new implementing regulations, states were required to submit SIPs by July 2, 2022. West Virginia, Oklahoma, and Arkansas were expected to be early movers. West Virginia developed a partial state plan for one designated coal-fired EGU – the Longview Power LLC – and was expected to submit the plan to EPA for approval. The approval process was not completed before the Biden Administration began.

As supported by NMA, EPA did not include any final action concerning the NSR reforms the agency proposed in conjunction with the ACE proposal. While EPA originally planned to take final action on the proposed NSR reforms in a separate final action, the agency did not complete this rulemaking during the Trump Administration.

Litigation:

***American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.) (ACE Challenge)**: On July 8, 2019, the American Lung Association and American Public Health Association filed the first challenge to the ACE Rule. Eleven other environmental organizations, 22 states, 8 cities, and 22 other parties (representing mining, electric utilities, oil and gas, biomass, wind, solar, and power authorities) filed challenges. On Aug. 7, 2019, NMA filed a motion to intervene in support of the government. The court granted our motion on Sept. 11, 2019. 20 other industry parties (mining, electric utilities, and others), 22 states, and 3 unions also filed motions to intervene in support of the government. Opening briefs were filed on Mar. 27, 2020, and final briefs were filed on July 30, 2020. On Oct. 8, 2020, the D.C. Circuit heard oral argument on this case. Justices Millett, Pillard, and Walker heard the case, which lasted over eight hours.

On the last day of the Trump Administration, the D.C. Circuit issued a 147-page per curium opinion that vacated the Affordable Clean Energy (ACE) Rule (including the repeal of the CPP and the implementation regulations) and remanded it back to the agency for further consideration. According to the court, "[t]he ACE Rule expressly rests on the incorrect conclusion that the plain statutory text clearly foreclosed the Clean Power Plan[.]" The D.C. Circuit also vacated amendments to the implementing regulations generally applicable to the emissions guidelines promulgated under CAA section 111(d) that extended several compliance timelines, including when states were required to submit plans for emissions reductions and when sources were required to comply. Finally, the D.C. Circuit rejected other attacks on the rule by concluding that EPA: (1) made the requisite endangerment finding; and (2) is not precluded from using CAA section 111 to regulate GHG emissions from power plants even though they are already regulated under CAA section 112 for hazardous air pollutants.

Judge Walker – appointed by President Trump – concurred in part in the judgment and dissented in part. While he addressed the "major questions" doctrine, he ultimately concluded that the regulation of coal-fired EGUs under CAA section 111 is foreclosed because the source is already regulated under CAA section 112 for hazardous air pollutants. According to Judge Walker, "the EPA was required to repeal the [Clean Power Plan] and wrong to replace it with provisions promulgated under [CAA section 111].

On Feb. 12, 2021, EPA filed a motion for a partial stay of the mandate in the ACE case, asking the D.C. Circuit to leave the CPP repeal in place, but allowing vacatur of ACE and the deadline extensions to become effective. EPA requests that "the Court stay the issuance of the mandate for the vacatur of the [CPP]. On Feb. 22, 2021, the court granted EPA's motion, withholding issuance of the mandate with respect to the vacatur of the CPP Repeal Rule until the EPA responds to the court's remand in a new rulemaking action. The court directed EPA to file status reports at 90-day intervals. EPA was also directed to "notify the court promptly upon completion of the agency rulemaking so that the remainder of the mandate may issue." On Mar. 5, 2021, the court issued its partial mandate vacating the ACE Rule but leaving the CPP Repeal intact.

Separately, on Feb. 12, 2021, EPA sent a letter to the Region Administrators to provide information for responding to requests regarding the agency's view of the court's opinion. Specifically, EPA stated: "Because the court vacated ACE and did not expressly reinstate the CPP, EPA understands the decision as leaving neither of those rules, and thus no CAA section 111(d) regulation, in place with respect to GHG emissions from EGUs." Accordingly, "EPA does not expect states to take any further action to develop and submit plans under CAA section 111(d) with respect to GHG emissions from EGUs at this time."

***West Virginia v. EPA*, No. 20-1540 (Sup. Ct.)**: A group of 19 states, led by West Virginia, petitioned the U.S. Supreme Court for review of the D.C. Circuit's decision to vacate the Trump administration's ACE rule. In their petition, the states argued the "ancillary" statutory provision underlying both ACE and the CPP did not authorize EPA to issue a rule to force fossil fuel-fired utilities to reduce operations and subsidize an expansion of renewable energy. That kind of significant authority, argued the states, requires a clear statement from Congress, which does not exist in the CAA. The petition also argued that, properly read, the statute only authorizes EPA to impose control measures that can be implemented at an individual stationary source of emissions (like those in ACE), and that EPA cannot impose measures that require the involvement of multiple sources, and even non-emitting facilities, to comply. If read broadly enough to authorize the CPP, the petition argued such a broad grant of authority would violate the prohibition on delegating legislative power to an administrative agency in the executive branch. On May 28, 2021, NMA filed a brief with the Supreme Court in support of the appeal led by West Virginia.

On Oct. 29, 2021, the Supreme Court agreed to hear this petition. The North American Coal Corporation (No. 20-1531) and the state of North Dakota (No. 20-1780) filed similar petitions that were also granted. Westmoreland Mining Holdings, LLC (20-1778) filed a petition that was partially granted. The Supreme Court declined to take a second question presented by the company on whether EPA has the authority to impose standards of performance on existing stationary sources under CAA Section 111(d) for GHGs if those sources are already regulated under CAA Section 112 for hazardous air pollutants.

The parties filed their opening briefs on Dec. 13, 2021: (1) West Virginia and 17 additional states; (2) North Dakota; (3) The North American Coal Corporation; and (4) Westmoreland Mining Holdings LLC. The National Mining Association (NMA) filed a brief in support of West Virginia's arguments regarding the limits of the EPA's authority under Clean Air Act section 111(d). NMA's brief argues that EPA's reliance on two sentences in section 111(d) to adopt the Clean Power Plan, which would have set major national policy through complete transformation of the nation's electric grid, cannot stand. Under the major question doctrine, an agency only has the authority to establish a major national policy if Congress clearly and unambiguously delegated such authority. This doctrine furthers the separation of powers by adopting a statutory presumption that Congress would generally not want administrative agencies to resolve significant national policy issues. The parties in opposition filed on Jan. 18, 2022. All of the filings in this case may be accessed here. Oral argument was held on Feb. 28, 2022.

Status:

Litigation:

***West Virginia v. EPA*, No. 20-1540 (Sup. Ct.)**: In a major victory for the coal mining industry, the Supreme Court on June 30, 2022, held that "Congress did not grant EPA in Section 111(d)

of the Clean Air Act (CAA) the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan (CPP)." The NMA issued a press statement applauding the Supreme Court's decision.

In a 6 to 3 decision, authored by Chief Justice Roberts, the Court declared unlawful the CPP's conclusion that the "best system of emission reduction" under CAA 111(d) for coal-fired power plants included a requirement for existing coal-fired power plants to reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources. The court noted that since passage of the CAA 50 years ago, "EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly." Slip In examining the question whether the conception of EPA's authority as articulated in the CPP is within the power granted to it by the CAA, the Court's answer was a resounding no

Notably, the Court did not completely bar EPA from regulating greenhouse gases under the relevant statutory provisions. Rather, it merely said that the CPP presented an "extraordinary" case of an administrative agency using vague language to wield transformative power that had not been clearly granted to it by Congress. The Court's ruling goes beyond any one statute and holds that Congress must speak clearly via statute to authorize an agency to make decisions of vast economic and political significance (the "major questions" doctrine).

On Aug. 1, 2022, the Supreme Court issued its mandate and judgment to the D.C. Circuit. On Sept. 19, 2022, the D.C. Circuit ordered the parties to file motions to govern by Oct. 3, 2022. In that motion, EPA indicated that it "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, [and therefore] the parties agree that the pending challenges to the ACE Rule should be placed in abeyance pending completion of that process." EPA also said it expected to issue a proposed rule by March 2023 and finalize a rule by Spring 2024. EPA proposed to file status reports on 90-day intervals. North Dakota filed a separate motion to request that the court clarify that the ACE Rule and the CPP Repeal Rule "are and remain in effect," hoping to force EPA to first repeal them before writing a new rule.

On Oct. 27, 2022, the D.C. Circuit granted EPA's motion and denied North Dakota's motion. The court issued an amended partial mandate that: (1) denied the coal industry petitioners' petitions for review of the ACE Rule; (2) granted the petitions for review challenging the timing portion of the implementing regulations; (3) denied the petitions for review of the CPP Repeal Rule; and (4) held in abeyance the remaining challenges to the ACE Rule pending competition of a rulemaking by the EPA. EPA is required to file status reports every 90 days. On Feb. 13, 2023, EPA issued the latest status report acknowledging that "administrative proceedings for a new rulemaking action are ongoing."

Biden Administration Reconsideration:

The Biden transition team included this rule on its initial list of environmental policy actions for review. On the same day, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which revokes President Trumps Executive Order 13783, "Promoting Energy Independence and Economic Growth" that started the reconsideration process resulting in the ACE rule. The Executive Order also ordered an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions.

- *Pre-Rulemaking Comment Period*

In September 2022, EPA opened a pre-rulemaking docket to collect public feedback on the agency's plans to regulate GHG emissions from new and existing fossil-fired EGUs. According to EPA, the "goal of this non-rulemaking docket is to gather perspectives from a broad group of stakeholders in advance of [the agency's] proposed rulemaking(s)." The docket is available on the Federal eRulemaking Portal by searching EPA-HQ-OAR-2022-0723. Notably, EPA posted a document in the pre-rulemaking docket outlining a variety of questions for public comment. EPA is keeping this docket open until Mar. 27, 2023.

On Jan. 10, 2023, NMA filed comments raising critical issues to the coal mining industry and coal powered generation. Overall, the NMA requested EPA to stay within the authority Congress clearly provided to the agency in the Clean Air Act, respect states' authority to set performance standards for existing EGUs, and recognize the many real-world constraints on achieving rapid decarbonization of the electric utility industry.

Specific to the questions EPA posed, the NMA argued that: (1) carbon capture, utilization and/or sequestration is not yet sufficiently demonstrated for a performance standard under the Clean Air Act; (2) fuel-switching and co-firing cannot be the "best system of emission reduction" (BSER) for a Section 111 standard of performance; (3) EPA should respect state authority to set performance standards for existing EGUs; (4) EPA should allow states to offer flexibility in complying with the standards they set; and (5) EPA should not focus on recent announcements or commitments to transitioning generation in selecting the BSER for EGUs.

- *Proposed Rule*

EPA's Fall semi-annual regulatory agenda targets April 2023 (a 1-month delay) for a proposed rule and June 2024 for a final rule.

- *Direct Final Rule on ACE Rule SIPs*

In the Fall semi-annual regulatory agenda, EPA added a rulemaking to extend the state submission deadline for the ACE Rule due to the court's vacatur for 536 days. EPA plans to issue this extension as a direct final rule without an opportunity for public comment. EPA targeted January 2023 for this rule but missed its internal deadline.

- *New Implementing Regulations*

On Dec. 23, 2022, EPA issued a proposed rule amending the implementation to amend the implementing regulations that govern the processes and timelines for state and federal plans that implement emission guidelines for existing sources under Clean Air Act (CAA) Section 111(d). 87 Fed. Reg. 79176. EPA's factsheet is available here. EPA's proposed rule covers: (1) state plan timing requirements; (2) federal plan timing requirements; (3) increments of progress for state plans with compliance schedules longer than 16 months; (4) flexibility and efficiency mechanisms; (5) a new requirement for meaningful engagement; (6) requirements when states account for the remaining useful life of a facility; (7) other requirements for applying less-stringent standards at a facility; (8) certain compliance flexibilities through trading or averaging. **Comments are due on Feb. 27, 2023**.

NEW SOURCE PERFORMANCE STANDARDS: CO_2 REGULATIONS FOR NEW POWER PLANTS UNDER CAA SECTION 111(b)

PRIORITY A – EPA

Background:

Obama Administration:

- Rulemaking:

In response to the rollout of President Obama's Climate Action Plan in June 2013, EPA on Sept. 20, 2013, signed a re-proposed New Source Performance Standard (NSPS), which rescinded a prior proposal issued in April 2012 (77 Fed. Reg. 22,391). On Jan. 8, 2014, EPA published the re-proposal in the *Federal Register*. 79 Fed. Reg. 1430. This proposal set separate emissions rates for CO_2 under Subpart Da for coal-fired units at 1,100 lb. CO_2/MwH and Subpart KKKK for combined cycle natural gas (NGCC) units at 1,000 lb. CO_2/MwH. EPA also proposed that partial CCS constituted the Best System of Emissions Reduction (BSER) for coal units, while NGCC units without CCS constituted BSER for natural gas units. On Mar. 10, 2014, NMA submitted extensive technical, legal and policy comments on the re-proposed rule and testified at EPA's hearing in Washington D.C.

On Oct. 23, 2015, EPA published a final rule establishing CO_2 emission limits for new EGUs and modified and reconstructed units. 80 Fed. Reg. 64,510. Pursuant to the final rule, newly constructed coal-fired steam EGUs cannot emit more than 1,400 lbs CO_2/MWh (gross), an increase of 300 lbs CO_2/MWh (gross) over the proposed emission standard for these sources (1,100 lbs CO_2/MWh). The final rule reduced the stringency of required CCS, requiring that it capture 16 percent of CO_2 produced by an EGU burning bituminous coal (or 23 percent if burning subbituminous or dried lignite).

- Litigation:

NMA filed a Petition for Review that was consolidated in *State of North Dakota v. Environmental Protection Agency,* No. 15-1381 (D.C. Cir.). On Aug. 30, 2016, the D.C. Circuit issued an order setting an amended briefing schedule. Briefing concluded on Feb. 6, 2017, with oral argument scheduled for April 17, 2017. On Mar. 28, 2017, EPA filed a motion to hold the case in abeyance and continue oral argument. EPA's motion relied on President Trump's Executive Order 13783, "Promoting Energy Independence and Economic Growth," and the agency's initiation of a review of this rule for reconsideration and possible future rulemaking.

On Mar. 30, 2017, the D.C. Circuit ordered that the case be removed from the oral argument calendar pending disposition of EPA's motion. On Apr. 28, 2017, the D.C. Circuit granted EPA's motion to hold the case in abeyance for 60 days with status reports filed at 30-day intervals. The D.C. Circuit also ordered parties to file supplemental briefs addressing whether this case should be remanded to the agency rather than be held in abeyance. On Aug. 10, 2017, the Court issued a motion holding the case in abeyance and requiring EPA to file status reports every 90-days, beginning Oct. 27, 2017. Since issuance of the order holding the litigation in abeyance, EPA has filed 90-day status reports as required by the D.C. Circuit's order.

On July 31, 2019, the D.C. Circuit granted the North Carolina Department of Environmental Quality's motion to withdraw from the case.

Trump Administration Reconsideration:

On Mar. 28, 2017, EPA signed a notice announcing its review of the NSPS rule on the same day that it filed its motion to hold the litigation in abeyance. EPA published the notice in the *Federal Register* on April 4, 2017. 82 Fed. Reg. 16,330.

On Dec. 6, 2018, EPA announced its proposal to replace the Obama administration's NSPS for new, modified and reconstructed coal power plants with a standard reflecting the most efficient demonstrated steam cycle and best operating practices (*e.g.*, supercritical technology for large units and subcritical technology for small units). EPA also proposed an emission limit of 1,900 CO_2/MWh-gross for new large units and 2,000 lb. CO_2/MWh-gross for small units. The proposed revisions aligned generally with the comments NMA filed with EPA during the Obama Administration. On Dec. 20, 2018, EPA published the proposed rule in the *Federal Register.* 83 Fed. Reg. 65,424. Comments were originally due on Feb. 19, 2019. EPA also published a notice of a public hearing for Jan. 8, 2019, in Washington, D.C. Due to the federal government shutdown, EPA first rescheduled the public hearing for Jan. 30, 2019, and then temporarily postponed the hearing until after funding was restored. Ultimately, EPA rescheduled the public hearing for Feb. 14, 2019, with written comments due on March 18, 2019.

NMA participated in the public hearing in support of the proposal and submitted written comments to the agency. NMA supported the agency's reconsideration, including the agency's determination that BSER is not partial CCS. NMA, however, urged the agency to reconsider the level of the standard to ensure it can be met under actual operating conditions. NMA recommended that the agency reexamine its "normalizing" methodology, which does not appropriately account for unavoidable natural variability in carbon dioxide (CO_2) emission rates and the inevitable degradation in performance of new units over time. In addition, NMA strongly urged EPA to adopt a separate subcategory for lignite-fired EGUs. NMA also recommended that EPA establish separate standards for low duty cycle units and low load operation, regardless of coal type.

On Jan. 13, 2021, EPA published a rule finalizing a significant contribution finding (SCF) for purposes of regulating GHG emissions from EGUs under CAA section 111(b). 85 Fed. Reg. 2542. This action was a surprise given that the SCF issue was merely addressed in a footnote of the 2018 proposed rule. EPA's final rule took no action on the existing CAA section 111(b) standard and CCS requirement and solely articulated a SCF for EGUs. In doing so, EPA also established a framework for determining whether source categories significantly contribute to climate change due to their GHG emissions. Specifically, EPA finalized a pollutant-specific SCF for GHG emissions using an emissions threshold framework. EPA concluded that a "significant contribution" occurs when a source category generates greater than 3 percent of U.S. GHG emissions. In applying the new SCF methodology to EGUs, the agency found that GHG emissions from EGUs contribute significantly to dangerous air pollution. The SCF rule had an effective date of March 15, 2021.

***California v. EPA*, No. 21-1035 (D.C. Cir.) (challenge to SCF rule)**: On Jan. 19, 2021, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin, the District of Columbia, Broward County, and the Cities of Boulder, Chicago, Los Angeles, New York, and South Miami filed a

petition of review challenging EPA's SCF rule. On the same day, the American Public Health Association, Appalachian Mountain Club, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club also filed a petition for review. *American Public Health Association v. EPA*, No. 21-1036. On Feb 21, 2021, the American Lung Association filed their own petition for review challenging EPA's SCF rule. *American Lung Association v. EPA*, No. 21-1063 (D.C. Cir.) (challenge to SCF rule). These cases were consolidated.

On Mar. 17, 2021, EPA filed a motion asking the D.C. Circuit to voluntarily remand and vacate the SCF rule because *"[the agency]* failed to provide any public notice or opportunity for comment on the central elements of the [SCF] Rule, rendering it unlawful." EPA asserted that a procedural defect occurred because the "criteria promulgated in the [r]ule were never proposed or otherwise subject to public notice and comment in any respect," and the relief requested was appropriate because the agency "does not presently intend to cure the defect through additional rulemaking." None of the parties in the litigation objected to the relief EPA requested from the court. If EPA decides that a pollutant-specific contribution finding is warranted, it will not proceed with a re-proposal of the SCF rule. According to EPA, "[g]iven the depth and breadth of the review to be conducted, and the substantial possibility that the review may change the [a]gency's approach to the questions presented in the [SCF rule], EPA [did] not plan to simply re-propose the existing [SCF]." On Apr. 5, 2021, the D.C. Circuit granted EPA's motion.

Status:

Biden Administration Reconsideration:

The Biden transition team included the SCF rule on its initial list of environmental policy actions for review. Additionally, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions.

EPA has no plans to repropose the existing SCF that was vacated by the D.C. Circuit. EPA is evaluating how to address the 2018 proposal. EPA's Fall semi-annual regulatory agenda targets April 2023 (a 1-month delay) for a proposed rule and June 2024 for a final rule. According to news reports, EPA began select stakeholder outreach in August 2022. On Sept. 8, 2022, EPA opened a pre-proposal docket "to collect public input to guide the Agency's efforts to reduce greenhouse gases from new and existing fossil fuel-fired electric generating units." EPA's question related to the 111(b) program is directed at the draft white paper on GHG control technologies and mitigation options for new combustion turbines that primarily use natural gas.

EPA also announced a potential Small Business Review Panel (SBAR) on proposed amendments to the NSPS for greenhouse gas emissions from new, modified, and reconstructed stationary sources in the EGU sector. EPA states that: "The development of this proposed rulemaking could affect many regulated entities throughout the power sector that fire fossil fuels in stationary combustion turbines to generate and sell electricity." However, EPA's notice focuses solely on natural gas-fired stationary combustion turbines. This SBAR process did not address other aspects of the 2015 rule related to coal. The NMA raised this issue with the Small Business Administration.

Litigation:

***State of North Dakota v. Environmental Protection Agency*, No. 15-1381 (D.C. Cir.) (challenge to Obama 111(b) rule)**: On Jan. 9, 2023, EPA filed the latest status report requesting that the case remain in abeyance, stating that it "is presently reviewing all other aspects of the 2018 proposed rule, including the proposal to relax the stringency of the standards of performance for coal-fired electric generating units in the 2015 Standards of Performance Rule, in light of Executive Order 13990." EPA argues this affects the disposition of petitions challenging the underlying 2015 rule and asks the court to keep this case in abeyance.

Notice of Intent to Sue: On Sept. 29, 2022, the Environmental Defense Fund and Sierra Club sent a notice of intent to sue requesting that the EPA "review, and if appropriate revise, the greenhouse gas emission limits for stationary combustion turbines at 40 C.F.R. Part 60, Subpart TTTT as part of [a proceeding to also review and revise the NSPS for NOx emissions from stationary combustion turbines at 40 C.F.R. Part 60, Subpart KKKK for new natural gas-fired electric generating turbines]." Specifically, these organizations request: "EPA establish a comprehensive CO2eq emission limit for stationary combustion turbines at Subpart TTTT, expressed in pounds of CO2eq per megawatt-hour. The standard should be based on the best systems of emission reduction for all greenhouse gases emitted by the facility." EPA has 60 days to respond before the organizations could proceed with litigation.

MERCURY AND AIR TOXICS STANDARDS (MATS)

PRIORITY A – EPA

Background:

Obama Administration:

On Feb. 16, 2012 (effective April 16, 2012), EPA published its final National Emissions Standards for Hazardous Air Pollutants (NESHAPS) rule for major and area sources of HAPS (mercury, trace metals, and acid gases) under CAA Section 112 for new and existing coal- and oil-fired electric generating units. At the time, the potential impact was estimated to be between 30-70 GW of coal unit retirements by 2015/2016 compliance deadlines and these have proven to be accurate.

NMA and various other stakeholders challenged the final rule in the D.C. Circuit. *White Stallion Energy Center v. EPA*, No. 12-1272 (D.C. Cir.). On April 15, 2013, the D.C. Circuit denied all petitions for review. On July 14, 2014, NMA, the Utility Air Regulatory Group, and various states filed writ of certiorari petitions with the Supreme Court. The Supreme Court granted certiorari on the question of whether EPA reasonably ignored costs in determining that it was appropriate to regulate. On June 29, 2015, the court issued a 5-4 decision granting NMA's request to strike down the final rule and remanded the case back to the D.C. Circuit for further proceedings. The D.C. Circuit, consistent with the decision of the Supreme Court, requested parties to file briefs to govern further proceedings. Oral argument was held on Dec. 4, 2015, and on Dec. 15, 2015, the court granted EPA's request to remand the rule without vacating it.

Separately, on Dec. 1, 2015, EPA published a supplemental finding that it is appropriate and necessary to regulate hazardous air pollutants from coal- and oil-fired electric generating units. 80 Fed. Reg. 75,025. NMA filed comments on Jan. 15, 2016. NMA's comments took issue with

the substance and content of the supplemental finding; the limitation on the issues to be decided and the costs that can be considered; how EPA weighed costs and benefits; and whether the benefits of regulation of acid gases (the major cost driver) is justified by the projected benefits. NMA urged EPA to rescind and re-propose the finding based on a more complete analysis of costs and benefits, including reanalysis of the Regulatory Impact Analysis' examination of the rule's impact on coal-based generation, employment, and the impact on electricity rates in regions where coal is the predominant source for electric generation.

On April 25, 2016, EPA issued a final finding that it is appropriate and necessary to set standards for emissions of air toxics from coal- and oil-fired power plants. The finding was challenged in *Murray Energy v. EPA*, No. 16-1127, (D.C. Cir. Apr. 25, 2016). NMA participated in the case via our participation in the Utility Air Regulatory Group whose challenge has been consolidated with the Murray action. The Utility Air Regulatory Group disbanded this summer and has subsequently withdrawn from the case. Briefing began Nov. 18, 2016.

Trump Administration:

- Rulemaking:

On Dec. 28, 2018, EPA released the prepublication version of its proposed revised supplemental cost review and residual risk and technology review (RTR) results regarding the "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units" (commonly referred to as the Mercury and Air Toxics Standards (MATS)). On Feb. 7, 2019, EPA published the proposed reconsideration in the *Federal Register*. 84 Fed. Reg. 2670.

EPA proposed that it is not "appropriate and necessary" to regulate HAP emissions from power plants under Section 112 of the CAA because the costs of such regulation grossly outweigh the quantified HAP benefits. EPA did not propose to remove coal- and oil-fired power plants from the list of affected source categories for regulation under section 112. Accordingly, the 2012 MATS standards would stay in place for such plants. In the proposal, EPA explained that its decision to retain the 2012 MATS rule's requirements is dictated by the D.C. Circuit's precedent in *New Jersey v. EPA*, that a negative "appropriate and necessary" finding cannot by itself remove a source category from regulation. EPA did not propose to delist power plants from regulation, which would have required EPA to satisfy the requirements of Section 112(c), including a determination that the highest remaining risk is less than 1-in-1 million.

Finally, EPA proposed to complete the statutorily mandated residual risk and technology (RTR) for MATS, which is due 8 years after initial issuance of every new HAP standard. While EPA's RTR findings confirmed that risks are acceptable and provide an "ample margin of safety," and thus no revisions to MATS are necessary, the level of risk does not meet the Section 112(c)(9) standard for delisting.

On Feb. 28, 2019, EPA published a notice in the *Federal Register* announcing the **scheduling of a public hearing on March 18, 2019, and extending the comment deadline to Apr, 17, 2019. NMA participated in the public hearing and filed comments.** NMA's comments supported EPA's proposed reversal of the 2016 supplemental cost analysis and decision that it is not "appropriate and necessary" to regulate HAP emissions from EGUs because the cost of regulating EGU HAPS was not justified by the HAP-related benefits. NMA did not seek rescission of MATS. While NMA supported EPA's proposed reversal, we also requested that the agency correct the record and explicitly acknowledge in the preamble to the final rule the

devastating impact MATS has levied on the coal mining industry. EPA should have recognized the impacts to the coal mining industry when it originally evaluated the potential cost impacts of MATS. The final draft of the comments includes additional support for this request.

Regarding the RTR, NMA supported EPA's decision to conduct the residual risk review not withstanding its "appropriate and necessary" determination, as well as the agency's conclusion that there is no residual risk and public health is protected with an ample margin of safety and therefore no additional control is necessary. NMA also supported EPA's control technology review and conclusion that there have been no significant developments in practices, processes, or controls since promulgation of the final standards and thus no revisions to the standards are warranted.

Finally, NMA partnered with the Appalachian Region Independent Power Producers Association in supporting a separate subcategory and alternate acid gas HAP standard for existing EGUs that fire eastern bituminous coal refuse. Existing EGUs that convert coal refuse into alternative energy provide a significant environmental benefit to communities by remediating and reclaiming abandoned mine sites to reduce or eliminate sources of environmental contamination, including acid mine drainage. The existing MATS standard would threaten the viability of these units.

On April 15, 2020, EPA issued a final rule establishing a subcategory of certain existing EGUs firing eastern bituminous coal refuse for acid gas HAP emissions.

On April 16, 2020, EPA signed and released its final MATs rule. NMA issued a press release applauding the agency's efforts, recognizing that "the agency's action rights a longstanding abuse of regulatory power." EPA's press release is available here, and fact sheet is available here. EPA published the rule on May 22, 2020, with an effective date the same day. EPA did not remove coal- and oil-fired EGUs from the list of affected source categories for regulation under CAA section 112. Accordingly, MATS remained in effect.

EPA finalized its conclusion that it is not "appropriate and necessary" to regulate emissions of air toxics from coal- and oil-fired EGUs under CAA section 112 because the costs of such regulation outweigh the benefits of HAP emission reductions. Essentially, EPA found serious flaws in the 2016 Supplemental Cost Finding and the reliance on co-benefits from non-HAP emissions such as particulate matter (PM). In contrast, EPA's final Supplemental Cost Finding compares the cost of compliance with MATS with the benefits that are specifically attributable to reductions in emissions of HAP. EPA found that given the HAP-specific focus of CAA section 112, it was inappropriate to use monetized PM co-benefits as the primary determinative factor in this analysis. Additional details on the costs and benefits the agency assessed is available here.

According to EPA, this narrower approach aligns with the purpose of the CAA and the 2015 Supreme Court decision in *Massachusetts v. EPA*, where the court concurred with NMA's primary argument that EPA was unreasonable in not considering costs—including the cost of compliance—before deciding whether regulation of power plants is appropriate and necessary. According to EPA, "[a] proper consideration of costs demonstrates that the total projected cost of compliance with MATS ($7.4 to $9.6 billion annually) dwarfs the monetized HAP benefits of the rule ($4 to $6 million annually)." While EPA acknowledged that certain unquantified HAP benefits are associated with MATS, the agency concluded that these benefits do not support a finding that it is appropriate and necessary to regulate coal- and oil-fired EGUs under CAA section 112.

EPA finalized the results of the RTR of MATS in accordance with CAA section 112. Regarding the residual risk review, EPA determined that the residual risks due to emission of air toxics from coal and oil-fired EGUs are acceptable and that the current standards provide an ample margin of safety to protect the public health and prevent an adverse environmental effect. Regarding the technology review, EPA identified no cost-effective air toxics emissions controls to achieve further emissions reductions. Accordingly, EPA did not promulgate any revisions to MATS based on the results of these reviews.

- Litigation:

***Obama Rule: Murray Energy v. EPA*, No. 16-1127, (D.C. Cir. Apr. 25, 2016)** (challenge to Obama EPA's final action finding that it is appropriate and necessary to set standards for emissions of air toxics from coal- and oil-fired power plants). On Jan. 31, 2017, the state and industry petitioners filed a motion with the D.C. Circuit asking the court to temporarily halt the litigation to allow the new Administration to evaluate whether it can resolve any issues raised in the case. The D.C. Circuit on Feb. 9, 2017, denied the motion.

On March 10, 2017, the Court scheduled oral argument for May 18, 2017. On April 18, 2017, EPA filed a motion to continue oral argument to "give the appropriate officials adequate time to fully review the Supplemental Finding." EPA stated that "the new Administration [would] be closely scrutinizing the Supplemental Finding to determine whether it should be maintained, modified, or otherwise reconsidered." On April 27, 2017, the Court issued an order removing the case from the oral argument calendar, holding the matter in abeyance and directing EPA to file status reports every 90-days. In a joint motion to govern further proceedings filed Aug. 5, 2020, all parties agreed that the litigation should continue to be held in abeyance pending resolution of challenges to EPA's 2020 reconsideration of the supplemental finding and RTR, and the court granted that motion on Aug. 26, 2020, directing the parties to file another motion to govern the proceedings by Feb. 22, 2021.

Trump Rules: ***American Academy of Pediatrics v. Andrew Wheeler*, No. 20-1221.** The 2020 action has also been challenged in the D.C. Circuit by numerous parties—seven petitions for review all told, filed by various groups of states, environmentalist organizations, and industry representatives. NMA is not involved in this litigation.

The first to file, on May 22, 2020, was Westmoreland Mining Holdings LLC, seeking to argue that EPA must revoke MATS entirely, since it determined that regulation of electric utilities under Section 112 was inappropriate and unnecessary. *Westmoreland Mining Holdings LLC v. EPA*, No. 20-1160 (D.C. Cir. filed May 22, 2020). Although initially consolidated with the other challenges to the 2020 action, Westmoreland asked the court to sever its case and hold it in abeyance, since the argument Westmoreland plans to press will depend on the court first upholding EPA's action as reasonable against the other challenges to it, and the court granted that request.

The other parties challenging EPA's action will assert that EPA's analysis of whether it was appropriate and necessary to regulate utilities under Section 112, in particular its evaluation of the costs of regulation, was unreasonable. *American Academy of Pediatrics v. Andrew Wheeler*, No. 20-1221 (D.C. Cir. filed June 22, 2020) (consolidated with No. 20-1265 (*Massachusetts et al.)*, 20-1266 (*Advanced Emissions Solutions et al.*), 20-1270 (*Calpine Corporation et al.*), 20-1271 (*Puget Sound Energy et al.*).

They will also attack EPA's separate determination that the level of risk remaining with MATS in place is acceptable with an ample margin of safety. However, some of the petitioners have also filed a petition for reconsideration asking EPA to make MATS more stringent by imposing numeric emission standards in lieu of the MATS work practice standards for organic HAP (dioxins/furans) and periods of startup and shutdown. With that petition for reconsideration pending, the challengers to EPA's action have asked the court to sever that case and hold it in abeyance as well, which the court granted.

By granting the two requests for severance and abeyance, the court set up the litigation for (at least) two phases—one phase to adjudicate the legality of EPA's two determinations (reversal of the appropriate and necessary finding, and finding acceptable the risk remaining under MATS), and one (or more) phases to adjudicate both Westmoreland's claim that EPA must revoke MATS and claims by other petitioners advocating for a more stringent MATS rule. However, the Biden administration's reconsideration process could stall all litigation for the near term.

Status:

Biden Administration Reconsideration:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions. The Executive Order specifically targeted this rule for immediate review, directing that the review be completed by August 2021. As expected, the Biden transition team also included this rule on its initial list of environmental policy actions for review.

- *"Appropriate and Necessary" Finding*

On Jan. 31, 2022, EPA announced a proposed rule to "reaffirm the scientific, economic, and legal underpinnings of the 2012 Mercury and Air Toxics Standards (MATS) for power plants." EPA published the proposed rule on Feb. 9, 2022. 87 Fed. Reg. 7624. EPA's proposed rule does not change the current emissions standards. The proposal revoked the prior administration's May 2020 finding that it is not appropriate and necessary to regulate coal- and oil-fired EGUs under CAA section 112, and reaffirmed the agency's April 2016 finding that it remains appropriate and necessary to regulate HAP emissions from EGUs after considering cost. EPA concluded that the methodology applied in the May 2020 finding is "ill-suited to the appropriate and necessary determination because, among other reasons, it did not give adequate weight to the significant volume of HAP emissions from EGUs and the attendant risks remaining after imposition of the other requirements of the CAA, including many adverse health and environmental effects of EGU HAP emissions that cannot be quantified or monetized."

On Apr. 11, 2022, NMA filed comments asking EPA to more fairly recognize that the benefits cited are highly uncertain, the costs are real and substantial, and the risks from hazardous air pollutants (HAP) from coal-fired electric generating units (EGUs) are now lower than any threshold Congress or EPA has ever before deemed worthy of regulation. NMA also asked EPA to use its upcoming review of the 2020 RTR to further emphasize how low the risks of EGU HAP emissions are today and confirm that no more stringent regulation is necessary.

On Feb. 17, 2023, EPA announced the final rule reaffirming its "appropriate and necessary" finding for the 2012 MATS rule. According to EPA, "[r]eaffirming the science behind these clean

air standards advances the Biden-Harris Administration's whole-of-government commitment to environmental justice." EPA asserts that a reassessment of costs "concludes that the cost for the power sector to comply with the MATS was likely billions of dollars lower than originally estimated." EPA's fact sheet is available here. A pre-publication copy of the final rule is available here. NMA is currently evaluating this final rule. Publication in the Federal Register is expected soon.

- *Residual Risk & Technology Review*

EPA's "appropriate and necessary" proposed rule solicited information on the performance and cost of new or improved technologies that control HAP emissions, improved methods of operation, and risk-related information to further inform the agency's review of the MATS RTR. The agency is considering wither more stringent HAP standards are feasible and warranted. EPA sent the draft proposed RTR rule to OMB for interagency review on Feb. 6, 2023. According to the Fall semi-annual regulatory agenda, a proposed rule is expected in March 2023 and a final rule in March 2024.

Litigation:

***Murray Energy v. EPA*, No. 16-1127, (D.C. Cir. Apr. 25, 2016) (challenge to EPA's final action finding that it is appropriate and necessary to set standards for emissions of air toxics from coal- and oil-fired power plants)**: On Aug. 26, 2020, the court granted the joint motion to continue holding the litigation in abeyance pending resolution of challenges to EPA's 2020 actions and directed the parties to file motions to govern further proceedings on or before Feb. 22, 2021. In that filing, the parties requested that the court continue to hold the case in abeyance while the agency conducts its review of the 2020 rule. On Feb. 25, 2021, the D.C. Circuit granted the motion, directing EPA to file an abeyance status report by June 25, 2021, and at 120-day intervals thereafter. On Feb. 9, 2022, EPA filed the latest status report acknowledging that it had submitted the rule to OMB. EPA will report again in 120 days.

***American Academy of Pediatrics v. Andrew Wheeler*, No. 20-1221 (D.C. Cir. filed June 22, 2020) (challenge to EPA's final action that it is not appropriate and necessary to regulate electric utilities under Section 112)**: Statements of issues have been filed, but a briefing schedule has not been set. On Dec. 14, 2020, the parties filed proposed formats for the briefing of these cases. On Feb. 12, 2021, EPA asked to hold this case in abeyance until 90 days after the conclusion of review and any resulting rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period. The motion cited Executive Order 13990 and the Biden transition team's list targeting certain rules for immediate review. EPA also offered to file status reports at 120-day intervals. On Feb. 16, 2021, the D.C. Circuit granted the motion, directing EPA to file an abeyance status report by June 16, 2021, and at 120-day intervals thereafter. On Oct. 28, 2022, EPA filed the latest status report stating that the comment period had closed on the proposed rule and the agency will consider those comments and take further action as appropriate. EPA will report again in 120 days.

***Westmoreland Mining Holdings LLC v. EPA*, No. 20-1160 (D.C. Cir. filed May 22, 2020) and *Air Alliance Houston v. EPA*, No. 20-1268 (D.C. Cir. filed July 21, 2020):** These two cases have been severed and will be held in abeyance pending resolution of *American Academy of Pediatrics v. Andrew Wheeler*, No. 20-1221.

NAAQS: PM2.5

PRIORITY A – EPA

Background:

In 2013, EPA issued a final rule revising the level of the annual standard for $PM_{2.5}$ emissions from 15.0 µg/m^3 to 12.0 µg/m^3. 78 Fed. Reg. 3086. An industry coalition led by the National Association of Manufacturers challenged EPA's final PM NAAQS on the grounds that EPA's refusal to even take comment on the option of leaving the $PM_{2.5}$ standard unchanged was unlawful because EPA "prejudged both the necessity of revising the primary annual $PM_{2.5}$ NAAQS and the range of possible outcomes." *National Association of Manufacturers v. EPA*, No. 13-1069 (D.C. Cir.). The group challenged the roadside monitoring requirements in EPA's final rule. Environmental groups intervened on EPA's behalf, and argued that "the scientific evidence overwhelmingly supported an annual standard at least as protective as the one EPA adopted, and indeed was sufficient to justify even stronger standards." NMA did not challenge the rule since the coarse PM standard was not changed by EPA and participated in the litigation via the Utility Air Regulatory Group. The D.C. Circuit denied the petitions for review.

5-Year NAAQS Review:

On Dec. 3, 2014, EPA announced that the agency had initiated the next review of the PM NAAQS by issuing a call for information on recent research relating to the health and welfare effects of PM. In addition, EPA conducted workshops in February 2015 to discuss policy-relevant issues and questions to frame the review. In May 2016, EPA conducted a teleconference of the Clean Air Science Advisory Committee (CASAC) to review the Integrated Review Plan (IRP). The IRP was finalized in December 2016.

- **Integrated Science Assessment**: On Oct. 23, 2018, EPA released a draft Integrated Science Assessment for public comment and CASAC review. 83 Fed. Reg. 53,471. The draft Integrated Science Assessment indicated that more recent studies "provide evidence indicating a linear relationship [between short-term $PM_{2.5}$ exposure and mortality] at concentrations as low as 5 µg/m^3" and for an association between long-term $PM_{2.5}$ exposure "in some studies in the range of 5-8 µg/m^3." These findings preliminary findings challenged the adequacy of the 24-hour and annual primary $PM_{2.5}$ NAAQS. *Note*: The draft Integrated Science Assessment only considers non-ecological PM effects. Ecological effects of PM are being considered in a separate science review in conjunction with consideration of welfare effects of sulfur oxides and nitrogen oxides and likely consideration of a possible joint secondary NAAQS for NO_x, So_x, and $PM_{2.5}$.

  Comments on this draft were due Dec. 11, 2018. NMA did not file comments and instead supported the Utility Air Regulatory Group's comments. The Utility Air Regulatory Group looked at air quality monitoring data collected between 2015 and 2017 and found that reducing the annual $PM_{2.5}$ NAAQS from its present level of 12 µg/m^3 to 10 µg/m^3 could triple the number of Core-based Statistical Areas (CBSAs) above the standard and, if the standard were lowered to 8 µg/m^3, the number of CBSAs exceeding the standard could increase by more than an order of magnitude. The Utility Air Regulatory Group filed comments on the Integrated Science Assessment critiquing the agency's causal determinations as not accurately reflecting the status of the evidentiary record. On Jan. 27, 2020, EPA announced the availability of the final Integrated Science Assessment.

- **Policy Assessment**: On Sept. 11, 2019, EPA published a notice announcing the availability of the agency's draft Policy Assessment for review of the PM NAAQS. **Comments on the draft Policy Assessment were due on Nov. 12, 2019.** EPA staff recommended tightening the primary standards for $PM_{2.5}$ to increase public health protection against fine particle exposures. EPA staff asserted that "the available scientific evidence, air quality analyses, and the risk assessment . . . can reasonably be viewed as calling into question the adequacy of the public health protection afforded by the combination of the current annual and 24-hour primary $PM_{2.5}$ standards." EPA relied extensively on "the broad body of epidemiologic evidence reporting generally positive and statistically significant health effect associations." However, EPA staff also discussed certain uncertainties and limitations in the evidence and analyses, recognizing that the Administrator must weigh these in selecting a particular approach and reaching a final decision on the standards.

  Specifically, EPA staff recommended: (1) **tightening the annual standard down to a level as low as 8 to 10 µg/m^3 depending on the weight placed on specific aspects of the evidence, associated uncertainties, and public health improvements**; and (2) retaining the current 24-hour standard at 35 µg/m^3. Note that EPA staff also provided a heavily caveated alternative approach of lowering the 24-hour primary standard to 30 µg/m^3 to increase protection across the United States against the broader $PM_{2.5}$ air quality distribution. EPA recommended no change to the secondary (welfare-based) standard.

  On Oct. 22, 2019, a public teleconference was held to receive public comments for the CASAC to consider in their peer review of the draft Policy Assessment at their public meeting on Oct. 24-25, 2019. CASAC's final letter may be accessed here. CASAC's cover letter states: "The CASAC members did not come to consensus on whether the new scientific evidence and data reasonably call into question the public health protection afforded by the current 2012 $PM_{2.5}$ annual standard. The CASAC recommends that the final PM [Policy Assessment] provide quantitative uncertainty and sensitivity analyses to provide a clearer technical and scientific basis for data interpretation and policy making." One member of CASAC concluded that "[g]iven the increasing strength of evidence at lower concentrations, and the need to protect the public health with an adequate margin of safety, reducing the level of the annual standard to the lower part of this range, 8 or 9 µg/m^3, is warranted."

  Comments on the draft Policy Assessment were due on Nov. 12, 2019. NMA filed two comment letters. NMA's comment letter addressed EPA's inclusion of crustal material in the definition of $PM_{2.5}$, highlighting the serious concern that any reduction in the current $PM_{2.5}$ standard would inappropriately target coarse crustal particulate matter and result in misplaced control measures without public health benefits. NMA also joined the NAAQS Regulatory Review and Rulemaking coalition comments on the $PM_{2.5}$ NAAQS. The coalition comments summarize several expert critiques of the underlying draft Integrated Science Assessment and the failure to address major uncertainties. The coalition comments also recommended that EPA retain the $PM_{2.5}$ primary NAAQS.

  On Jan. 30, 2020, EPA announced the availability of the final Policy Assessment. In the Policy Assessment, EPA staff calls for one of two options: a limit set between 8 µg/m^3 and 10 µg/m^3, or a standard set between 10 µg/m^3 and 12 µg/m^3.

- **Rulemaking**: On April 14, 2020, EPA released the final pre-publication copy of the proposed rule to retain the NAAQS for particulate matter. On April 30, 2020, EPA published the proposed rule in the *Federal Register*, which started a 60-day comment period. 85 Fed. Reg. 24,094. Despite significant pressure to lower the level of the annual primary (health-based) standard for $PM_{2.5}$ emissions from 12.0 $\mu g/m^3$ to as low as 8 $\mu g/m^3$, EPA proposed to retain the standard at the current level. EPA asserted that "there are important uncertainties in the evidence for adverse health effects below the current standards and in the potential public health impacts of reducing ambient $PM_{2.5}$ concentrations below those standards." Comments were due on June 29, 2020.

  NMA testified at the public hearing on May 21, 2020. NMA supported EPA's proposal to retain the annual primary $PM_{2.5}$ NAAQS, stating it reflects sound policy judgment in light of the underlying scientific record. NMA also supported written coalition comments that focused predominantly on providing the legal and scientific support for retaining the $PM_{2.5}$ annual primary (health-based) and secondary (welfare-based) standards. These comments and scientific support are available here.

  On Dec. 7, 2020, EPA released a pre-publication copy of the agency's final rule retaining the PM NAAQS. According to EPA's press release, the agency's final decision "comes after careful review and consideration of the most recent available scientific evidence and technical information, consultation with the agency's independent scientific advisors, and consideration of more than 60,000 public comments on the proposal." EPA's fact sheet may be accessed here. On Dec. 18, 2020, the final rule was published in the *Federal Register* with an immediate effective date. 85 Fed. Reg. 82,684.

- **Litigation:** On Jan. 13, 2020, attorneys general from 17 primarily Democratic-led states seeking tougher PM NAAQS filed a petition for review in the D.C. Circuit. California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and Wisconsin signed on to the suit. *See California v. EPA*, No. 21-1014. On Jan. 19, 2021, 11 non-governmental organizations also filed a petition review. Groups petitioning the court for review include the American Lung Association, Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Conservation Law Foundation, Environment America, Environmental Defense Fund, National Parks Conservation Association, Natural Resources Council of Maine, Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists. *American Lung Association v. EPA*, No. 21-1027 (D.C. Cir.).

  On Feb. 9, 2021, the Center for Biological Diversity (CBD) also filed a petition for review, which was consolidated with the above cases. *Center for Biological Diversity v. EPA*, No. 21-1054 (D.C. Cir.). CBD also filed an administrative petition for reconsideration with EPA, claiming that the agency should have engaged in an Endangered Species Act Section 7 consultation with regard to its review of PM NAAQS. CBD made the same argument during the rulemaking process. EPA rejected this argument. These cases were consolidated. However, on Feb. 23, 2021, CBD filed a motion seeking to sever its case from the consolidated cases, arguing that "there is little, if any, commonality between the issues that the parties will focus on" and "delay would likely effectively deny [CBD] meaningful relief if they are correct that EPA must engage in Endangered Species Act Section 7 consultation." On Mar. 5, 2021, EPA opposed this motion. On May 14, 2021, the court denied CBD's request to sever the case from the consolidated litigation.

On Feb. 16, 2021, EPA filed a motion to hold the case in abeyance for 90 days to determine what further administrative action may be pursued in the reconsideration process. On Feb. 17, 2021, the D.C. Circuit granted this motion, directing parties to file motions to govern future proceedings by May 18, 2021. EPA filed that motion, requesting to hold the case in abeyance for an additional 90 days. On June 1, 2021, the court ordered that the case continue to be held in abeyance indefinitely with motions to govern further proceedings filed by Aug. 16, 2021. On Aug. 16, 2021, EPA requested that the court hold the case in **abeyance until Mar. 1, 2023**, with a status report due every 90 days. CBD unsuccessfully tried to establish a briefing schedule. On Oct. 1, 2021, the court issued a per curium order to hold these consolidated cases in abeyance. On Dec. 28, 2021, EPA filed its status report confirming the timeline for the rulemaking.

On Feb. 18, 2021, NMA joined the American Forest and Paper Association, American Petroleum Institute, American Wood Council, and the U.S. Chamber of Commerce in filing a motion to intervene in support of EPA's final rule. On Sept. 16, 2021, the court granted our motion to intervene.

Status:

Administrative Petitions for Reconsideration:

On Feb. 16, 2021, the states and NGOs filed separate administrative petitions for reconsideration specific to the primary and secondary $PM_{2.5}$ standard. The states outlined the following: (1) EPA should reconsider the final rule in light of its failure to provide the requisite protection of public health and welfare; and (2) EPA must reconsider the final rule in light of new studies demonstrating significant long-term health risks from PM exposure (e.g., a study refuting impact of unmeasured confounders, a study on deadly impacts of $PM_{2.5}$ exposure, a study linking PM exposure to significant health impacts from respiratory viruses like COVID, a study showing increases in serious neurodegenerative diseases).

The NGOs argued that "the 2020 review did not set standards at the levels the statute's directive demands, despite a coherent body of evidence which mandates strengthening revisions to the primary annual and 24-hour $PM_{2.5}$ standards, and the secondary welfare standard, to provide the requisite protection of health and welfare." The NGOs also included several studies that they claim were not adequately considered. Finally, the NGOs argued: "The final PM NAAQS decision is also inconsistent with a number of recent executive actions on protecting public health and the environment, racial equity, and scientific integrity that were issued after the public comment period for this action."

Biden Administration Reconsideration:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions. The Executive Order also revoked the April 2018 presidential memo that laid the groundwork for EPA's accelerated timeline for completing its review of the NAAQS. As expected, the Biden transition team included this rule on its initial list of environmental policy actions for review.

On June 10, 2021, EPA announced *plans to reconsider the PM NAAQS.* EPA's press release emphasized that long- and short-term exposures to $PM_{2.5}$ emissions can harm people's health,

particularly in vulnerable populations, as well as recent studies examining relationships between COVID and PM and potential health implications. Since the announcement, EPA has taken the following actions:

- On Sept. 30, 2021, EPA announced the availability of the draft supplement to the 2019 Integrated Science Assessment (ISA) for PM. This document, spanning over 300 pages, provides a targeted evaluation of the scientific literature on potential health and welfare effects associated with PM published since the literature cutoff date (approximately January 2018) of the 2019 PM ISA. The draft supplemental ISA "finds that recent studies further support, and in some instances extend, the evidence that formed the basis of the causality determinations presented within the 2019 PM ISA that characterizes relationships between PM exposure and health (i.e., cardiovascular effects and mortality) and welfare effects (i.e., visibility impairment)." Specifically, the document finds that many of the recent epidemiologic studies evaluated "report positive associations at lower $PM_{2.5}$ concentrations (i.e., annual $PM_{2.5}$ concentrations ranging from 5.9 to 16.5 $\mu g/m^3$; mean 24-hour avg $PM_{2.5}$ concentrations ranging from 7.1 to 15.4 $\mu g/m^3$)." Comments on the draft supplemental ISA were due on Nov. 29, 2021. NMA joined the NAAQS Regulatory Review & Rulemaking (NR3) coalition in filing comments.

- On Oct. 8, 2021, EPA published a notice announcing the availability of the agency's external review draft of the Policy Assessment for the reconsideration of the National Ambient Air Quality Standards (NAAQS) for Particulate Matter (PM). Not surprisingly, EPA staff recommends reducing the primary annual $PM_{2.5}$ NAAQS to as low as 8 $\mu g/m^3$, a position taken by environmental and public health organizations during the last NAAQS review. EPA staff also opens the door, although with several caveats, to reducing the primary 24-hour $PM_{2.5}$ NAAQS to 30 $\mu g/m^3$. Finally, EPA staff recommends retaining the primary PM_{10} NAAQS and secondary PM NAAQS. **Comments on the draft Policy Assessment wer due to EPA on Dec. 14, 2021.** NMA joined the NR3 coalition in filing comments.

- The CASAC PM Panel met **Oct. 14, 2021**, to receive a briefing from EPA on updates to the Policy Assessment and the draft ISA supplement, after which it began its peer review over the course of five meetings starting on **Nov. 17, 2021.** EPA Administrator Regan dismissed the entire Trump-era CASAC and opened a public comment process seeking new nominations for membership. On June 18, 2021, EPA announced the new CASAC members and solicited nominations of experts for the CASAC Particulate Matter Panel. On Aug. 30, 2021, EPA named 22 appointees to the reconstituted panel.

- On Mar. 18, 2022, CASAC released its final review of EPA's external review draft of the Policy Assessment and its final review of the draft supplement to the 2019 Integrated Science Assessment (ISA). **On the $PM_{2.5}$ standard,** CASAC's letter on the draft Policy Assessment continues to recommend, unanimously, revision of the 12 $\mu g/m^3$ primary annual standard. As before, an unspecified majority of CASAC members recommend an annual primary $PM_{2.5}$ standard in the range of 8-10 $\mu g/m^3$ and a minority recommends a standard in the range of 10-11 $\mu g/m^3$. An unspecified majority of CASAC members recommends lowering the 35 $\mu g/m^3$ 24-hour primary $PM_{2.5}$ standard to within the range of 25-30 $\mu g/m^3$, while a minority of CASAC considers the current standard adequately protective of public health. Finally, CASAC says that "greater justification" is needed to support retention of the current 15 $\mu g/m^3$ annual $PM_{2.5}$ secondary standard.

Proposed Reconsideration Rule:

EPA sent the draft proposed rule to OMB for interagency review on Aug. 16, 2022. On Sept. 28, 2022, NMA joined the U.S. Chamber of Commerce and the American Road & Transportation Builders Association to raise implementation issues. This meeting was one of four meetings organized by the NR3 coalition and its members to address the underlying science and implementation and cost concerns of a lower standard. On Jan. 27, 2023, EPA published its Reconsideration Rule, concluding that the existing standards may not provide adequate protection based on available scientific and technical information. EPA's overview presentation is available here. EPA's press announcement is available here. EPA held virtual public hearings on Feb. 21 and Feb. 22, 2023. **Comments are due on Mar. 28, 2023**. NMA supported the NR3 coalition's request for an extension of the comment period. EPA rejected that request.

EPA's proposed rule includes the following:

- A proposal to revise the level of the primary annual $PM_{2.5}$ standard from 12 micrograms per cubic meter ($\mu g/m^3$) to a level within the range of 9 to 10 $\mu g/m^3$, while soliciting comment on standards as low as 8 $\mu g/m^3$ and as high as 11 $\mu g/m^3$. EPA does not explicitly request comment on retaining the existing standard.
- While EPA is proposing to retain the primary 24-hour $PM_{2.5}$ standard at the level of 35 $\mu g/m^3$, it is requesting comment on revising the level as low as 25 $\mu g/m^3$.

- A proposal to retain the secondary standards for both $PM_{2.5}$ and PM_{10}, while requesting comment on revising the level of the secondary 24-hour $PM_{2.5}$ standard as low as 25 $\mu g/m^3$.

- Revisions to the Air Quality Index and monitoring requirements for the PM NAAQS, with a focus on communities with environmental justice concerns. For example, EPA is proposing to modify the $PM_{2.5}$ monitoring network design criteria to include an environmental justice factor.

NMA will continue to work with the NR3 coalition as it prepares to comment on the proposed rule.

According to the Fall semi-annual regulatory agenda, a final rule is targeted for Aug. 2023.

Litigation:

***California v. EPA*, No. 21-1014 (D.C. Cir.).** On Dec. 16, 2022, EPA filed the latest status report stating that once the rule has cleared OMB review it will sign the rule and make it available on EPA's website in advance of publication. The next status report is due in 90 days.

NAAQS: PM10

PRIORITY A– EPA

Background:

Protecting the current 24-hour PM_{10} NAAQS of 150 $\mu g/m^3$ is a priority for western coal and metal surface mines. A more stringent standard would cause difficultly in the context of NSR

permitting modeling, NEPA modeling reviews, and permit required monitoring. During the 2006 review, EPA considered lowering the standard as far as 50 µg/m^3, but ultimately retained the standard due to lack of scientific evidence supporting a standard in that range.

The Last 5-Year NAAQS Review

On Dec. 3, 2014, EPA announced that the agency had initiated the next review of the PM NAAQS by issuing a call for information on recent research relating to the health and welfare effects of PM. In addition, EPA conducted workshops in February 2015 to discuss policy-relevant issues and questions to frame the review. In May 2016, EPA conducted a teleconference of the Clean Air Science Advisory Committee (CASAC) to review the Integrated Review Plan (IRP). The IRP was finalized in December 2016.

- **Integrated Science Assessment**: On Oct. 23, 2018, EPA released a draft Integrated Science Assessment for public comment and CASAC review. 83 Fed. Reg. 53,471.*Note*: The draft Integrated Science Assessment only considers non-ecological PM effects. Ecological effects of PM are being considered in a separate science review in conjunction with consideration of welfare effects of sulfur oxides and nitrogen oxides and likely consideration of a possible joint secondary NAAQS for NO_x, So_x, and $PM_{2.5}$. On Jan. 27, 2020, EPA announced the availability of the final Integrated Science Assessment.

- **Policy Assessment**: On Sept. 11, 2019, EPA published a notice announcing the availability of the agency's draft Policy Assessment for review of the PM NAAQS. EPA staff took a more limited approach to evaluating the primary PM_{10} standard due to weaker causality determinations. While EPA staff claimed that "the evidence base for several $PM_{10-2.5}$-related health effects has expanded, broadening [the agency's] understanding of the range of health effects linked to $PM_{10-2.5}$ exposures," they recognized that "key limitations in the evidence that were identified in the 2009 [Integrated Science Assessment] persist in studies that have become available since the last review."

  These limitations include: (1) uncertainty associated with $PM_{10-2.5}$ exposure estimates in epidemiologic studies; (2) limited information on confounding by copollutants; and (3) limited support for the biological plausibility of serious effects following $PM_{10-2.5}$ exposures. Based on this information, EPA staff preliminarily concluded "that the available evidence does not call into question the scientific judgements that informed the decision in the last review to retain the current primary PM_{10} standard." Consequently, EPA staff did not recommend that the Administrator tighten the primary PM_{10} standard. EPA staff evaluated no alternative standards. EPA also did not recommend that the Administrator tighten the secondary (welfare-based) standard. On Oct. 22, 2019, a public teleconference was held to receive public comments for the CASAC to consider in their peer review of the draft Policy Assessment at their public meeting on Oct. 24-25, 2019. CASAC's final letter may be accessed here.

  Comments on the draft Policy Assessment were due on Nov. 12, 2019. NMA filed two comment letters. NMA's comment letter supported EPA's conclusion in the draft Policy Assessment that the scientific evidence as a whole does not support a causal connection between health effects and coarse particulate matter—particularly the crustal

particulate matter that predominates in rural areas of the West whose economies rely on mining. NMA also joined industry coalition comments on the $PM_{2.5}$ NAAQS (see below).

On Jan. 30, 2020, EPA announced the availability of the final Policy Assessment. In the Policy Assessment, EPA staff concluded: "While the available evidence supports maintaining a PM_{10} standard to provide some measure of protection against $PM_{10-2.5}$ exposures, uncertainties in the evidence lead to questions regarding the potential public health implications of revising the existing PM_{10} standard. Thus, consistent with the approach taken in the last review and with the advice from the CASAC in the review, we reach the conclusions that the available evidence does not call into question the adequacy of the public health protection afforded by the primary PM_{10} standard and that evidence supports consideration of retaining the current standard in this review."

- **Rulemaking**: On April 14, 2020, EPA released the final pre-publication copy of the proposed rule to retain the NAAQS for particulate matter. On April 30, 2020, EPA published the proposed rule in the *Federal Register*, which started a 60-day comment period. 85 Fed. Reg. 24,094. EPA proposed to retain the 24-hour primary (health-based) and secondary (welfare-based) standards for PM_{10} of 150 $\mu g/m^3$. Comments were due on June 29, 2020.

  NMA testified at the public hearing on May 21, 2020. As noted below, NMA supported EPA's proposal to retain the annual primary $PM_{2.5}$ NAAQS, stating it reflects sound policy judgment in light of the underlying scientific record. NMA also agreed with EPA's conclusion that the collective evidence does not support a finding of a causal or a likely causal relationship between PM_{10} and any category of health effects. NMA signaled in the public testimony that it would provide additional comments on the limited health effects evidence related to coarse PM and how EPA should address this fraction of the PM NAAQS differently moving forward. To date, EPA has not appropriately addressed coarse PM in setting the level and form of the 24-hour primary standard given the attenuated or non-existent causal links to health effects. EPA also continues to improperly include crustal material in the definition of $PM_{2.5}$.

  On June 29, 2020, NMA filed written comments that: (1) discussed the substantial scientific uncertainties that continue to plague coarse PM health effects research; (2) provided support for a change in the form of the PM_{10} standard for continuous monitoring; and (3) emphasized the importance of accounting for the impact of crustal PM on the $PM_{2.5}$ standard. These comments may be accessed here.

  On Dec. 7, 2020, EPA released a pre-publication copy of the agency's final rule retaining the PM NAAQS. EPA's fact sheet may be accessed here. On Dec. 18, 2020, the final rule was published in the *Federal Register* with an immediate effective date. 85 Fed. Reg. 82,684.

  The final rule did not agree with NMA's comments on the change in the form of the PM_{10} standard for continuous monitoring, rejecting the approach on grounds that the Agency would not support the establishment of two different forms of the same standard based on monitoring methodology. EPA also noted that it had not previously taken such an approach and a change in the form of the standard was not included in the proposed rule. Finally, EPA raised concerns that about protection of human health in light of the potential for more exceedances, a point that was developed in NMA's comments but disregarded by EPA.

On impacts of crustal material, EPA asserted that there are "positive associations with $PM_{2.5}$ mass as well as other components, like aluminum and silicon" commonly found in crustal material, but EPA acknowledged that there are only a handful of studies reporting "positive and statistically significant associations between coarse particles of crustal, non-urban origin and mortality or morbidity." Additionally, EPA acknowledged the shifts in the agency's position on causal relationships between health effects and PM_{10} but emphasized that "there are still extensive uncertainties in the evidence base" supporting these causal connections, and as a result no change was made to the standard.

- **Litigation**: On Jan. 13, 2020, attorneys general from 17 primarily Democratic-led states seeking tougher PM NAAQS filed a petition for review in the D.C. Circuit. California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and Wisconsin signed on to the suit. *See California v. EPA*, No. 21-1014 (D.C. Cir.). On Jan. 19, 2021, 11 non-governmental organizations also filed a petition review. Groups petitioning the court for review include the American Lung Association, Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Conservation Law Foundation, Environment America, Environmental Defense Fund, National Parks Conservation Association, Natural Resources Council of Maine, Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists. *American Lung Association v. EPA*, No. 21-1027 (D.C. Cir.).

  On Feb. 9, 2021, the Center for Biological Diversity (CBD) also filed a petition for review, which was consolidated with the above cases. *Center for Biological Diversity v. EPA*, No. 21-1054 (D.C. Cir.). CBD also filed an administrative petition for reconsideration with EPA, claiming that the agency should have engaged in an Endangered Species Act Section 7 consultation with regard to its review of PM NAAQS. CBD made the same argument during the rulemaking process. These cases were consolidated. However, on Feb. 23, 2021, CBD filed a motion seeking to sever its case from the consolidated cases, arguing that "there is little, if any, commonality between the issues that the parties will focus on" and "delay would likely effectively deny [CBD] meaningful relief if they are correct that EPA must engage in Endangered Species Act Section 7 consultation." On Mar. 5, 2021, EPA opposed this motion. On May 14, 2021, the court denied CBD's request to sever the case from the consolidated litigation.

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filing a motion to intervene in support of EPA's final rule. On Sept. 16, 2021, the court granted our motion to intervene.

Status:

Biden Administration Reconsideration:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions. The Executive Order also revoked the April 2018 presidential memo that laid the groundwork for EPA's accelerated timeline for completing its review of the NAAQS. As expected, the Biden transition team included this rule on its initial list of environmental policy actions for review.

On June 10, 2021, EPA announced ***plans to reconsider the PM NAAQS.*** EPA did not address PM_{10} in the press release, focusing solely on health effects of $PM_{2.5}$. *See* $PM_{2.5}$ entry above for a complete summary of actions EPA has taken in this reconsideration process.

On Mar. 18, 2022, CASAC released its final released its final review of EPA's external review draft of the Policy Assessment and its final review of the draft supplement to the 2019 Integrated Science Assessment. **On the PM_{10} standard**, CASAC's letter on the draft Policy Assessment supports the retention of the current primary PM_{10} standard. Notably, however, CASAC recommended that EPA "discuss in more detail whether PM_{10} is still the appropriate indicator since $PM_{10-2.5}$ was the focus of the chapter, and whether the increasing level of causality might warrant a re-evaluation of the NAAQS." Additionally, CASAC noted: "The 24-hour PM_{10} standard has not been changed since its 2006 promulgation, despite the recent findings of health effects at or below the standard." Among other things, CASAC also detailed recommendations on future research needs.

EPA sent the draft proposed rule to OMB for interagency review on Aug. 16, 2022. On Sept. 28, 2022, NMA joined the U.S. Chamber of Commerce and the American Road & Transportation Builders Association to raise implementation issues. This meeting was one of four meetings organized by the NR3 coalition and its members to address the underlying science and implementation and cost concerns of a lower standard. On Jan. 27, 2023, EPA published its Reconsideration Rule. EPA is proposing to retain the primary 24-hour PM_{10} standard at the level of 150 $\mu g/m^3$. However, the proposal "recognizes that important limitations in the evidence remain," and "these limitations lead to considerable uncertainty regarding the potential public health implications of revising the level of the current primary 24-hour PM_{10} standard." EPA requests comment on this proposed decision. NMA is evaluating whether to resurrect comments on the PM_{10} standard filed during the last NAAQS review. **Comments are due on Mar. 28, 2023.**

According to the Fall semi-annual regulatory agenda, a final rule is targeted for Aug. 2023.

Litigation:

***California v. EPA*, No. 21-1014 (D.C. Cir.).** On Dec. 16, 2022, EPA filed the latest status report stating that once the rule has cleared OMB review it will sign the rule and make it available on EPA's website in advance of publication. The next status report is due in 90 days.

OZONE NAAQS

PRIORITY B – EPA

Background:

2008 Ozone Standard:

Rule:

On Mar. 27, 2008, EPA under the Bush Administration issued a final rule revising the NAAQS standard for ozone. 73 Fed. Reg. 16,436. EPA revised the 8-hour primary ozone standard, previously 80 ppb (set in 1997), to 75 ppb. EPA also revised the secondary 8-hour standard to 75 ppb. Several lawsuits were filed. In Jan. 2010, the Obama Administration announced that it would reconsider and revise the 2008 standards. The D.C. Circuit stayed the ozone NAAQS lawsuit pending EPA's reconsideration of the 2008 NAAQS. *Mississippi v. EPA*, No. 08-1200 (D.C. Cir.). EPA published a proposed reconsideration on Jan. 19, 2010, proposing to lower the current eight-hour primary standard from 75 ppb to a new level in the range of 60-70 ppb. 75 Fed. Reg. 2938. On Sept. 2, 2011, President Obama announced that EPA would withdraw the rulemaking package submitted to OMB due to economic and implementation concerns. At the time, EPA indicated it would proceed with implementing the 2008 standards.

Litigation:

The D.C. Circuit heard oral arguments on Nov. 19, 2012, in *Mississippi v. EPA*, which consolidated various challenges to EPA's decision, including industry and several states, challenging EPA's decision to lower the primary and secondary standards, while environmental groups and several states challenged EPA's decision to set standards outside of CASAC's recommended range. The D.C. Circuit issued a unanimous decision on July 23, 2013, denying all challenges to the 2008 primary ozone standard while remanding the secondary standard to EPA for further action.

EPA missed its 5-year deadline to revise the ozone NAAQS in March of 2013 and was sued by several environmental groups for its failure to conduct the mandated review on time. NMA and other industry partners attempted to intervene but were denied.

Implementation:

On March 6, 2015, EPA issued a final rule implementing the 2008 ozone NAAQS, addressing a range of nonattainment area SIP requirements and revoking the anti-backsliding requirements. 80 Fed. Reg. 12,264. Several months later, environmental NGOs lead by the Sierra Club and California's South Coast Air Quality Management District filed suit in the D.C. Circuit challenging the final rule. *South Coast Air Quality Management District v. EPA*, No. 15-1123. The National Environmental Development Association's Clean Air Project filed briefs defending EPA's rule. The issues involved in the case include anti-backsliding provisions, emissions trading, and revocation of the 1997 standard. Oral argument was held on Sept. 14, 2017.

On Feb. 16, 2018, The D.C. Circuit issued its ruling, denying South Coast's petition to invalidate EPA's interpretation of the CAA and allow states to take credit for reductions occurring outside nonattainment areas for purposes of meeting reasonable further progress requirements. The Court granted part of Environmental petitioners' petition and vacated EPA's Final Rule as to: (1)

waiver of the statutory attainment deadlines associated with the 1997 NAAQS; (2) removal of New Source Review and conformity controls from orphan nonattainment areas; (3) grant of permission to states to move anti-backsliding requirements for orphan nonattainment areas to their list of contingency measures based on initial 2008 designations; (4) waiver of the requirement that states adopt outstanding applicable requirements for the revoked 1997 NAAQS; (5) waiver of the § 7505a(a) maintenance plan requirement for orphan nonattainment areas; (6) creation of the "redesignation substitute"; (7) creation of an alternative baseline year option; (8) elimination of transportation conformity in orphan maintenance areas; and (9) waiver of the requirement for a second 10-year maintenance plan for orphan maintenance areas.

On April 20, 2018, South Coast filed a petition for a panel rehearing with the D.C. Circuit. EPA followed suit. On Sept. 14, 2018, the D.C. Circuit denied South Coast's rehearing petition in its entirety. In the other order, the court also denied most aspects of EPA's rehearing petition. The court, however, stayed until Feb. 16, 2019, the effectiveness of its vacatur of provisions of the rule concerning transportation conformity in so-called "orphan" nonattainment areas. The environmental petitioners, who had prevailed in the case, had indicated that they did not oppose such a stay in the vacatur of this particular aspect of the court's decision.

2015 Ozone Standard:

Rule:

The U.S. District Court for Northern California ordered EPA to propose a rule by Dec. 1, 2014, and issue a final rule by Oct. 1, 2015. On Nov. 25, 2014, EPA released its proposed update to both the primary and secondary ozone standards, which EPA subsequently published in the *Federal Register* on Dec. 17, 2014. 79 Fed. Reg. 75,233. Specifically, EPA proposed to reduce the current ozone NAAQS from 75 ppb to a range of 65 to 70 ppb. EPA also accepted comment on lowering the standards to 60 ppb. NMA's advocacy efforts focused specifically on impacts to western operations that could be negatively impacted by lower standards that would make attainment in the intermountain west incredibly difficult given high background levels of ozone and a lack of available anthropogenic emissions sources that states can require to install emissions controls. On Oct. 26, 2015, EPA published a final rule that reduced the ozone NAAQS from 75 to 70 ppb. 80 Fed. Reg. 65,292.

Litigation:

On Oct. 26, 2015, Murray Energy filed a challenge to the final rule in the D.C. Circuit. *Murray Energy v. EPA,* No. 15-1385 (D.C. Cir.). Other industry and state petitioners also filed challenges along with several environmental groups. Briefing was completed in 2016. Oral argument was originally scheduled for Feb. 16, 2017 and then moved to April 19, 2017. On April 7, 2017, EPA moved to continue oral argument "to allow the new Administration adequate time to review the 2015 Rule to determine whether it will be reconsidered." On April 11, 2017, the Court issued an order removing the case from the oral argument calendar, holding the matter in abeyance and directing EPA to file status reports every 90-days.

Notably, on July 6, 2017, the states of California, Massachusetts, New York, Rhode Island, Vermont, and Washington, as well as the Delaware Department of Natural Resources & Environmental Control and the District of Columbia filed motions to intervene to defend the rule, claiming that recent actions by EPA (e.g., former Administrator Pruitt's letter to governors delaying the implementation of the 2015 standard for one year and notice extending the

deadline for promulgating designations) indicated the agency is not willing to defend the final rule. On Aug. 2, 2017, the D.C. Circuit granted their motion to intervene.

On Aug. 1, 2018, EPA submitted its final status report to the D.C. Circuit concerning the agency's 2015 review of the ozone NAAQS. In the final status report, EPA concluded that the agency would not reconsider the 2015 ozone NAAQS but would subsequently review the standards under an expedited review process. Four months later, the D.C. Circuit held oral argument.

On Aug. 23, 2019, the *D.C. Circuit issued a* per curium opinion *dismissing all claims that the primary standard was too lenient or too stringent. The D.C. Circuit also rejected various industry challenges to EPA's 2015 revisions to the ozone NAAQS, including: (1) that EPA was required to consider certain adverse effects and background ozone when setting the primary (health-based) standard; and (2) that EPA failed to appropriately consider adverse socioeconomic and energy impacts when establishing the primary and secondary NAAQS. On background ozone, The D.C. Circuit disagreed, stating that "[t]he text of the Act forecloses this argument" and "leaves no room for this hidden caveat." According to the court, "Congress decided that EPA should account for background ozone during enforcement, not when setting standards." The court pointed to three "enforcement exceptions" – exceptional events, rural transport, and international transport – that "allow the state some leeway as a practical matter," dismissing the states claims that the terms of these exceptions are difficult to achieve. In addition, the court vacated the grandfathering petition, stating that the statute unambiguously forbids construction of any facility that cannot demonstrate compliance with any effective NAAQS.*

Environmental and industry petitioners challenged various aspects of the secondary (welfare-based) standard. Most notably, the D.C. Circuit ruled in favor of environmental petitioners, finding that EPA did not adequately explain its decision to use a three-year averaging period as the benchmark. This decision did not accord with CASAC's advice to account for single-year spikes in ozone exposures. The court remanded this issue back to the agency "to either lower the standard to protect against unusually damaging cumulative seasonal exposures that will be obscured in its three-year average, or explain its conclusion that the unadjusted average is an appropriate benchmark notwithstanding CASAC's advice." Alternatively, the court suggested that EPA could "adopt the single-year W126 exposure index as the form and averaging time, which would presumably moot any problems with the way it translated that index to use as a benchmark." Additionally, the court held that EPA arbitrarily failed to set a level to protect against adverse welfare effects from visible leaf injury.

No appeal was filed. This case is closed.

Implementation:

- White Paper on Background Ozone: On Dec. 22, 2015, EPA released a white paper discussing background ozone as part of the implementation of the 2015 ozone standards. The white paper, which presents EPA's views on how to define and model background ozone was the subject of a workshop held on Feb. 25, 2016. On March 29, 2016, NMA filed comments focusing on the paper's inadequate consideration of background ozone and international transport of ozone precursors. The background paper was finalized and while it did provide some clarification the issue of international transport of ozone precursors was not adequately addressed.

- Implementation Rule: On Nov. 17, 2016, EPA issued a proposed implementation rule for the 2015 NAAQS for ozone on non-attainment area classifications and SIPs. 81 Fed. Reg. 81,276. NMA filed comments on Feb. 13, 2017, through the NAAQS Implementation Coalition. These comments: (1) highlight the continuing permitting challenges; (2) recommend that EPA focus on addressing implementation and permitting difficulties that increasingly more-stringent ozone NAAQS create by improving its tools and policies; (3) supports EPA's proposal to revoke the 2008 Ozone NAAQS for all purposes in each area one year after the effective date of the designation for the 2015 Ozone NAAQS; (4) recommends that EPA not finalize the anti-backsliding measures outlined in the proposal; (5) criticizes EPA's handling of internationally-transported ozone; and (6) urges EPA to not confine relief under CAA § 179B to border regions.

  On Dec. 6. 2018, EPA published the final rule implementing the 2015 standard. 83 Fed. Reg. 62,998. In these rules, EPA codified its policy that state plans for nonattainment areas will need to include reasonable measures for reducing emissions from sources that are in-state but outside the nonattainment area *if necessary to bring the nonattainment area into compliance* with the NAAQS. EPA also reaffirmed its position that any state (not just border states) can make a demonstration that international emissions are preventing alignment of the ozone NAAQS, and if a state makes a satisfactory demonstration, EPA is willing to approve attainment plans for those areas and not bump them up to the next higher ozone nonattainment classification if they fail to attain as a result of international emissions. EPA deferred revocation of the 2008 ozone standard and whether/how to address anti-backsliding, stating it would address this in a separate rulemaking.

- Implementation Rule Litigation: On Feb. 4, 2019, Downwinders at Risk, Sierra Club, and the National Parks Conservation Association filed a petition for review in the D.C. Circuit challenging the 2018 final rule. ***Downwinders at Risk v. EPA*** **(No. 19-1024)** (consolidated with *Sierra Club v. EPA*, No. 15-1465). On Mar. 6, 2019, the State of Texas and Texas Commission on Environmental Quality filed a motion to intervene in support of the government. On July 22, 2019, petitioners filed their opening brief arguing that: (1) EPA provided no rational basis for authorizing interprecursor trading; (2) EPA unlawfully and arbitrarily allowed areas to avoid emission reductions required by the CAA's reasonable further progress provisions; and (3) EPA unlawfully allowed states to rely on already-implemented controls as contingency measures. Final briefs were filed Jan. 31, 2020. NMA participated as an amicus with other industry trade associations, filing a brief on Nov. 8, 2019. The amicus brief argued that the interprecursor trading provisions are: (1) legally supportable; (2) designed to ensure that sources achieve meaningful emissions reductions that satisfy the CAA's offset requirements; and (3) allows flexibility that is crucial to businesses while providing important long-term environmental benefits.

  NMA participated through the filing of a coalition amicus brief supporting EPA's interprecursor trading program for ozone. Our amicus brief largely deferred to EPA's brief on the matter of statutory construction. Our focus was primarily on the technical robustness of the trading program and the environmental benefits it conferred, including a number of real-world examples using the interprecursor trading provisions.

  On Jan. 29, 2021, the D.C. Circuit vacated three of the four provisions at issue, including the interprecursor trading program rules. The court agreed with the petitioners that the CAA prohibits interprecursor trading, pointing to statutory provisions establishing offset

ratios for VOCs and separate provisions establishing offset ratios for NOx. It says that the use of the term "such air pollutant" in each of those provisions unambiguously refers to VOCs or NOx, respectively, and not to ozone or to ozone precursors collectively. Accordingly, the court concludes that "[t]he plain language of the statute thus requires that increased VOC emissions be offset with reductions in VOC emissions, and the same is true for NOx emissions under most circumstances." In reaching its holding, the court rejected EPA's arguments that the general offset provisions of the CAA grant the agency discretion to define "air pollutant" for purposes of offsets. Note, the court focused on the implementation rule for the 2015 ozone NAAQS although the case also involved interprecursor trading under the implementation rule for the 2008 NAAQS. As a result, the court only vacated the provision applicable to the 2015 NAAQS. Because the decision was based on the court's interpretation of the statute, the provision related to the 2008 NAAQS must also necessarily be unlawful. Nevertheless, the court did not vacate it.

As to other aspects of the petitioners' case, the court: (1) held that states must demonstrate reduction in actual emissions to show reasonable further progress milestones were achieved, but that the provision allowing states to choose between two baseline dates for these demonstrations – the year of the most recently available triennial inventory or the year preceding the nonattainment designation – was consistent with the CAA; (2) vacated the provision allowing measures that had already been implemented to satisfy the requirement for contingency measures; and (3) did not address the use of banked emissions for offsets, which we supported and the petitioners opposed, and accordingly, use of banked emissions remains legal.

- 179B Guidance: Early in 2020, EPA provided an informal opportunity for interested stakeholders to review and comment on a draft guidance document about developing technical demonstrations pursuant to CAA section 179B to show that an area would be able to attain, or would have attained, the relevant NAAQS but for emissions emanating from outside the U.S. The draft guidance described recommended types of technical analyses for air agencies to include in such demonstrations. EPA accepted feedback on the draft guidance through Mar. 10, 2020. NMA joined a coalition in submitting written comments on the guidance. On Oct. 5, 2020, NMA participated in a coalition meeting with OMB during its interagency review of the draft final guidance. NMA focused on the importance of 179B demonstrations to non-border states.

  EPA finalized the guidance in December 2020. EPA provided notice of the guidance in the *Federal Register* on Jan. 7, 2021. 86 Fed. Reg. 1105. The primary request in the coalition's comments was for EPA to finalize language recognizing that relief under 179B is not restricted to areas adjoining international borders. The final guidance retains that language with only slight changes. Like the draft guidance, the final guidance also asserts that "technical demonstrations for non-border areas may involve additional technical rigor and resources compared to demonstrations for border areas."

5-year NAAQS Review:

On May 9, 2018, former EPA Administrator Pruitt signed a memorandum outlining a "back-to-basics process" for reviewing NAAQS under the CAA. According to EPA' s press release, the "back-to-basics" memorandum "ensures that EPA and its independent science advisors follow a transparent, timely, and efficient process in reviewing and revising public health- and welfare-based NAAQS." The memorandum committed EPA to begin the next review of the ozone

NAAQS and finalize any revisions by October 2020 (the statutorily required five-year deadline). On Nov. 2, 2018, EPA issued the draft integrated review plan. 83 Fed. Reg. 55,163.

On July 25, 2019, Administrator Wheeler sent a letter to the chair of CASAC outlining EPA's commitment to completing the NAAQS review in 2020. EPA also committed to create a "pool of subject matter expert consultants" that the CASAC can use for support in their review. On Sept. 13, 2019, EPA announced the pool of NAAQS subject matter experts.

- **Integrated Science Assessment**: On Sept. 6, 2019, EPA published a notice of public comment period on the draft Integrated Science Assessment. The document is over 1,400 pages. Key findings:

    - The document found that for two health outcomes – cardiovascular harm and increased mortality – evidence of ozone's impacts is weaker than previously thought. Specifically, that the evidence is "suggestive of, but not sufficient to infer, a casual relationship" with short-term ozone exposure (compared to "likely to be causal relationship" in the 2013 Integrated Science Assessment).

    - For long-term exposure's effect on human health, EPA maintained its previous position that the evidence is "suggestive" of a causal link for cardiovascular harm and total mortality. Notably, EPA found evidence of more harm through a first-time assessment of ozone's impact on metabolic effects such as diabetes, stating that ozone exposure is likely to be causal of metabolic effects in both the short- and long-term.

    - On "U.S. background" (of USB), the draft ISA stated: "Trends in baseline ozone levels suggested a rising contribution from natural and international sources through approximately 2010. Recently, however, this trend has shown signs of slowing or even reversing, possibly due to decreasing East Asian precursor emissions."

    - On the secondary standard, EPA introduced some first-time estimates of the relationship between ozone and several environmental outcomes, for which EPA found ozone is likely causal including, tree mortality, alteration of herbivore growth and reproduction, and alteration of plant-insect signaling.

    Comments were due on Dec. 2, 2019. NMA filed comments with the NAAQS Regulatory Review and Rulemaking coalition providing further support for the EPA staff recommendation to retain the current primary and secondary standards. The coalition comments urged EPA to revise the causal determinations for metabolic health and respiratory effects due to short- and long-term exposure to lower causal classifications. The coalition comments also provided additional perspective on how the agency could respond to the *Murray* decision on the secondary standard.

    On Jan. 21, 2020, CASAC released its draft responses to the draft Integrated Science Assessment (here). On April 20, 2020, EPA published notice of the Final Integrated Science Assessment. 85 Fed. Reg. 21,849.

- **Policy Assessment**: On Nov. 1, 2019, EPA announced the release of the draft Policy Assessment, requesting comment by Dec. 16, 2019. EPA's draft Policy Assessment recommended that the Administrator retain the current primary standard. The draft

Policy Assessment did not identify any potential alternative standards for consideration in this review. However, EPA staff identified several key uncertainties and areas for future research. Regarding the secondary (welfare-based) standard, the draft Policy Assessment found that the current standard is adequate and should be retained without revision. Interestingly, EPA did not explain how it would address the *Murray* decision that remanded the secondary standard back to the agency.

NMA filed comments with the NAAQS Regulatory Review and Rulemaking Coalition, building upon comments on the draft Integrated Science Assessment. The coalition comments presented evidence from health studies related to respiratory effects associated with short-term ozone exposure that supports the retention of the current NAAQS. The coalition's comments also highlighted other health effects evidence as supporting the EPA's staff recommendation. On the secondary standard, the coalition's comments addressed an adverse appellate court decision to assist the agency in developing an adequate record to support its action in this review of the secondary ozone NAAQS. The coalition's comments also defended the draft Policy Assessment's conclusion that the current secondary standard provides adequate protection commensurate with a W126 Index level.

On Jan. 21, 2020, CASAC released its draft responses to the draft Policy Assessment (here) that contain its written advice to the agency. A majority of CASAC backed the agency staff's finding that the existing primary and secondary standards are adequate. CASAC was not without criticism, however, and strongly recommended changes to the draft Integrated Science Assessment and process moving forward. CASAC met on Feb. 11 and 12 to discuss the draft letters. CASAC agreed 6-1 to recommend that EPA retain the 2015 NAAQS. On May 22, 2020, EPA published notice of the Final Policy Assessment. 85 Fed. Reg. 31,182.

- **Rulemaking**: On July 13, 2020, EPA signed and released a pre-publication copy of the proposed rule retaining the current primary standard of 70 parts per billion (ppb) as the fourth-highest daily maximum 8-hour concentration averaged across three years without revision**.** Regarding the secondary (welfare-based) standard, the Administrator also finds that the current standard is adequate and should be retained without revision and seeks comment on this proposal. According to EPA's press release, "[t]his proposal comes after careful review and consideration of the most current available scientific evidence and risk and exposure information, and with consultation of the agency's independent science advisors." EPA's fact sheet may be accessed here. On Aug. 14, 2020, EPA published the proposed rule in the *Federal Register*, which started a 45-day comment period ending on Oct. 1, 2020. 85 Fed. Reg. 49,830.

  NMA joined the NAAQS Regulatory Review & Rulemaking coalition in submitting written comments. The coalition's comments provide the scientific and legal support for EPA's decision to retain the primary (health-based) and secondary (welfare-based) standards. The comments explain why the Administrator's proposals to retain these standards are both reasonable and rational based on the current scientific record. The coalition's comments also addressed other factors that support the reasonableness of retaining the current standard given the scientific uncertainty, including socioeconomic impacts and proximity to background ozone levels. Finally, the coalition's comments asserted that a revised standard would only burden local officials already implementing multiple other ozone NAAQS.

On Dec. 23, 2020, EPA announced its decision to retain, without changes, the 2015 ozone NAAQS of 70 ppb. According to EPA, the release of this final rule, "marks the second time in Clean Air Act history that the agency has completed an ozone NAAQS review within the congressionally mandated five-year timeframe." EPA's final rule was published in the *Federal Register* on Dec. 31, 2020, with an immediate effective date. 85 Fed. Reg. 87,256. EPA's fact sheet on the final rule is available here.

- **Administrative Petitions for Reconsideration**: On Mar. 1, 2021, the American Academy of Pediatrics, American Lung Association, American Public Health Association, Appalachian Mountain Club, Clean Air Task Force, Chesapeake Bay Foundation, Earthjustice, Environment America, Environmental Defense Fund, Environmental Law & Policy Center, National Parks Conservation Association, Natural Resources Defense Council, and Sierra Club submitted a petition requesting that EPA convene a proceeding for reconsideration of the ozone NAAQS under CAA Section 307(d). The NGOs argue that "the 2020 review failed to rationally engage with the body of evidence that mandated strengthening the standard, did not set standards at the levels the statute's directive demands, and is the result of a truncated process that resulted in ultimately arbitrary conclusions."

  The States of New York, California, Connecticut, Illinois, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the District of Columbia, and the City of New York also filed a similar petition arguing EPA must reconsider the final rule because: (1) a new study demonstrating significant health risks to elderly people in the United States from long-term exposure to ozone; (2) the agency did not reopen the air quality review to enable the agency, CASAC, and the public to fully consider recent epidemiologic studies linking ozone exposure to negative health effects; and (3) a new report from the Government Accountability Office suggests that ozone data relied upon by EPA is incomplete.

- **Litigation**: On Jan. 19, 2021, the State of New York, California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, District of Columbia, and the city of New York filed a petition for review challenging the final rule in the D.C. Circuit. ***New York v. EPA*, No. 21-1028 (D.C. Cir.)**. On Feb. 11, 2021, Earthjustice on behalf of 15 public health and environmental organizations filed a petition for review in the D.C. Circuit. *American Academy of Pediatrics v. EPA*, No. 21-1060 (D.C. Cir.). Petitioners include: American Academy of Pediatrics, American Lung Association, American Public Health Association, Appalachian Mountain Club, Chesapeake Bay Foundation, Inc., Clean Air Council, Conservation Law Foundation, Environment America, Environmental Defense Fund, Environmental Law and Policy Center, National Parks Conservation Association, Natural Resources Council of Maine, Natural Resources Defense Council, and Sierra Club.

  On Feb. 17, 2021, EPA filed a motion to hold this consolidated case in abeyance for 90 days. On Feb. 22, 2021, the D.C. Circuit granted the motion and directed parties to file motions to govern further proceedings no later than May 21, 2021. The court ultimately extended that date to Sept. 9, 2021.

On Feb. 18, 2021, several industry associations filed a motion to intervene in support of EPA's rule, including the U.S. Chamber of Commerce, the American Petroleum Institute, the American Forest & Paper Association, the American Wood Council, and the American Chemistry Council. NMA is not participating in this case. On the same day, the States of Texas, Arkansas, Louisiana, Mississippi, Missouri and Montana also filed to intervene in support of EPA's rule.

On Feb. 27, 2021, the Center for Biological Diversity also filed a petition for review challenging the final rule. *Center for Biological Diversity v. EPA*, No. 21-1073. This challenge is consolidated with the state and NGO challenge.

On Sept. 9, 2021, EPA filed a motion to hold the case in abeyance. In that motion, EPA stated that it "expects that it will reach a decision on whether or not to pursue reconsideration of the Ozone NAAQS decision by Oct. 22, 2021." Accordingly, EPA requested that the court extend the motion to govern deadline until Oct. 29, 2021.

Separately, Arkansas, Louisiana, Mississippi, Missouri, Montana, and Texas filed a motion on Sept. 9, 2021, for leave to file a motion to govern further proceedings, asking the court to move this case forward rather than further delaying it. The states argued that "as long as the Ozone NAAQS Decision remains subject to challenge, the State Intervenors will not have clear guidance about what specific actions, if any, are appropriate with to ensure that their state implementation plans achieve and maintain the Ozone NAAQS." The states also asked the court to grant their motion to intervene and issue a briefing and scheduling order.

On Oct. 29, 2021, EPA filed a motion to continue to hold this case in abeyance until Dec. 15, 2023, with status reports filed every 90 days. EPA's motion also includes an affidavit by Joe Goffman confirming the end of 2023 to finish the reconsideration. The motion by the Texas intervenor respondents asked the court to end abeyance and to set a briefing schedule.

In a response to EPA's motion, the environmental and public health organizations provided additional detail about the agency's plans. According to their filing, EPA planned to: (1) complete an ozone-specific review panel nomination process by early spring 2022; (2) conduct CASAC public meetings by summer 2022; (3) issue a proposed rule by spring 2023; and (4) issue a final rule by December 2023.

Legislation:

Senator Shelley Moore Capito (R-W.Va.) and Rep. Pete Olsen (R-Texas) introduced "The Ozone Implementation Act of 2017" (S. 263/H.R. 806), which if signed into law would have pushed back the 2015 ozone NAAQS implementation deadline by 8 years to Oct. 2025 instead of Oct. 2017. The bills would also have established a 10-year cycle for the EPA to conduct mandatory reviews of its standards (up from 5 years under current law); allow the EPA Administrator to consider technological feasibility in a decision on where to set the standards; and instruct the agency to prepare a report to Congress on the effects of emissions from other countries on ozone compliance; and require the processing of permits for new and modified industrial facilities under the less-stringent 2008 ozone standards until 2025.

On June 28, 2017, H.R. 806 was reported out of the House Committee on Energy and Commerce for consideration in the full House of Representatives. The bill was then considered

by the House and on July 18, 2017, passed by a bipartisan vote of 229 – 199. The Senate did not move the bill during the 115th Congress. No other significant actions have occurred legislatively.

Status:

Biden Administration Reconsideration:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions. The Executive Order also revoked the April 2018 presidential memo that laid the groundwork for EPA's accelerated timeline for completing its review of the NAAQS. As expected, the Biden transition team included this rule on its initial list of environmental policy actions for review.

On Jan. 21, 2022, EPA invited public comment on 32 nominations to be considered for appointment to the CASAC ozone review panel. Comments were due on Feb. 11, 2022. On Feb. 23, 2022, EPA announced an 18-member review panel. On Apr. 4, 2022, EPA announced two public meetings of the Clean Air Scientific Advisory Committee (CASAC) Ozone Panel beginning on **Apr. 29, 2022**, during which CASAC received a briefing from EPA on the draft Policy Assessment supporting the agency's recommendation to retain the existing 70 ppb standards without change. On May 31, 2022, the NMA joined the NR3 coalition in filing comments supporting EPA's recommendation to retain the standard. On June 15, 2022, following additional meetings, the CASAC Chair paused the review. Members of CASAC expressed concerns regarding EPA's characterization in the 2020 Ozone Integrated Science Assessment (ISA) of the science concerning health and welfare effects of ozone. CASAC met again starting Aug. 29, 2022, to discuss the underlying science. CASAC held three meetings in September 2022 to continue the discussion.

CASAC met again in November 2022. On Nov. 22, 2022, CASAC sent a letter with its review to the EPA. Recognizing that the 2020 ISA is a final document, CASAC does not recommend that it be reopened and revised. Instead, CASAC offers advice of areas of improvement for future review. On the primary standard side, CASAC's differences with EPA reflect differences in the weight to be given to controlled human exposure studies versus epidemiological studies. CASAC notes that some of its members, based on epidemiological evidence, would find "likely causal" relationships for short-term and long-term ozone exposures and cardiovascular effects and mortality. At this level of causality evidence, such effects could be the basis for a NAAQS. In addition, CASAC has "a strong consensus" that EPA staff should consider alternative, cumulative forms for the secondary NAAQS in their Policy Assessment.

CASAC is scheduled to meet on Mar. 2, 2023, to receive a briefing from EPA on the External Review Draft Version 2 of the Policy Assessment. CASAC will hold a public meeting to peer review the draft Policy Assessment on Mar. 29, 2023. EPA has not released the draft Policy Assessment to the public.

These additional meetings have delayed EPA's reconsideration of the ozone NAAQS. According to EPA's Fall semi-annual regulatory agenda, the agency is targeting April 2023 for a proposed rule. Given CASAC's March meetings, EPA will not meet this internal deadline. We expect a proposed rule this summer. EPA did not provide its timing for a final rule.

Litigation:

***New York v. EPA*, No. 21-1028 (D.C. Cir.) (challenging the 2020 final rule retaining the standard)**: On Dec. 19, 2022, EPA filed the latest status report acknowledging the additional CASAC meetings. EPA asks the court to continue to hold this case in abeyance given the agency's ongoing rulemaking.

Legislation:

To date, nothing has been introduced.

NSR REFORMS

PRIORITY B – EPA

Background:

New Source Review (NSR) is an air quality permitting program created by Congress in the 1977 amendments to the Clean Air Act. NSR requires major stationary sources to complete rigorous pre-construction permitting reviews to assess the need for environmental controls and to receive an NSR construction permit if they propose to build new facilities or make "major modifications" to existing facilities that would cause an emissions increase of certain regulated air pollutants. Facilities triggering the NSR requirements must comply with stringent, case-by-case new source emission limits based on Best Available Control Technology (BACT) in areas complying with the National Ambient Air Quality Standards (NAAQS), and the Lowest Achievable Emission Rate (LAER), regardless of costs, in areas not complying with those standards.

Trump Administration Reconsideration:

The Trump Administration focused on NSR reform to remove barriers to economic growth. In August 2017, the U.S. Department of Energy's "Staff Report to the Secretary on Electricity Market and Reliability" recommended that "EPA allow coal-fired power plants to improve efficiency and reliability without triggering new regulatory approvals and associated costs." The DOE found that "the uncertainty surrounding NSR requirements has led to a significant lack of investment in plant and efficiency upgrades, which would otherwise lead to more efficient power generation, benefits to grid management and reduced environmental impacts." Similarly, in October 2017, the U.S. Department of Commerce's report "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing" highlighted the need for reform of the NSR program. EPA appointed an internal task force to review the NSR program and identify regulatory and non-regulatory options to streamline the NSR requirements.
Completed actions:

1. ***Actual-to-Projected-Actual Applicability Test**:* On Dec. 7, 2017 the agency issued a memorandum, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability." Through this memorandum, EPA indicates that it is dropping its policy on using its own emission projections rather than relying upon a company's projections. Under EPA's revised policy, it will not second guess a company's emission projections.

2. ***Project Emissions Accounting – Guidance Memorandum***: On Mar. 13, 2018, EPA Administrator Pruitt signed a memorandum, revising a key component of the NSR pre-construction permitting program. Under EPA's new policy, permit applicants will be permitted to consider projected emissions decreases, as well as increases, at the first step of deciding whether a planned construction project is subject to the agency's strict NSR permit requirements. This is a major departure from the historical application of the two-step test. EPA subsequently started a rulemaking process to codify this change (*see* below for summary of the proposed rule).

3. ***Aggregation & "Common Control"***: On April 30, 2018, Bill Wehrum, then-Assistant Administrator for EPA's Office of Air and Radiation, sent a letter to the Secretary of the Pennsylvania Department of Environmental Protection revising the agency's determination of when sources should be "aggregated" and counted as a single source under the CAA's Title V and NSR programs. EPA reevaluated and narrowed the agency's interpretation of "common control" to reflect a "common sense notion of a plant" and "minimize the potential for entities to be held responsible for decisions of other entities over which they have no power or authority." In its new interpretation, EPA says that for source determinations, the assessment of "control" for Title V and NSR permitting purposes should focus "on the power or authority of one entity to dictate decisions of the other that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements."

4. ***Adjacency***: On Sept. 4, 2018, EPA issued a draft guidance memorandum entitled, "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas." EPA sought to clarify its interpretation of the term "adjacent" as it is defined in NSR and Title V regulations. For entities with multiple sites of operation, an expansive definition of "adjacent" can add significant uncertainty and cost to business operations. On Oct. 5, 2018, NMA joined an informal coalition of trade associations in filing comments on this draft guidance.

   On Nov. 26, 2019, EPA issued final guidance, returning to its 1980 position that "adjacent" means physical proximity, not functional interrelatedness or other relationship criteria, and is determined on a site-by-site basis. The guidance does not establish a bright-line test or a fixed distance that can be used to evaluate adjacency. Instead, it explains that properties should comport with what the D.C. Circuit called the "common-sense notion of a plant." EPA-approved state, local, and tribal permitting authorities are not required to apply this interpretation and retain the discretion to determine when pollutant-emitting activities are located on contiguous or adjacent properties. This guidance applies prospectively and should not be used to revisit prior source determinations or related permits.

5. ***Ambient Air Definition & Exclusions***: On Nov. 9, 2018, EPA released a draft guidance to revise the agency's 1980 policy on the exclusion of certain areas from the scope of "ambient air" under the CAA and implementing regulations. In 1980, EPA Administrator Costle issued a letter articulating the agency's policy that "the exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers." The Costle letter established a two-part test that the agency further explained in a 2007 agency memorandum: (1) the area, although external to buildings, must be owned or controlled by the source; and (2) access to the area by the public is precluded by means of a fence or physical barriers. Although EPA has allowed a natural barrier to be an adequate substitute for a fence, these limited situations do not account for other circumstances that equally deter or preclude public

access. Stakeholders identified this policy as being outdated and inflexible as applied to certain situations arising under the PSD permitting process.

EPA's draft guidance proposed replacing the requirement that "a fence or other physical barriers" be in place, with a more flexible requirement that would allow "measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public." According to EPA, the revised policy would "provide greater flexibility in determining where to place modeling receptors for air quality analyses, while maintaining public health protection." EPA included the following examples as measures that can serve as an effective deterrent to public access: "video surveillance and monitoring, clear signage, routine security patrols, drones, and other potential future technologies." On Dec. 21, 2018, NMA through our participation in the NAAQS Implementation Coalition, supported this guidance with recommended changes to broaden the type of measures a permit applicant may employ to preclude public access.

On Nov. 22, 2019, EPA issued final guidance that allows sources to establish a property's boundary based on more than physical barriers to access, such as video surveillance, monitoring, clear signage, routine security patrols, and even drones. As a result, a source may be able to exclude more of its property from modeling than just the areas secured with a fence, a change that could be particularly helpful in cases where fencing is impractical due to the size or terrain of the property. Companies should be aware that non-physical measures may need to become enforceable permit conditions. In addition, defining where the source ends and "ambient air" begins remains a site-specific issue, one over which states have discretion and authority to decide. EPA's new guidance is not binding on states or sources and it remains to be seen which states will follow the policy.

6. ***PSD & Nonattainment NSR: Aggregation***: On Nov. 15, 2018, EPA published a final rule that concluded the agency's reconsideration of the 2009 "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review: Aggregation." 83 Fed. Reg. 57,324. This final action addressed when related physical or operational changes should be treated as a single "modification" for the purpose of determining NSR applicability at a stationary source. Notably, in EPA's 2018 final action the agency rejects the 2010 proposed preferred option of revoking the 2009 NSR Aggregation rule, finding that a single, comprehensive policy statement is needed for prospective determinations on a project. Furthermore, EPA concluded that "the 'substantially related' criterion is an appropriate principle for concluding that claimed separate projects are a single project for NSR applicability purposes," does not "reflect a major shift in policy from EPA's prior policy on aggregation," and would not impermissibly narrow the scope of physical or operational changes that must be considered for purposes of determining NSR applicability.

   On Jan. 14, 2019, NRDC filed a petition for review in the D.C. Circuit challenging EPA's final rule. *NRDC v. EPA*, No. 19-1007 (D.C. Cir.). This case was consolidated with the previous challenge (No. 09-1103). NRDC filed a non-binding statement of issues on Feb. 19, 2019. However, on June 25, 2019, NRDC filed a motion for voluntary dismissal of the case before any other filings could occur. On June 27, 2019, the court granted the motion and dismissed both cases.

7. ***Reasonable Possibility in Recordkeeping Rule***: Under the George W. Bush Administration, EPA on Dec. 21, 2007, issued a final rule, "Prevention of Significant Deterioration and Nonattainment New Source Review: Reasonable Possibility in Recordkeeping." The rule clarified record-keeping obligations when a major stationary

source of emissions undergoes a modification that does not trigger the agency's "major" NSR requirements. Specifically, if a company predicts its emissions will not trigger major NSR, it is only subject to emissions record-keeping and reporting requirements if there is a "reasonable possibility" that the predicted emissions from the modification will equal or exceed 50 percent of the CAA's significant threshold levels for any pollutant. The final rule clarified the "reasonable possibility" standard.

On Feb. 15, 2008, the State of New Jersey submitted a petition asking the agency to reconsider this rulemaking. New Jersey argued that the final rule was not a logical outgrowth of the proposal and undermined a vital accountability mechanism for the NSR program. New Jersey also filed suit over the rule in the D.C. Circuit. *See State of New Jersey v. EPA*, D.C. Cir. No. 08-1065 (Feb. 19, 2008). This case was held in abeyance to allow the Obama Administration's reconsideration; however, that process was never completed. On Nov. 5, 2019, EPA Administrator Wheeler sent a letter to New Jersey's Attorney General communicating the agency's decision not to reconsider the rule or solicit additional public comment and that if New Jersey wanted to require additional records to enforce NSR requirements the state retains the discretion to do so. This action reactivated the case in the D.C. Circuit. On Mar. 5, 2021, the D.C. Circuit issued a 2-1 ruling, rejecting New Jersey's challenge to the final rule. According to the court, the agency was justified in setting a minimum threshold of emissions below which no reporting is required. The court also rejected the state's claim that the rule could have led facilities to avoid "major" NSR emissions controls. Justice Walker filed a dissent holding that New Jersey did not have standing to bring the challenge.

8. ***Plantwide Applicability Limits*****:** On Feb. 13, 2020, EPA released draft guidance on plantwide applicability limitations (PALs). According to EPA, this draft guidance addresses specific concerns raised by stakeholders regarding the use of PALs including: PAL permit reopening; PAL expiration; PAL adjustment during renewal; PAL termination; monitoring requirements; treatment of replacement units; general advantages of PALs and other considerations. Comments were due on March 16, 2020. On Aug. 4, 2020, EPA finalized the guidance on PALs. PALs allow a facility to take a 10-year cap on emissions at a specific level—baselines plus the significant thresholds—and then conduct any projects they want without triggering NSR, so long as they comply with the cap. While in theory this provision could be useful to avoid the risk and hassle of project-by-project reviews for NSR applicability, few facilities have taken PALs because the requirements associated with them raise a number of constraints and uncertainties. EPA's guidance attempts to address concerns raised by stakeholders.

9. ***Begin Actual Construction***: On Mar. 25, 2020, EPA issued draft guidance focused on the agency's interpretation of "begin actual construction" under the NSR preconstruction permitting regulations. What constitutes "beginning actual construction" under major NSR (and in many cases under minor NSR) has been the source of controversy due to an overly restrictive agency interpretation that has prevented important construction activities from proceeding. For decades, EPA has considered "almost every physical on-site construction activity that is of a permanent nature to constitute the beginning of 'actual construction,' even where that activity does not involve construction 'on an emissions unit.'" Consequently, EPA prohibited construction on any part of a stationary source without first obtaining an NSR permit. The interpretation offered by EPA in the draft guidance would reverse course to better conform to the regulatory text. Specifically, a source owner or operator would be able, prior to obtaining an NSR permit, to "undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in

nature – provided that those activities do not constitute physical construction on an emissions unit." Accordingly, if this guidance document is finalized, companies will have assurance that they can conduct a broad array of on-site construction activities while awaiting issuance of a major NSR permit. EPA accepted public comment by May 11, 2020. NMA did not receive interest in commenting on this guidance from Subcommittee members. EPA did not finalize this guidance before the change in Administrations. However, the draft guidance remains on EPA's Guidance Portal.

10. ***Project Emissions Accounting – Rulemaking & Litigation***: On Aug. 9, 2019, EPA published a proposed rule to codify the guidance memorandum and withdraw the agency's 2006 "project netting proposal". 84 Fed. Reg. 39,244. On Oct. 8, 2019, NMA filed comments offering support for the agency's proposal. NMA also provided recommendations for the rule's implementation. Specifically, NMA recommended that project proponents be allowed to define a project to encompass emission decreases without being subject to claims of "over aggregation." NMA also urged the agency not to adopt any new recordkeeping or reporting requirements just for emission decreases given that existing regulations sufficiently address the matter. Finally, NMA asserted that the proposed applicability revisions be part of EPA's base NSR program requirements to ensure consistent application in the states.

    On Oct. 22, 2020, EPA signed the final rule. EPA's fact sheet is available here. On Nov. 24, 2020, the final rule was published in the *Federal Register*. 85 Fed. Reg. 74,890 and went into effect on Dec. 24, 2020. Notably, EPA reversed course on one aspect of the proposed rule against NMA's recommendation. EPA originally proposed that sources could group unrelated pollution control projects with other emissions-increasing projects. In the final rule, EPA asserts that its aggregation policy—focused on "substantial relatedness," both economically and technically—applies to both over- and under-aggregation of projects if the intent is to circumvent permitting. In short, the only decreases that can count in project emissions accounting are those that are directly part of the project under review. This change adds another layer of complexity in relying on the new project emissions accounting policy.

    Additionally, EPA's final rule confirms that the existing monitoring, recordkeeping, and reporting requirements at 40 C.F.R. 52.21(r)(6) are sufficient to account for emission decreases under Step 1 and ensure that adequate records are maintained in circumstances where there is a reasonable possibility that a project determined not to constitute a major modification could result in a significant emissions increase. Responding to criticisms of this decision, EPA asserts that sources who manipulate data to circumvent NSR or the "reasonable possibility" requirements, for example by overestimating projected decreases or underestimating projected increases, could be subject to NSR requirements, substantial civil penalties, and/or criminal liability.

    On Jan. 19, 2021, New Jersey, Maryland, Massachusetts, Minnesota, Oregon, Pennsylvania, Washington, and the District of Columbia filed a petition for review in the D.C. Circuit challenging the project emissions accounting rule. *State of New Jersey v. EPA*, No. 21-1033 (D.C. Cir.). On Jan. 22, 2021, Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council and Sierra Club also filed a petition for review. *Environmental Defense Fund v. EPA*, No. 21-1039 (D.C. Cir.) (challenge to Project Emissions Accounting Rule). These cases were consolidated. On Feb. 16, 2021, EPA filed a motion to hold this case in abeyance for six months to review the rule pursuant to Executive Order 13990 and determine whether any further action is needed. On Feb. 17, 2021, the D.C. Circuit granted this request, directing the agency to file status reports on 90-day

intervals (first report due May 18, 2021). No statement of issues was filed before this court order. On Nov. 12, 2021, EPA filed another unopposed motion to hold the case in abeyance while it discusses next steps with the parties given the agency's denial of an administrative petition to reconsider the rule (see below). On Nov. 15, 2021, the court granted this motion.

On Feb. 22, 2021, several industry trade associations filed a motion to intervene in the support of the rule including: American Chemistry Council, Portland Cement Association, Council of Industrial Boiler Owners, Auto Industry Forum, American Wood Council, American Petroleum Institute, American Iron and Steel Institute, American Fuel & Petrochemical Manufacturers, American Forest & Paper Association, American Coke and Coal Chemicals Institute and Air Permitting Forum. The court has not yet ruled on this motion. NMA is not participating in this litigation.

11. ***NSR & the ACE Proposed Rule***: As summarized above, EPA on Aug. 31, 2018, published the ACE rule, which included a proposal to revise the NSR permitting program to provide EGUs the opportunity to make efficiency improvements without triggering NSR permit requirements. To reduce the risk of initiating NSR, EPA proposed an hourly-emissions increase test for modifications at EGUs. The agency proposed three alternatives that states may consider: two alternatives for an hourly emissions test based on maximum achieved emissions (*i.e.*, either the single highest hour or a statistical analysis), and one alternative based on maximum achievable emissions (*i.e.*, relying on the current NSPS definition of "modification"). States would not be required to adopt the hourly emissions increase test.

    In comments on the ACE rule, NMA provided EPA with a set of recommendations to improve the formulation of the hourly test. NMA identified certain failures in EPA's statistical approach for the hourly test in properly reducing the influence of outliers and the failure to include a causation provision. To address causation, NMA recommended that the agency include a provision recognizing that post-project emission increases do not constitute a "major modification" unless they are caused by a project that is subject to review. NMA also urged EPA to avoid relying on a single hourly measurement as a mandatory point of comparison and to develop a statistical analysis for both the pre-project baseline and the post-project evaluation that can determine when a statistically significant emissions increase actually occurs. This recommendation would ensure that the statistical test does not produce false positives. NMA continued to advocate necessary changes to the NSR proposal, addressing issues related to data exclusion and averaging. While this rulemaking remained on the semi-annual regulatory agenda, it was not completed before the end of the administration.

12. ***PSD & Nonattainment NSR: Fugitive Emissions***: As summarized above, this issue has languished since 2009, except for a January 2014 guidance regarding the inclusion of fugitive emissions in GHG permitting where EPA stated that the rule was indefinitely stayed and claimed that all sources – both listed and unlisted – must include fugitives in a threshold calculation for a modification. EPA's semi-annual regulatory agenda originally targeted November 2019 for a notice of proposed rulemaking, but planned action has slipped to May 2021 (according to last Fall's semi-annual regulatory agenda).

Legislation:

Last Congress, NMA supported legislation, H.R. 3127 and H.R. 3128, introduced in the House of Representatives by Rep. Morgan Griffith (R-Va.). H.R. 3127 would have excluded energy efficient, pollution reduction and grid reliability projects from the definition of modification. H.R.

3128 would have amended the CAA "emissions increase test" by requiring an hourly instead of annual emissions test. On July 17, 2018, the House Energy and Commerce Subcommittee on Environment met to mark-up H.R. 3128. The bill was forwarded by the Subcommittee to the Full Committee on the same date. Nothing further happened in the 115th Congress.

On Jan. 3, 2019, Rep. Griffith reintroduced the legislation under H.R. 172, the "New Source Review Permitting Act of 2018." On July 11, 2019, Senator Rand Paul (R-Ky.) introduced two bills. S. 2104 would amend the CAA to exclude energy efficiency projects, pollution control projects, and reliability projects from the definition of a modification. S. 2015 would amend the CAA to clarify when a physical change in, or change in the method of operation of, a stationary source constitutes a modification, relying on the maximum achievable hourly emissions rate. The bills were referred to the Senate Environment and Public Works Committee.

On Oct. 22, 2019, Senator John Barrasso (R-Wyo.) joined with Senate Majority Leader Mitch McConnell (R-Ky.) and Senators Mike Braun (R-Ind.), Shelley Moore Capito (R-W.Va.), and Rand Paul (R-Ky.), in introducing S. 2662, "The Growing American Innovation Now (GAIN) Act." The GAIN Act would amend the definition of "modification" and "construction" to clarify when NSR permits are required, enable facilities to more readily carry out pollution control projects, energy efficiency projects, and equipment and reliability and safety improvements. The bill also provides EPA with the authority to require NSR permitting after determination of an adverse effect to human health and the environment.

Status:

Biden Administration Reconsideration:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions. We expected EPA to scrutinize most, if not all, of these NSR reforms. We will include actions in the list below as they become public:

1. ***Project Emissions Accounting*:** On Oct. 18, 2021, published a notice in the *Federal Register* denying a petition for reconsideration and administrative stay of the Project Emissions Accounting Rule. EPA's denial is largely procedural—it is based solely on the fact that the petition did not meet the requirements for a mandatory reconsideration under Clean Air Act Section 307(d)(7)(B). Although EPA denied the petition and decided not to withdraw the 2018 guidance memorandum, the agency expressed sympathy for the three issues petitioners raised, agreeing that there are "potential concerns that warrant further consideration by the EPA." EPA's Fall semi-annual regulatory agenda includes a new rulemaking to address concerns in the petition. EPA targets September 2023 (a 7-month delay) for a proposed rule.

2. ***Actual-to-Projected-Actual Applicability Test**:* On Dec. 9, 2022, EPA Administrator Michael Regan rescinded the Pruitt letter, which barred the agency from second guessing states and industry when deciding whether "major source" new source review air permits are necessary for new or modified facilities. Administrator Regan does not commit to new guidance on the matter.

Litigation:

***State of New Jersey v. EPA*, No. 21-1033 (D.C. Cir.) & *Environmental Defense Fund v. EPA*, No. 21-1039 (D.C. Cir.) (Project Emissions Accounting Rule).** On Feb. 10, 2022, EPA filed an unopposed motion to govern asking the court to continue to hold this case in abeyance until Feb. 23, 2023. According to EPA's filing, the agency has initiated its rulemaking process. EPA also asks that this case be consolidated with the cases below. On Nov. 28, 2022, EPA filed the latest status report again acknowledging it has initiated the rulemaking process. EPA's next status report is due on Feb. 27, 2022.

***Environmental Defense Fund v. EPA*, No. 21-1259 (D.C. Cir.) (challenge to EPA's denial of petition for reconsideration)**. On Dec. 10, 2021, the Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club filed a petition for review with the D.C. Circuit on the agency's denial of their petition to reconsider and administratively stay the project emissions rule. On Nov. 28, 2022, EPA filed the latest status report again acknowledging it has initiated the rulemaking process. EPA's next status report is due on Feb. 27, 2022.

***Environmental Defense Fund v. EPA*, No. 18-1149 (D.C. Cir.) (Project Emissions Accounting Guidance).** This case is in abeyance, with 90-day status reports, pending EPA's review of the memorandum considering Executive Order 13990. On Nov. 28, 2022, EPA filed the latest status report again acknowledging it has initiated the rulemaking process. EPA's next status report is due on Feb. 27, 2022.

Legislation

On Sept. 12, 2022, the Senate Environment and Public Works Committee Ranking Member Shelley Moore Capito (R-W.Va.) along with 39 Republican cosponsors introduced the "Simplify Timelines and Assure Regulatory Transparency (START) Act." The legislation seeks to address several key federal regulatory and permitting reforms. Among the provisions, the bill contains reforms to the NSR program. Specifically, the bill includes language to clarify the definition of modification for emission rate increases, pollution control, efficiency, safety, and reliability projects, as well as language to clarify the definition of construction for prevention of significant deterioration.

On Jan. 9, 2023, Rep. Morgan Griffith (R-Va.) introduced H.R. 165, "New Source Review Permitting Improvement Act," which modifies terminology, including "modification" and "construction," to reduce permitting burdens for certain projects.

REGIONAL HAZE SIPs

PRIORITY B – EPA

Background:

EPA Implementation:

The Regional Haze program aims to restore visibility to natural conditions in Class I areas by 2064 and requires states to submit to EPA State Implementation Plans (SIPs) outlining measures they will take to achieve this goal. In the eastern portion of the United States, many

states have continued efforts to satisfy their regional haze "best available retrofit technology" (BART) requirements for electric generating units (EGUs) through compliance with EPA's transport rules—first the Clean Air Interstate Rule (CAIR) and later its replacement, the Cross-State Air Pollution Rule (CSAPR). Where CSAPR does not satisfy BART—including Eastern states only partially covered by CSAPR, industries or pollutants not covered by CSAPR at all, and in Western states—BART has been imposed on a case-by-case basis through SIPs.

During the first Phase of the program, EPA at least partially disapproved the SIPs for many states, including Arizona, Arkansas, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. In most cases, EPA replaced those SIPs with more stringent control requirements under a Federal Implementation Plan (FIP). EPA's disapprovals have led to significant litigation, but EPA prevailed in nearly every case, receiving deference from the federal appellate courts that have jurisdiction over such disputes.

Obama Administration Regional Haze Guidance:

In 2016, EPA released a draft guidance document on "Progress Tracking Metrics, Long-term Strategies, Reasonable Progress Goals and Other Requirements for Regional Haze State Implementation Plans for the Second Implementation period." This document addressed several controversial issues critical to Western states, including: (1) improving the consultation among states and between states and federal land managers; (2) the difficulty of discerning improvement in visibility due to control of anthropogenic sources in areas where highly variable natural sources, such as large fires, can dominate visibility on the haziest of days; and (3) how impacts from sources outside the United States that are beyond the control of states and federal government can be accounted for in a reasonable way. EPA did not finalize this guidance before the second planning period began.

Obama Administration Regional Haze Rule Revisions:

On Jan. 10, 2017, EPA published a rule finalizing revisions to the requirements under the CAA for state plans for protection of visibility in mandatory Class I Federal areas in order to continue steady environmental progress while addressing administrative aspects of the program. 82 Fed. Reg. 3078. The Obama administration's revisions and proposed guidance: (1) expanded federal land manager authority under the program, and (2) minimized the relevance of visibility impacts in making control decisions. The revisions also extended the SIP submittal deadline for the second planning period to 2021. The Utility Air Regulatory Group; the State of Alaska; Southwestern Public Service Company, Entergy Services, Inc., and Cleco Power LLC filed petitions for reconsideration.

On Jan. 17, 2018, former EPA Administrator Pruitt signed letters to counsel for the Utility Air Regulatory Group, the three companies, and the State of Alaska that had petitioned for administrative reconsideration of the 2017 Regional Haze Rule, stating that while it is not at this time acting on the petitions for reconsideration, EPA had "decided to revisit aspects of the 2017 Regional Haze Rule under its inherent rulemaking authority." EPA indicated that it would prepare a notice of proposed rulemaking to address portions of the rule including but not limited to: (1) the Reasonably Attributable Visibility Impairment provisions; (2) the provisions regarding Federal Land Manager consultation; and (3) other elements of the rule the agency may identify for additional consideration. EPA also plans to finalize one or more guidance documents for regional haze SIP revisions due in 2021.

Litigation on Obama Regional Haze Rule Revisions:

On Jan. 23, 2017, the State of Texas filed suit challenging the final regulation, *State of Texas v. EPA*, No. 17-1021 (D.C. Cir.). The State of Texas is claiming that EPA failed to properly address the impacts of international emissions of pollutants on visibility in Class 1 areas in the United States, especially those areas along or near an international border, among other issues. On Sept. 27, 2017, the Court issued an order granting EPA's request for a 90-day stay of the litigation to permit the agency to determine "which of the contested issues it will address through non-litigation proceedings, whether through granting reconsideration and commencing a rulemaking or through guidance." Briefing formats were due on Dec. 21, 2017; however, EPA requested another extension of time. The D.C. Circuit granted this request with a new deadline of Jan. 22, 2018. On Jan. 30, 2018, the D.C. Circuit granted EPA's motion to hold the case in abeyance.

Trump Executive Order:

On Apr. 12, 2018, President Trump signed a Presidential memo, "Promoting Domestic Manufacturing and Job Creation—Policies and Procedures Relating to Implementation of Air Quality Standards," which address the CAA Regional Haze Program. Specifically, the memo directed the EPA Administrator to undertake a process to review all full or partial FIPs issued under the 2007 planning period to develop options, at the request of affected States, to replace FIPs with approvable SIPs.

Trump Administration Regional Haze Reform Roadmap:

On Sept. 11, 2018, Administrator Andrew Wheeler issued a memorandum entitled, "Regional Haze Reform Roadmap." The memorandum describes the Administrator's plans for the regional haze program "to ensure that the agency provides adequate support to states to enable timely and effective implementation of the regional haze program today and in the future." The roadmap for reform details the agency's plans to assist states as they develop their SIPs for the second planning period. EPA acknowledged that some states have already begun to prepare their SIPs for the second planning period and plan to submit those plans to the agency that year. EPA stated it would work with these states to ensure that their plans satisfy the statutory and regulatory requirements. EPA also worked collaboratively with states to replace federal implementation plans from the first planning period with approvable SIPs.

Trump Administration Regional Haze Guidance:

On Dec. 20, 2019, EPA issued a "Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program." This guidance describes EPA's recommended methods on two technical aspects of regional haze SIP development: (1) the visibility tracking metrics; and (2) estimating international anthropogenic impacts and optional adjustment to the uniform rate of progress glidepath.

On Aug. 20, 2019, EPA finalized much-anticipated guidance on the regional haze program, clarifying its expectations for states in preparing the next round of regional haze state implementation plans (SIPs), which are due July 31, 2021. Although the guidance purports to finalize guidance proposed in 2016 under the Obama Administration, the final guidance reverses course from the proposed version on several key issues.

- In deciding which sources to evaluate for new control measures, the proposed guidance encouraged states to re-evaluate BART sources, but the final guidance indicates that a re-evaluation of sources already subject to BART is likely unnecessary.

- In deciding which control measures to impose, the proposed guidance discouraged states from considering visibility benefits, but the final guidance encourages states to balance visibility benefits against other factors in selecting the measures necessary to make "reasonable progress" toward natural visibility conditions.

- In comparing various control options to determine which ones may be "cost-effective," the proposed guidance recommended comparing cost to tons per year of emission reductions, but the final guidance recommends comparing cost to visibility benefits.

On May 8, 2020, the National Parks Conservation Association, Sierra Club, Natural Resources Defense Council, Western Environmental Law Center, Appalachian Mountain Club, Coalition to Protect America's National Parks, and Earthjustice petitioned EPA to administratively reconsider this guidance. They argue, among other things, that the guidance will result in inconsistencies between SIPs, create arbitrary exceptions allowing states to avoid controlling emission sources, impede progress toward the national goal of a restoring natural visibility, and may actually degrade visibility at some Class I areas.

Trump Administration Regional Haze Regulatory Reform:

EPA claimed that it was reevaluating certain components of the agency's January 2017 regional haze rule. When EPA announced this evaluation, the agency committed to addressing the "Reasonably Attributable Visibility Impairment provisions, the provisions regarding Federal Land Manager consultation and possibly other elements of the rule." According to the Regulatory Reform Roadmap, EPA was also exploring other regulatory changes to the regional haze rule to streamline planning efforts. EPA, however, punted this rulemaking to the agency's "long-term" action list and did not initiate a rulemaking.

Notably, however, EPA converted several Obama EPA FIPs into SIPs, accepting state-offered alternatives to stringent, source-specific emissions controls that would otherwise be required under the program's BART mandate (e.g., Texas and Utah). These actions have been challenged in federal appellate courts by various environmental organizations.

Status:

The second Phase of the Regional Haze program began in 2018 and will end in 2028. The main issue for industry in the second Phase will be how EPA interprets the CAA requirement for states to make "reasonable progress" towards pristine visibility at national parks and wilderness areas. SIPs were due by July 31, 2021. **EPA has published 1 final action and received 36 SIPs awaiting EPA action. There are 15 SIPs outstanding**.

Biden Administration Reconsideration:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions. The

Executive Order also revoked the April 2018 presidential memo that provided a framework for working with states to turn FIPs into SIPs.

- ***Guidance***

While the Biden Administration did not target EPA's most recent guidance or committed to any rulemaking proceedings, on July 8, 2021, the agency issued a guidance memorandum to the Regional Air Division Directors that purports to clarify certain key issues regarding Regional Haze SIPs for the second planning period. EPA's guidance memorandum cites the 2019 Trump EPA final guidance and makes no mention of the 2016 Obama EPA draft guidance, confirming that EPA does not plan to retract the 2019 version or officially reinstate the 2016 version. However, the content of the memorandum emphasizes concepts from the 2016 version and will likely increase the pressure on states to identify and impose new control measures, even where visibility at Class I areas is improving well ahead of schedule. It also confirms EPA is likely to be critical of states that rely on a lack of visibility benefits to avoid imposing significant new control measures.

For example, like its prior guidance, EPA admits visibility is relevant in determining which control measures to impose. However, much more like its 2016 draft guidance, and less like its 2019 final guidance, EPA states "a state should not use visibility to summarily dismiss cost-effective potential controls." EPA also indicates that "a state that has identified cost-effective controls for its sources but rejects most (or all) such cost-effective controls across those sources based on visibility benefits is likely to be improperly using visibility as an additional factor." Also, even if modeling shows a control measure will not meaningfully improve visibility, the state should still require that measure if it would eliminate a meaningful portion of the state's total impact, regardless of how small that impact may be.

- ***Findings of Failure to Submit SIPs***

On Apr. 7, 2022, EPA announced "its intent to make findings that certain states have failed to submit regional haze implementation plans for the second planning period . . . by August 31, 2022." EPA advised "[s]tates wishing to avoid inclusion in the Findings of Failure to Submit should submit their second planning period SIPs by August 15, 2022." **On Aug. 30, 2022, EPA published a final action finding that 15 states have failed to submit SIPs for the second planning period. This action establishes a 2-year deadline for EPA to promulgate FIPs**, unless prior to EPA promulgating a FIP the state submits, and EPA approves, a SIP that meets the requirements. States affected by the new findings are: Alabama, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, Pennsylvania, Rhode Island, Vermont, and Virginia. EPA said it "intends to continue to work with states subject to these findings to assist them in developing approvable SIP submittals in a timely manner."

We are also watching whether states that submitted SIP amendments for the first planning period and were approved by the Trump EPA are reopened. So far, EPA has chosen to defend the Utah SIP in *HEAL Utah v. EPA*, No. 21-9509 (10th Circuit). Oral argument in this case is scheduled for Mar. 21, 2023.

- ***Amendments to Requirements for State Plans***

EPA's Fall semi-annual regulatory agenda has a rulemaking on its long-term action list that would address portions of the 2017 Regional Haze Rule, including but not limited to, the Reasonable Attributable Visibility Impairment provisions, the provisions regarding Federal Land

Manager consultation, and any other elements of the rule it may identify for reconsideration. No timeline is provided for this rulemaking.

Litigation:

***State of Texas v. EPA*, No. 17-1021 (D.C. Cir.) (challenging the 2017 Regional Haze Rule)**: On Nov. 25, 2022, EPA filed the latest status report stating it is "appropriate for these cases to remain in abeyance while its administrative proceedings continue." According to EPA, the agency "is still evaluating regulatory revisions consistent with the Regional Haze Reform Roadmap and currently anticipates that the notice-and-comment rulemaking . . . will impact implementation of the regional haze program starting in the third implementation period, i.e., in 2028."

***Notice of Intent to Sue* (Failure to Submit Second Round SIPs):** On Feb. 7, 2022, a coalition of 39 groups, including National Parks Conservation Association, Sierra Club, and Earthjustice, sent a letter to EPA Administrator Michael Regan providing 60-days' notice of their intent to file suit in federal court for EPA's failure to issue "findings of failure to submit" SIPs by Jan. 31, 2022. The **39 states** targeted at that time were: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

***Sierra Club v. EPA*, No. 3:22-cv-02302 (N.D. Cali filed Apr. 13, 2022):** On Apr. 13, 2022, the National Parks Conservation, Sierra Club, Environmental Defense Fund, and Center for Biological Diversity filed a complaint for declaratory and injunctive relief against EPA to compel the agency to make a finding that **34 states** failed to submit SIPs for the second implementation period. At the time of the filing, the states at issue were: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, West Virginia, and Wyoming.

The plaintiffs argued that EPA's announcement unlawfully extended the deadline for states to submit updated regional haze plans from July 31, 2021, to Aug. 31, 2022. They wanted EPA to complete all actions required by 42 U.S.C. §7410(k)(1)(B) within 30 days of judgment. On May 20, 2022, the plaintiffs filed a motion for summary judgment. On June 1, 2022, the chief judge rejected plaintiffs' petition seeking a ruling in their suit before the Aug. 15, 2022, deadline for states to submit their plans to EPA.

SOCIAL COST OF CARBON

PRIORITY B – ADMINISTRATION WIDE

Background:

In June 2013, the Intergovernmental Working Group (IWG) released the revised Technical Support Document (TSD) on Social Cost of Carbon (SCC) recommended for use in Regulatory Impact Analyses. In the revised TSD, the IWG continued to express the SCC as the dollars/ton

of monetized damages associated with an incremental increase in carbon emissions in a given year. The IWG used the same basic methodology that it used in 2010 to estimate the SCC figures. As per the 2010 TSD, the SCC values were estimated using the average results from the same three integrated assessment models at the same discount rates – 2.5%, 3%, and 5% – and a fourth value using the 95th percentile estimate at the 3% discount rate.

The IWG used the same five climate change scenarios utilized in 2010. The new SCC values estimated for 2020 in 2007 dollars were $12, $43, $65, and $129 for the 5%, 3%, 2.5%, and 95th percentile of the 3% discount rates, respectively. By comparison, the SCC values in the 2010 TSD for 2020 were $7, $26, $42, and $81, respectively (all in 2007 dollars). At the key discount rate of 3% (considered the central value), the new SCC Estimate of $43 was approximately 65% higher than the 2010 value. Thus, in a span of five years, the central SCC Estimate changed multiple times and increased 600 percent.

NMA joined with numerous other trade associations in objecting to the use of the revised SCC to underpin regulatory decisions by the federal government. NMA filed comments with numerous other trade associations on Feb. 26, 2014, urging OMB to withdraw the TSD and instruct federal agencies to cease the rulemaking and policymaking uses of the SCC estimates and TSDs for the following reasons: (1) the SCC estimates fail in terms of process and transparency; (2) the models with inputs used were not subject to peer review; (3) the modeling conducted in this effort did not offer a reasonably acceptable range of accuracy for use in policymaking; (4) the IWG failed to disclose and quantify key uncertainties as required by OMB; (5) the IWG severely limited the utility of the SCC for use in cost analysis and policymaking; and (6) the IWG must provide all of the data, models, assumptions and analyses relied on to arrive at the SCC estimates and allow public comment on the supplemented record. NMA also jointly funded a report by Dr. Anne Smith of NERA Economic Consulting on the uncertainties associated with the SCC.

On Aug. 2, 2016, the IWG issued final, non-binding guidance for federal agencies to consider the impacts of their actions on climate change in their NEPA reviews. On Aug. 22, 2016, IWG issued an addendum to the SCC adding methane and nitrous oxides to the metric. The cost of methane was set between $870 per ton in 2010 and $2,500 per ton in 2050 using a 3% discount rate, based on 2007 dollars. Nitrous oxides were priced higher at between $12,000 per ton in 2010 and $27,000 per ton in 2050 using the same discount rate. The addendum also included a lower range using a 5% discount rate and a "high impact" scenario with increased per-ton costs for each.

On Jan. 11, 2017, the National Academy of Sciences (NAS), released a report, "Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide," with a second round of recommendations to "strengthen the scientific basis, provide greater transparency, and improve" discussion of uncertainty surrounding the estimates. The NAS report called for updating the SCC roughly every five years; proposed an "integrated modular approach" to carbon cost modeling to better draw from a wide range of scientific disciplines; and recommended both near and long-term research priorities for filling in gaps in understanding of climate impacts**.**

Trump Administration:

On March 28, 2017, President Trump issued Executive Order 13783, "Promoting Independence and Economic Growth," which, among other things disbanded the IWG on the Social Cost of Greenhouse Gases and withdrew the technical documents developed by the IWG as no longer being representative of governmental policy. The Trump administration valued the SCC at $1

per ton (7 percent discount rate) to $8 (3 percent discount rate), considering only domestic impacts, and using the year 2030.

Separately, the Government Accountability Office (GAO) in 2018 agreed to review the Trump administration's decisions to scale back the use of the SCC tool, responding to requests from several Democratic Senators. In a Dec. 5, 2017, letter, Sen. Sheldon Whitehouse (D-R.I.) and six other Senators requested that the GAO look into the justification the Trump Administration used to support its change from a default discount rate of 3 percent for climate-focused regulations to 7 percent, among other questions. GAO reportedly began its investigation in December 2018. In June 2020, the GAO issued a report: "Social Cost of Carbon: Identifying a Federal Entity to Address the National Academies' Recommendations Could Strengthen Regulatory Analysis."

Status:

Biden Administration Reconsideration:

- ***Executive Order 13990***:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which revoked President Trump's Executive Order 13783, "Promoting Energy Independence and Economic Growth" that disbanded the IWG.

The Executive Order contains a specific section to reintroduce SCC into federal decision-making. According to Executive Order 13990, it is "essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account." To that end, the Administration reestablished the IWG on the Social Cost of Greenhouse Gases that will be co-chaired by the Chair of the Council of Economic Advisors, Director of OMB, and Director of the Office of Science and Technology Policy.

The IWG will also include: the Secretary of the Treasury; the Secretary of the Interior; the Secretary of Agriculture; the Secretary of Commerce; the Secretary of Health and Human Services; the Secretary of Transportation; the Secretary of Energy; the Chair of the Council on Environmental Quality; the Administrator of the Environmental Protection Agency; the Assistant to the President and National Climate Advisor; and the Assistant to the President for Economic Policy and Director of the National Economic Council.

The IWG shall, as appropriate and consistent with applicable law, publish an interim SCC, social cost of nitrous oxide (SCN), and social cost of methane (SCM) by Feb. 19, 2021 (within 30 days of the date of the Executive Order), which agencies shall use when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions until final values are published. Final SCC, SCN, and SCM must be published no later than January 2022. Additionally, the IWG must provide recommendations to the President, no later than Sept. 1, 2021, regarding areas of decision-making, budgeting, and procurement by the Federal Government where the SCC, SCN, and SCM should be applied.

Finally, the IWG must provide recommendations by no later than June 1, 2022, regarding a process for reviewing, and, as appropriate, updating, the SCC, SCN, and SCM to ensure that these costs are based on the best available economics and science; and provide recommendations, to be published with the final SCC, SCN, and SCM if feasible, and in any

event by no later than June 1, 2022, to revise methodologies for calculating the SCC, SCN, and SCM, to the extent that current methodologies do not adequately take account of climate risk, environmental justice, and intergenerational equity.

In carrying out these directives, the IWG must consider the recommendations of the NAS as reported in "Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide" (2017) and other pertinent scientific literature; solicit public comment; engage with the public and stakeholders; seek the advice of ethics experts; and ensure that the SCC, SCN, and SCM reflect the interests of future generations in avoiding threats posed by climate change.

- ***Interim Metrics***:

On Feb. 26, 2021, the White House released in a blog post the new interim social cost of greenhouse gases, including for the SCC, SCM, and SNC. The blog post touts this action as "an important early step in bringing evidence-based principles back into the process of estimating the benefits of reducing climate pollution."

The IWG decided to replace the Trump Administration's metrics with the estimates developed by the Obama Administration, adjusted for inflation. The details are included in a new Technical Support Document and summarized below:

- **SCC**: The central SCC estimate in 2020 is $51 per ton of CO_2 assuming a standard 3 percent discount rate. The estimates also specify a $14 per ton estimate at a 5 percent rate, a $76 per ton estimate at a 2.5 percent discount rate, and $152 per ton using a so-called 95th percentile calculation that is based on worst-case climate damages. In comparison, the Trump administration valued the SCC at $1 per ton (using a 7 percent discount rate) to $8 (using a 3 percent discount rate), considering only domestic impacts.

- **SCM**: The central SCM estimate in 2020 is $1,500 per ton of methane assuming a standard 3 percent discount rate. The estimates also specify a $670 per ton estimate at a 5 percent rate, a $2,000 per ton estimate at a 2.5 percent discount rate, and $3,900 per ton using a so-called 95th percentile calculation that is based on worst-case climate damages. In comparison, the Trump administration valued the SCM at $57 per ton (using a 7 percent discount rate) and $184 per ton (using a 3 percent discount rate), considering only domestic impacts.

- **SCN**: The central SCN estimate in 2020 is $18,000 per ton of nitrous oxide assuming a standard 3 percent discount rate. The estimates also specify a $5,800 per ton estimate at a 5 percent rate, a $27,000 per ton estimate at a 2.5 percent discount rate, and $48,000 per ton using a so-called 95th percentile calculation that is based on worst-case climate damages. In comparison, the Trump administration valued the SCN at $2,820 per ton (using a 3 percent discount rate), considering only domestic impacts.

These new metrics take into account climate impacts abroad and use discount rates (the approach to calculating present-day value of future climate damages) previously established by the IWG. However, the IWG signals in the Technical Support Document that discount rates appropriate for intergenerational analysis are lower than 3 percent. Accordingly, the IWG recommends that agencies consider conducting additional sensitivity analysis using discount rates below 2.5 percent when a rule has important intergenerational benefits or costs. Finally,

the IWG claims certain limitations (updated damage functions and sensitivity analyses) suggest that the range of these metrics likely underestimates societal damages from GHG emissions.

The Office of Management and Budget published a notice of availability that opened public comment on this document through June 21, 2021. The NMA joined a coalition in providing comments that provided constructive recommendations focused on the process for developing these metrics, the appropriate application of these metrics, and key scientific and technical issues underlying the metrics.

Litigation:

***Missouri v. Biden*, No. 4:21-cv-00287 (E.D. Missouri)**. On Mar. 26, 2021, Missouri, Arizona, Arkansas, Indiana, Kansas, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee and Utah filed a lawsuit in the United States District Court for the Eastern District of Missouri Eastern Division, arguing that assigning values like the social cost of greenhouse gases "is a quintessentially legislative action that falls within Congress's exclusive authority under Article I, Section 1 of the Constitution." Accordingly, the states argue that: "The Biden Administration's actions violate the separation of powers by encroaching on the legislative power that is exclusively vested in Congress through Article I, Section 1 of the U.S. Constitution."

They also argue that the SCC, SCM, and SCN violate the Administrative Procedure Act because the IWG "declined to give any weight, or proper weight, to the positive externalities associated with affordable and reliable domestic energy and agricultural production." Additionally, they argue that the IWG "mischaracterized the scientific models on which [the metrics were previously] based, failed to adequately justify its selection of a discount rate, failed to adequately justify its consideration of global effects, and suffered from other similar deficiencies in explanation and methodological problems."

The states ask, among other things, that the court declare Section 5 of Executive Order 13990 and the IWG's interim values unconstitutional and declare that federal agencies cannot use the values where federal statutes require consideration of costs, burdens, benefits, or impacts.

On May 3, 2021, the states filed a motion for preliminary injunction. On June 4, 2021, DOJ filed a motion to dismiss the lawsuit, arguing the states did not have standing, because any possibility of an injury caused by the challenged actions was speculative and any injury would be the result of "future, hypothetical agency actions," not the actions challenged in this case. In addition, the defendants argue that the claims are not ripe, that the states lack a cause of action, and that their claims are meritless. The DOJ also responded to the states' motion for a preliminary injunction, arguing that they failed to show imminent, irreparable harm, that a preliminary injunction would disserve the public interest, and that any relief should be limited to declaring the interim metrics non-binding. Oral argument occurred on Aug. 25, 2021.

On Aug. 31, 2021, Judge Audrey Fleissig dismissed the states' motion as moot and granted the government's motion to dismiss the case. Flessing's decision rested on a standing analysis. On whether there is an "injury in fact," Judge Fleissig found: "T]he injury that Plaintiffs fear is from hypothetical future regulation possibly derived from these [interim estimates]. That injury is not concrete and therefore insufficient for standing." On "causation and redressability," Judge Flessig concluded: "In light of the inherently speculative nature of Plaintiffs' alleged harm, it is unknowable in advance whether that harm caused by possible future regulations would have any causal connection to EO 13990 or the Interim Estimates. The causal chain, supported by a number of bare assumptions, is too weak for standing."

***Louisiana v. Biden*, No. 2:21-cv-01074 (W.D. Louisiana)**. On April 22, 2021, Louisiana led nine states, including Alabama, Florida, Georgia, Kentucky, Mississippi, South Dakota, Texas, West Virginia, and Wyoming, in filing a lawsuit in the United States District Court for the Western District of Louisiana challenging and seeking to vacate and enjoin the interim metrics. The states argue, among other things, that the IWG published the interim metrics without complying with the Administrative Procedures Act notice-and-comment rulemaking requirements, the interim metrics are arbitrary and capricious, and the interim metrics are contrary to law by "directing agencies to consider factors Congress did not authorize them to consider and causing delays in mandatory energy development on public lands and waters."

On June 28, 2021, the DOJ filed a motion to dismiss the lawsuit. Similar to the case above, the DOJ argues court lacks jurisdiction to hear the claim and that all of the challengers' "alleged injuries are (1) speculative; (2) caused by future hypothetical agency regulations (rather than the Executive Order or the Interim Estimates); and (3) are not likely to be redressed by a victory here." DOJ adds that if the plaintiffs "do face an actual or imminent injury from an agency action taken in reliance on the Executive Order, Plaintiffs can challenge that action . . . at that time." In response, the states on July 27, 2021, filed a motion for preliminary injunction. DOJ filed an opposition brief on Sept. 1, 2021. The states filed their reply brief on Sept. 10, 2021. A hearing was held Dec. 7, 2021.

On Dec. 9, 2021, the judge ordered the parties to file supplemental memoranda by Jan. 21, 2022, to include: (1) "evidence of agency use of the interim estimates as well as specific evidence of the interim estimates actually being utilized;" (2) the proposed date the final metrics will be finalized; and (3) the President's authority to issue Executive Order 13990 including the major questions doctrine. In the government's brief. the administration indicated it was "working to prepare revised social-cost estimates" following their consideration of public comments, as well as working to publish its proposed final estimates within the next two months. The administration also commits to providing a second round of public comment on the proposed final estimates and subject these estimates to a scientific peer-review process. The administration predicts publishing final estimates likely during the summer of 2022, which is a delay from the Executive Order 13990 deadline to issue final metrics in January 2022.

Status:

Final Metrics:

On Jan. 25, 2022, EPA announced a new independent external scientific review of the "Technical Support Document: Social Cost of Greenhouse Gas Estimates" (TSD). At that time, EPA sought nominations of scientific experts for the upcoming peer review of the TSD. The peer review process was to be managed by a contractor to EPA. **Public nominations of experts were due on Feb. 15, 2022.** According to EPA's notice, a TSD with updated SC-GHG estimates was being developed and would be released for public comment and undergo peer review. A revised TSD was never released to the public.

On Nov. 11, EPA released a supplemental proposal to reduce methane and other harmful pollution from oil and natural gas operations. EPA also released a supplementary document for its regulatory impact analysis for the rule – an "EPA External Review Draft of Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Scientific Advances." **In this document, EPA recommends setting the SCC ranging from $120 to $340 per ton in 2020, to between $280 and $600 per ton in 2080**. The lower value is based on a 2.5 percent discount rate and the higher based on a 1.5 percent discount rate. **Compare to the interim**

metrics based on a 3 percent discount rate resulting in a SCC estimate in 2020 at $51 per ton for CO_2.

Despite releasing these updated metrics, EPA continues to rely on the "interim" SCC values adopted last year. Significantly, however, EPA's report presents new estimates of the SC-GHGs outside of the IWG process. In the report, EPA acknowledges that it "is participating in the IWG's work under E.O. 13990" and that "while that process continues, this report presents a set of SC-GHG estimates that incorporates numerous methodological updates addressing the near-term recommendations of the National Academies."

On Nov. 11, 2022, EPA also announced it was accepting public comments on the candidates for consideration for the independent, expert peer review panel, which was originally created to review an updated TSD. EPA has co-opted that panel and charged it with conducting a review of EPA's new document instead. Comments were due on Dec. 1, 2022. The NMA joined a coalition letter lead by the U.S. Chamber of Commerce urging EPA to select panel members to ensure sufficient breadth of expertise, as well as provide a process of commenting on the panel's charge questions. On Feb. 13, 2023, the EPA announced the seven independent experts chosen to peer review its draft document. More on this peer review here. EPA has not scheduled the peer review meeting.

The NMA is working with the coalition to further probe procedural flaws given EPA has acted outside of the IWG process for updating the SC-GHG metrics and there has been no word from the IWG on its next steps.

Litigation:

***Missouri v. Biden*, No. 4:21-cv-00287**. Missouri (and its coalition of states) appealed this decision to the **Eighth Circuit. (Case No. 21-3013)**. On Dec. 3, 2021, the states filed their opening brief, arguing that the court erred in holding that they lacked standing and that the case is not ripe for review. The states also asked for a preliminary injunction, asserting that President Biden and the IWG violated the separation of powers and ignored notice-and-comment obligations under the APA. The government filed its response brief on Feb. 15, 2022. The states' filed their reply brief on Mar. 16, 2022. Oral argument occurred on June 16, 2022.

On Oct. 21, 2022, the Eighth Circuit rejected the states appeal, concluding that the states failed to show standing. According to the court, "the States are requesting a federal court to grant injunctive relief that directs 'the current administration to comply with prior administrations' policies on regulatory analysis [without] a specific agency action to review,' a request that is 'outside the authority of the federal courts' under Article III of the Constitution.

On Dec. 5, 2022, the states filed a petition for rehearing en banc arguing: (1) the decision is inconsistent with *Iowa League of Cities* because the states have a right to comment on rules to avoid regulatory obligations; (2) the panel decision raises exceptionally important questions as to allowing the executive to exercise legislative rulemaking power without complying with the APA. **On Jan. 27, 2023, the full Eighth Circuit denied the states' request**.

***Louisiana v. Biden*, No. 2:21-cv-01074**. On Feb. 11, 2022, Judge James Cain issued a preliminary injunction that prevents federal agencies from using the Biden administration's revised interim SC-GHG metrics. Judge Cain found in part that President Joe Biden lacked authority to order the use of these metrics under the "major questions" doctrine, which states that an agency only has the authority to decide a major national policy if Congress clearly and

unambiguously delegated such authority. Judge Cain's memorandum ruling is available here. Judge Cain's order is available here.

Notably, the preliminary injunction enjoined federal agencies and the Intergovernmental Working Group (IWG) on SC-GHGs from: (1) relying on the underlying methodology's treatment of global effects, discount rates, and time horizons and ordering a return to the Circular A-4 guidance in conducting regulatory analysis; (2) using any SC-GHG interim metrics based on global effects or that otherwise fail to comply with applicable law; (3) using any SC-GHG interim metrics that do not utilize discount rates of three and seven percent or that otherwise do not comply with Circular A-4; and (4) relying on or implementing Section 5 of Executive Order 13990, which directed the IWG's mission and work for updating the interim metrics and determining additional applications within federal decision making such as budgeting and procurement. The preliminary injunction went into effect immediately and will stay in place unless overturned on appeal or until final disposition of this case.

On Feb. 19, 2022, the government filed a motion for stay pending appeal, requesting that the court rule on the motion no later than Feb. 28, 2022. The government argued that the consequences of the injunction are dramatic, delaying pending rulemakings and stopping environmental analyses under mandatory deadlines. On Mar. 1, 2022, the government filed an emergency motion for stay pending appeal with the Fifth Circuit, requesting a decision by Mar. 15, 2022. On Mar. 9, 2022, Judge Cain denied the motion.

On Mar. 16, 2022, the Firth Circuit granted the government's request for a stay pending appeal. On Mar. 30, 2022, the states filed a petition for rehearing en banc. On Apr. 14, 2022, the Fifth Circuit denied the states petition for rehearing.

On May 3, 2022, the government filed a brief with the Fifth Circuit requesting oral argument in this case. ***Louisiana v. Biden*, 5th Cir. (No. 22-30087)**. The government argued: "The district court's order should be vacated and the complaint dismissed for lack of jurisdiction; at minimum, the order should be narrowed to an injunction against the mandatory use of the Interim Estimates." On May 10, 2022, New York led an amicus brief – joined by Colorado, Delaware, Illinois, Maryland, Michigan, New Jersey, Oregon, Vermont, Washington, Wisconsin, and Massachusetts – supporting the government. Specifically, the states argue that the SC-GHGs has not been used to disapprove SIPs or impose FIPs under the CAA's Good Neighbor Provision. Judge Cain partly based his order blocking the use of the interim metrics on the 2021 Good Neighbor Rule. The states filed its brief on June 16, 2022, arguing that the preliminary injunction was lawful. The government filed its reply brief on July 18, 2022. **Oral argument happened on Dec. 7, 2022.**

Supreme Court Emergency Filing: On Apr. 28, 2022, Louisiana led an emergency application – supported by Alabama, Florida, Georgia, Kentucky, Mississippi, South Dakota, Texas, West Virginia, and Wyoming – asking the Supreme Court to reverse the Fifth Circuit's decision to stay the preliminary injunction. The states argued that the case raises questions surpassing national importance that warrant review and judgment in favor of states and the stay order imposes irreparable harm on the states. On May 2, 2022, ten Republican states - Missouri, Arizona, Arkansas, Indiana, Kansas, Montana, Nebraska, Oklahoma, South Carolina, and Utah – filed a motion for leave to file an amicus brief in support of Louisiana. On May 9, 2022, Solicitor General Elizabeth Prelogar filed a response calling on the Supreme Court to reject the emergency application arguing that it "threatens irreparable harm across the executive branch." On May 20, 2022, the states filed a response. On May 26, 2022, the Supreme Court denied the states' request to hear the case for reinstating the preliminary injunction that temporarily blocked

the Biden administration's use of the interim SC-GHG metrics. The order did not provide any details about the merits of the states' arguments. The case will continue to be heard on the merits in the 5th Circuit.

Legislation:

On June 21, 2022, Sen. James Lankford (R-Okla.), Senate Environment and Public Works ranking member Shelley Moore Capito (R-W.Va.) and 11 other Republican Senators introduced the "Transparency and Honesty in Energy Regulations Act" (S. 4596) to prevent agencies from considering the SC-GHGs as they write regulations or guidance. Rep. Richard Hudson (R-N.C.) is leading a companion bill (H.R. 8499) in the House.

We are monitoring activity in the 118th Congress.

SIP CALL – STARTUP, SHUTDOWN & MALFUNCTION (SSM)

PRIORITY C – EPA

Background:

On Feb. 22, 2013, EPA published a proposed rule in response to a 2011 petition by the Sierra Club, which claimed that 38 states and the District of Columbia violated the CAA by providing exemptions or affirmative defenses in their State Implementation Plans (SIPs) for excess emissions during SSM periods. Most states had these provisions in their SIPs for over 30 years. The Sierra Club asked EPA to undertake a rulemaking to eliminate the state SSM rules, or, at a minimum, require states to revise the rules to conform to EPA's current interpretation of the CAA. EPA proposed to deny the request for a prohibition on affirmative defenses for SSM periods in SIPs but proposed to grant the petition for 36 states with SSM exemptions. Relying in part on a 2008 decision by the D.C. Circuit in a case holding that limitations adopted under Section 112 of the CAA must apply on a "continuous" basis, EPA proposed to find that these state SIPs were inconsistent with the CAA and issue a "SIP call" requiring states to eliminate their SSM exemptions.

NMA filed comments on the proposed rule, stressing that EPA's action: (1) would have significant impacts for numerous sources and the named states; (2) would mark a significant re-interpretation of longstanding policy; (3) failed to recognize the significant difficulties in running pollution equipment during SSM periods; (4) improperly differentiated startup and shutdown periods that result from malfunctions periods; and (5) failed to recognize that other emissions limits – including work practice standards, clean fuels and good combustion practices – could be appropriate to apply during startup and shutdown periods should EPA move forward with the proposed SIP call.

Separately, on April 18, 2014, the D.C. Circuit issued a decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir 2014), striking down the affirmative defense provision in EPA's National Emissions Standards for Hazardous Air Pollutants (NESHAP) for manufacturers of Portland cement, issued under Section 112 of the CAA, finding that the affirmative defense provisions in EPA's regulations cannot be applicable to violations of Section 112 standards. EPA extended the Court's logic to SIP provisions and revised its SSM policy on approvability of affirmative

defense provisions in SIPs. EPA then issued a supplemental SSM proposal in September 2014, revising its earlier proposal with respect to affirmative defenses.

EPA issued its final rule on June 12, 2015. 80 Fed. Reg. 33,840. EPA found that 36 states, several local jurisdictions, and the District of Columbia (45 jurisdictions total) had regulations in their SIPs that impermissibly allowed exemptions or affirmative defenses for excess emissions during SSM periods, and that states do not have the discretion to determine whether such excess emissions are CAA violations or not. With respect to startup and shutdown provisions, EPA did note that different emissions limitations, such as work practices, could apply to different modes of operation. It recommended states consider specified criteria in revising their SIPs on the SSM issue. Affected states had until Nov. 22, 2016, to respond to the SIP call. Several states, including Texas, West Virginia, and Colorado, are seeking alternatives to numeric emissions limits during SSM. Until a state revises its regulations and EPA takes action to approve those revisions into the state's SIP, the existing SIP provisions remain in effect. Should states fail to issue valid SIPs in accordance with EPA guidance, they will be subject to a Federal Implementation Plan.

A group of 18 states and a large number of utilities and industry groups challenged the rule in various circuits, and environmental advocacy groups intervened. All challenges were consolidated by the D.C. Circuit as *Southeastern Legal Foundation, Inc. and Walter Coke, Inc. v. EPA*, No. 15-1166 (D.C. Cir.). The Court set out a briefing schedule, allowing separate briefs by state petitioners, industry petitioners, and Texas. Briefing was completed in Oct. 2016 and oral argument was scheduled for May 8, 2017.

Trump Administration:

On April 18, 2017, EPA filed a motion to continue oral argument to allow "the new Administration adequate time to review the [2015 final rule] to determine whether it will be reconsidered." EPA also referred to the administrative petition filed by the Texas Commission on Environmental Quality on March 15, 2017, requesting that EPA reconsider the final rule. On April 24, 2017, the Court issued an order removing the case from the oral argument calendar, holding the matter in abeyance and directing EPA to file status reports every 90-days. Subsequently, Walter Coke filed an unopposed motion to voluntary dismiss its portion of the consolidated case. The D.C. Circuit granted this motion and consolidated the remaining cases under *Environmental Committee of the Florida Electric Power Coordinating Group, Inc. v. EPA*, No. 15-1239.

Instead of attempting to reverse the entire SSM SIP Call in a single nationwide action, EPA decided to allow the EPA regional offices to reconsider the SIP Call on a state-by-state basis to account for the unique circumstance associated with each state's rules and air quality status. EPA Region 6 acted first by withdrawing the Texas SIP Call based on a determination that 5th Circuit precedent confirms that affirmative defenses are not prohibited under Section 110 of the CAA. 85 Fed. Reg. 7232. EPA Region 4 followed by withdrawing the North Carolina SIP Call based on a determination that the state's SIP as a whole was protective of the NAAQS, notwithstanding the SSM exemption it contains, in light of the fact that the state does not have any nonattainment areas. 85 Fed. Reg. 23,700. In addition, EPA Region 7 finalized the withdraw of the SIP Call for Iowa on grounds similar to those expressed by EPA Region 4. 85 Fed. Reg. 73,218 (Nov. 17, 2020). In each of these individual actions, EPA recognized that the individual state actions were inconsistent with the nationwide policy set forth in the 2015 SSM SIP Call.

EPA had expected to defend these individual state withdrawal actions in the local circuits—*e.g.*, the 5th Circuit for Texas, 4th Circuit for North Carolina, and 8th Circuit for Iowa—instead of in the D.C. Circuit where the litigation over the entire SIP Call remains held in abeyance. However, challengers to the Texas, North Carolina, and Iowa actions petitioned the D.C. Circuit for review of those actions instead of the local circuits, complaining that EPA's actions actually reflect a change in nationwide policy, despite the state-specific focus of each individual action. In an unusual order, the D.C. Circuit agreed to allow briefing on the state-specific cases to proceed but then hold those cases in abeyance until oral argument can be heard on both the state-specific cases and the entire 2015 SSM SIP Call at the same time. *See Environmental Committee of the Florida Electric Power Coordinating Group, Inc. v. EPA*, No. 15-1239 (2015 SSM SIP Call) (order filed July 16, 2020); *Sierra Club v. EPA*, No. 20-1115 (D.C. Cir. filed Apr. 7, 2020) (Texas withdrawal); *Sierra Club v. EPA*, No. 20-1229 (D.C. Cir. filed June 29, 2020) (North Carolina withdrawal); *Sierra Club v. EPA*, No. 21-1022 (D.C. Cir. filed Jan. 15, 2021) (Iowa withdrawal).

Trump Administration Guidance:

Subsequent to the D.C. Circuit's decision to simultaneously consider the legality of the SIP Call and the individual state withdrawal actions, EPA issued new guidance on Oct. 9, 2020, announcing a change in its nationwide SSM policy. The new guidance mirrors the underlying justification of the actions to withdraw the SIP Call as to Texas, North Carolina, and Iowa, by asserting that the CAA does not prohibit states from adopting exemptions and affirmative defenses to emission limitations that comprise a state's Section 110 SIP. In particular, EPA rejected its own prior attempts to rely on D.C. Circuit precedent addressing Section 112 of the CAA, namely *Sierra Club v. EPA* in 2008 and *NRDC v. EPA* in 2012. EPA contrasted the highly prescriptive and federal nature of Section 112 with the highly flexible and state-focused provisions of Section 110 in asserting that exemptions and affirmative defenses are allowed in Section 110 SIPs even if prohibited from Section 112 standards. EPA makes clear that the guidance itself is not a final action and therefore immune to legal challenges but recognizes that the policies underlying it may be challenged once the guidance forms the basis for future actions taken to reconsider the SSM SIP Call. In the guidance, EPA promised to resolve all outstanding issues for all other states subject to the SIP Call no later than December 31, 2023.

Status:

Biden Administration Reconsideration:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions. The Biden transition team included the October 2020 guidance on its initial list of environmental policy actions for review.

On Sept. 30, 2021, EPA Deputy Administrator Janet McCabe sent a memorandum to the Regional Administrators providing notice that she withdrew the Oct. 9, 2020, guidance memorandum issued in the Trump administration. She rejected the reasoning advanced in the 2020 memorandum, asserting that the 2020 analysis did not adequately address CAA requirements other than NAAQS attainment and maintenance under Section 110, such as the requirement that all emission limitations apply on a "continuous" basis. She concluded that the 2020 memorandum does not meaningfully apply relevant D.C. case law in determining the

permissibility of SSM exemptions. She also emphasized that returning to the 2015 policy will "ensure all communities and populations across the affected states, including minority, low-income and indigenous populations overburdened by pollution, receive the full health and environmental protections provided by the CAA."

Along with withdrawing this memorandum, McCabe reinstated the 2015 policy that "SSM exemption provisions (e.g., automatic exemptions, discretionary exemptions, and overly broad enforcement discretion provisions) and affirmative defense SIP provisions will generally be viewed as inconsistent with CAA requirements." EPA also committed to revisiting the agency's prior withdrawal of SIP Calls for Texas, North Carolina, and Iowa, and committed to implementing pending SIP Calls that remain in place. Additionally, EPA will no longer be modifying or withdrawing SIP Calls by the end of 2023. All outstanding SIP Calls will remain in effect and EPA will now rely on the 2015 policy when it responds to SIP submissions already received and in deciding how to address states that failed to make a submission.

On Jan. 12, 2022, EPA published a final action to find that 12 States and local air pollution control agencies failed to submit SIP revisions in a timely manner to address EPA's 2015 findings of substantial inadequacy and ''SIP calls'' for provisions applying to excess emissions during periods of SSM. Areas impacted include: Alabama, Arkansas, California -- San Joaquin Valley Air Pollution Control District, District of Columbia, Illinois, Ohio, North Carolina -- Forsyth County, Rhode Island, South Dakota, Tennessee -- Shelby County, Washington -- Energy Facility Site Evaluation Council, and Washington -- Southwest Clean Air Agency. According to a presentation given to the Association of Air Pollution Control Agencies on Sept. 28, 2022, EPA said it is continuing to review and act on the approximately 15 pending SIP Call response submittals and other SSM-related submittals

SSM SIP Call Withdrawals for Texas, North Carolina, and Iowa: On Jan. 25, 2023, EPA sent to OMB for interagency rule a proposed rule, "State Implementation Plans: Restatement of SSM Policy; Findings of Inadequacy; and Amendment Provisions Applying to Excess Emissions During SSM Periods." OMB completed its review on Feb. 13, 2023. On Feb. 24, 2023, EPA published the proposed rule to reinstate its findings of substantial inadequacy and associated "SIP Calls" that were previously withdrawn for Texas, North Carolina, and Iowa for SSM provisions that do not comply with statutory requirements and EPA's SSM Policy. **Comments are due on Apr. 25, 2023**. EPA plans to issue a final rule in March 2024.

SSM SIP Call on New States: In EPA's proposed rule on Texas, North Carolina, and Iowa, also included a proposal to issue new findings of substantial inadequacy and SIP calls to the state of Connecticut; the state of Maine; Shelby County, Tennessee; the state of North Carolina; Buncombe County, NC; Mecklenburg County, NC; the state of Wisconsin; and the state of Louisiana, for additional SSM provisions identified as deficient by the agency. **Comments are due on Apr. 25, 2023.**

Petition on CAA Section 111 & SSM Exemptions: On Sept. 13, 2022, a coalition of 17 environmental organizations lead by Earthjustice, filed a petition with EPA requesting the agency remove SSM exemptions from CAA Section 111 NSPS implementing rules. The petitioners accuse EPA of unlawfully carving out blanket exemptions from standards of performance during SSM events. They claim that at least 23 CAA Section 111 subparts contain unlawful loopholes, and that elimination of these provisions is necessary. They argue that "SSM exemptions fail to meet the plain text requirement of the Act for continuous application of

emissions standards." They requested EPA initiate a single rulemaking to eliminate all SSM exemptions from the NSPS.

Litigation:

***2015 SSM SIP* Call, No.15-1239 (D.C. Cir.)**: The litigation over the 2015 SSM SIP Call remains in abeyance. However, EPA on Oct. 4, 2021, filed its most recent status report, stating that in light of the 2021 McCabe memorandum announcing the agency's current guidance on the permissibility of SSM provisions in SIPs, "EPA intends to confer with the parties and anticipates filing motions to govern further proceedings in this and related cases within 30 days." Accordingly, the litigation over the SSM SIP Call may reactivate soon. On Nov. 3, 2021, EPA filed a stipulated motion to lift the abeyance and schedule oral argument in this case as expeditiously as practicable following supplemental briefing to address any new changed circumstances and authorities. EPA proposes supplemental briefs would be due by state and industry petitioners by Jan. 3, 2022. On Dec. 17, 2021, the court issued an order removing this case from abeyance. Supplemental briefing ends Feb. 9, 2022. Oral argument was held on Mar. 25, 2022. Notably, the D.C. Circuit will likely rule on the lawfulness of the SIP Call before EPA issues final decisions approving or denying the SSM provisions in the SIPs of many states (as required in the consent decree discussed below).

***Sierra Club v. EPA*, N.D. Cali, 4:21-cv-06956 (failure to implement 2015 SIP Call)**: Separately, on May 10, 2021, the Sierra Club, EIP, and NRDC filed a notice of intent to sue the agency for failure to implement the 2015 SSM SIP Call, even though they joined a motion to hold in abeyance the D.C. Circuit litigation over that rule. In essence, they are asking the California court to force EPA to implement the rule before the D.C. Circuit can decide whether it is legal. On Sept. 8, 2021, the Sierra Club, EIP, and NRDC filed a "deadline suit" seeking to compel the agency to act, arguing that EPA should have issued findings of "failure to submit" for 12 states and air districts and failed to approve or disapprove SIPs from another 29 states and air districts. They asked the court to issue an injunction requiring EPA to perform these duties by certain dates. EPA's answer to this complaint was due on Nov. 8, 2021. However, the parties entered into settlement discussions and asked the court for a 60-day extension of the litigation proceedings, changing the response time to Jan. 7, 2022. On Dec. 21, 2021, the parties asked the court for another 60 days because they are still in settlement discussions.

On Apr. 12, 2022, EPA published a proposed consent decree that sets deadlines to make decisions on certain SIPs. Comments on the consent decree were due May 11, 2022. EPA agreed to sign a final rule within 240 days approving or disapproving SIPs from California, Georgia, Indiana, Michigan, Minnesota and West Virginia. Within 360 days, EPA commits to sign a final rule approving or denying SIPs from Florida, Kansas, Kentucky, Maine, Missouri, New Mexico, North Dakota, South Carolina, Tennessee and Virginia. The plan also includes various deadlines for specific state SIPs, ranging from 180 days to 480 days, for EPA to approve or deny plans from states including Colorado, Delaware, Louisiana, Oklahoma, Mississippi, New Jersey and Washington. For Colorado, the deal sets a specific deadline of May 31, 2023. The final consent decree outlining these deadlines was entered with the court on June 27, 2022.

Note: On May 5, 2022, EPA published a notice in the *Federal Register* proposing to approve SIP modifications from Indiana, Michigan, and Minnesota that remove SSM exemptions. Comments were due on June 6, 2022.

SSM SIP Call Withdrawals for Texas, North Carolina, and Iowa (Nos. 20-1115, 20-1229, 21-1022): On Feb. 3, 2021, EPA filed a motion requesting that the cases challenging the withdrawal of that SIP Call as to Texas, North Carolina, and Iowa also be placed in abeyance to allow the agency to review these actions consistent with Executive Order 13990. Prior to this motion, briefing on those state-specific cases was to be completed first and then held in abeyance until EPA fully completed its reconsideration of the entire SSM SIP Call. Now, all cases are held in abeyance pending the agency's reconsideration. EPA requested that status reports be due starting Apr. 5, 2021, and filed every 90 days thereafter. On Oct. 4, 2021, EPA alerted the court to the 2021 McCabe memorandum, the agency's plans to reconsider the withdrawal actions, and that the agency "intends to confer with the parties and anticipates filing motion to govern further proceedings in this and related cases within 30 days." On Nov. 3, 2021, EPA filed a motion for voluntary remand without vacatur of the three state-specific withdrawal actions. EPA intends to undertake notice-and-comment proceedings to reconsider the three withdrawal actions. On Dec. 17, 2021, the court issued an order granting this motion for voluntary remand without vacatur.

EXCEPTIONAL EVENTS

PRIORITY C – EPA

Background:

For almost a decade**,** EPA failed to meaningfully implement a working system to flag exceptional events from NAAQS attainment demonstrations despite indications from EPA headquarters that EPA was willing to acknowledge exceptional events with anthropogenic components including mining (*See* 2006 PM_{10} NAAQS *Federal Register* Preamble). Regional offices were not implementing the standard in a manner consistent with EPA Headquarters' position when reviewing exceptional event flags entered by states. EPA's inaction on state flagged data resulted in lingering nonattainment areas that impacted mining operations.

In June 2013, EPA released interim guidance on the "Preparation of Exceptional Events Demonstrations for Wildfire Events that May Influence Ozone Concentrations." At that time, EPA signaled that it may be moving toward a "weight of the evidence" test, and that it was considering default wind speed of 25 mph among other implementation issues.

These approaches had the potential to significantly impact mining, processing and related operations, particularly in the western United States. Unaddressed events/unsuccessful demonstrations could lead to nonattainment designations. The guidance on how to exempt exceptional events (e.g., dust storms, wildfires) from counting toward states' compliance with federal standards failed to address the burdensome process and raised the potential for mine sites to be subject to adverse compliance determinations. Separately, EPA incorporated this issue in the ozone NAAQS rulemaking.

2016 Exceptional Events Rule:

On Nov. 20, 2015, EPA proposed a rule, "Treatment of Data Influenced by Exceptional Events." 80 Fed. Reg. 72,840. NMA participated in the development of the NAAQS Implementation Coalition comments, as well as filed comments that focused on specific mining industry issues most relevant to NMA members. NMA's comments were generally supportive of the purpose and intent of the proposed rule to make the submission and consideration of exceptional event

demonstrations more efficient. However, the comments highlighted areas where EPA had not utilized its full authority under the CAA, thus limiting the agency's ability to exclude certain data "from regulatory decisions so as not to drive SIPs to include unreasonable or additional measures[.]" NMA's comments discussed, at length, EPA's inappropriate treatment of international transport of pollutants and the proposed rule's limitations on the consideration of this in compliance determinations.

On Oct. 3, 2016, EPA issued the final rule (81 Fed. Reg. 68,216) and announced the availability of the final version of the guidance document, "Guidance on the Preparation of Exceptional Events Demonstrations for Wildfire Events that May Influence Ozone Concentrations," which explains how to apply the rule revisions to wildfire events that could influence monitored ozone concentrations. While the final rule addressed some of the concerns advanced by industry, it failed to adequately consider international transport of pollutants.

Litigation:

2016 Exceptional Events Rule: On Nov. 28, 2016, the Arizona Attorney General's office on behalf of state petitioners sent a letter to the D.C. Circuit in the *Murray Energy Corporation v. EPA* case on the 2015 ozone NAAQS, rejecting the agency's claim that this final rule improves the petition process for the purposes of that lawsuit. On Dec. 2, 2016, the Natural Resources Defense Council and Sierra Club filed a lawsuit in the D.C. Circuit challenging the final rule, claiming that EPA acted arbitrarily by expanding the definition of "exceptional event" to include "natural events" that encompass human activity in violation of the CAA. *See Natural Resources Defense Council v. EPA*, No. 16-1413 (D.C. Cir.) Briefing in *Natural Resources Defense Council v. EPA* concluded in November 2017. Oral argument was held on March 22, 2018.

On July 20, 2018, the D.C. Circuit issued an opinion in *Natural Resources Defense Council v. EPA,* No. 16-1413 (D.C. Cir. July 20, 2018). Petitioners objected to EPA's definition of a "natural event" and argued that "an event caused by human activity cannot be a natural event." EPA responded that "there is not always a bright line" between a naturally occurring and anthropogenic event. In reviewing EPA's definition of "natural event," the D.C. Circuit relied on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if it is determined that a statue is silent or ambiguous on a particular issue, then the court will rely on the respective agency's "reasonable interpretation" of the statute. The D.C. Circuit determined that the language used in the statute was ambiguous with regards to its treatment of "natural event" and that EPA's definition of the term as applied in the 2016 Exceptional Events Rule should be upheld. The Court denied the advocacy groups petition for review but stated that "[i]f EPA applies the rule in a way that the Act would not permit, an injured party can petition us to review the agency's action at that time."

Arizona Lawsuit on EPA Granting Exceptional Events Waiver: On July 28, 2021, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) supported EPA's policy granting a state's retroactive regulatory waivers for exceptional events due to major wildfires in southeast California that impacted six air quality monitors 300 miles east in Phoenix, Arizona. *Sandra L. Bahr; Jeanne Lunn; David Matusow v. Regan*, No. 20-70092. If not for those six exceedances, Arizona would have been able to demonstrate it had retained the ozone NAAQS. Arizona submitted three sets of statistical demonstrations to the agency. Arizona submitted its initial demonstration while the 2007 rule was in effect but submitted its two supplemental demonstrations while the 2016 rule was in effect. EPA decided to apply the requirements of the 2016 rule in excluding the six exceedances from its NAAQS calculations. Petitioners argued that EPA violated the presumption against retroactivity when it applied the 2016 version of the

Exceptional Events Rule because the wildfires and exceedances occurred in 2015. The Ninth Circuit disagreed. Petitioners also claimed that Arizona's evidence did not support the agency's finding that a clear causal connection existed between the wildfire and the exceedances. The Ninth Circuit deferred to EPA's technical conclusions and found that Arizona adduced evidence sufficient to allow the agency to make such a finding.

Status:

EPA had indicated that it planned to issue updated guidance on regulatory exemptions for exceptional events in Fiscal Year 2018. The Trump Administration did not do so. In a 2022 presentation, EPA stated that the agency had concurred on 114 state demonstrations that were submitted since the 2016 Exceptional Events rule. In August 2020, EPA deployed an Exceptional Events Submission and Tracking System. EPA's webpage provides additional resources, including example demonstrations for Ozone and PM. EPA's Fall semi-annual regulatory agenda does not address this matter.

CASAC in its review of the PM NAAQS recently called into question exceptional events for wildfires in its final review of the draft Policy Assessment. CASAC continues to express concerns with wildfires, stating that "wildland and wildland-urban interface (WUI) fires are no longer exceptional, and it is not always accurate to call them natural events." CASAC recommends that EPA "consider the implications of the exceptional events approach when applied to wildfires, particularly with respect to the [PM NAAQS] risk assessment."

On May 12, 2022, EPA notified 15 additional areas in California, Nevada, New Mexico and Wyoming that they have two years to submit mitigation plans to reduce the impacts of the growing incidence of fires. Generally, "areas subject to the mitigation requirements have experienced three events or three seasons of events of the same type and pollutant in a 3-year period." The 2016 exceptional events rule did not establish a process for adding new areas to the original list of 29 that must submit plans, and the new notice now establishes this process. If an air agency has not submitted the required mitigation plan within two years: "EPA will not concur with an air agency's request to exclude data that have been influenced by an event of the type that is the subject of a required mitigation plan. An air agency may submit a mitigation plan in advance of, or as part of, an exceptional events demonstration submission of the same event type and pollutant as the focus of the mitigation plan."

UNDERGROUND COAL MINES: TITLE V PERMITTING

PRIORITY C – EPA

Background:

In 2010, EPA finalized a rule requiring underground coal mines to report GHG emissions, including methane emitted from ventilation and degasification wells or shafts, as well as carbon dioxide (CO_2) generated from the combustion of any captured methane. 75 Fed. Reg. 39,736, 39741 (July 12, 2010). The reporting rule, codified under 40 CFR Part 98 Subpart FF, originally applied to all mines required to perform quarterly testing under rules established by the Mine Safety Health Administration (MSHA). 75 Fed. Reg. at 39743. EPA originally estimated that approach would cover only 128 of the estimated 612 underground mines active at that time, but learned later that it would require all mines to report. 76 Fed. Reg. 47392, 47400 (Aug. 4, 2011).

To better reflect its original intent of only requiring the "gassiest" mines to report, the rule was subsequently revised to require reporting by mines with ventilation emissions of 36,500,000 actual cubic feet of methane or more per year (100,000 cubic feet of methane per day), which removed reporting requirements for approximately 500 mines. 76 Fed. Reg. 73,886, 73,892 (Nov. 29, 2011). To convert methane emissions into CO_2-equivalent (CO_2e), the current version of the rule applies a multiplier of 25. 40 CFR Part 98, Subpart A, Table A-1.

The GHG reporting program increased the profile of ventilation and degasification emissions from underground coal mines. In doing so, it also raised the question of whether those emissions would render underground coal mines subject to permitting requirements under the Title V operating permit and Prevention of Significant Deterioration (PSD) construction permit programs. Those permitting programs apply to "major sources" that have the potential to emit more than certain thresholds—100 tons per year (tpy) for Title V, and 250 tpy for PSD. If those programs apply to underground coal mines, they will significantly increase the regulatory burden borne by the coal mining industry. However, in determining "major source" status, mines are allowed to exclude emissions that are "fugitive"—*i.e.*, emissions which "could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening." *See, e.g.*, 40 CFR 70.2; 40 CFR 52.21(b)(1)(c)(iii) & (b)(20). Notably, the GHG reporting rule does not appear to clearly state whether the emissions that mines must report are fugitive or non-fugitive.

At essentially the same time EPA adopted its GHG reporting requirements, EPA also issued its GHG "Tailoring Rule" for Title V and PSD. Recognizing that a "major source" threshold of just 250 tpy of GHG would render more than 6 million sources subject to Title V and PSD that EPA never intended to regulate, EPA's Tailoring Rule sought to raise the "major source" threshold for GHGs to 100,000 tpy CO_2e. Even at that increased threshold, some underground coal mines could trigger permitting requirements under Title V and PSD if ventilation and degasification emissions were deemed non-fugitive and counted toward the threshold. However, the Supreme Court held in 2014 that GHG emissions alone cannot trigger Title V and PSD permitting requirements, and that EPA may only regulate GHG emissions in such permits if the requirement for a permit is first triggered by other pollutants. *UARG v. EPA*, 134 S. Ct. 2427 (2014) (holding that "[EPA] may not treat [GHGs] as a pollutant for purposes of defining a 'major emitting facility' (or a 'modification' thereof)").

The Supreme Court's decision in *UARG* means methane or CO_2 emissions from underground coal mines cannot trigger Title V or PSD, regardless of whether they are fugitive or non-fugitive. However, the issue identified in the context of GHG emissions—the possibility that underground coal mine ventilation emissions might be considered non-fugitive—remains a potential threat with respect to non-GHG pollutants. For example, if an underground coal mine emits more than 250 tpy of volatile organic compounds (VOCs) from its ventilation and degasification systems, and those emissions are deemed to be non-fugitive, then the mine may trigger Title V and PSD. Moreover, if those permitting programs are triggered for VOCs, then any permit issued may also be required to address GHG emissions as well.

NMA actively worked with the states of OH, IL, IN, KY, VA, and WV in submitting a letter to EPA requesting that it make a determination that methane emissions from ventilation and degasification systems at underground coal mines are fugitive emissions. This matter was not completed before the transition to the Trump Administration. Efforts to seek favorable guidance under the Trump Administration were likewise unsuccessful.

Status:

One coal mine in Colorado is currently facing pressure from state permitting authorities to seek a Title V permit due to VOC emissions from its ventilation system. That same mine is also facing a lawsuit in federal court from an environmental group alleging the mine is subject to both Title V and PSD permitting programs. Thus far, the Colorado state permitting authority has not issued a permit or made a determination on whether ventilation emissions are fugitive.

In an order issued on Sept. 30, 2021, Judge Raymond Moore in the U.S. District Court for the District of Colorado issued an order granting WildEarth Guardians motion for partial summary judgment on standing, while rejecting the motion for summary judgment on whether VOC emissions are fugitive "[d]ue to the absence of clear authority in this area." Specifically, Judge Moore states that "[EPA] has not yet made an official determination as to whether emissions from coal mines are fugitive." He also recognizes that, while "[s]ome state EPAs, including Ohio's, have determined that they are, [ ] the [Colorado] Air Division has yet to make any determination one way or the other."

Interestingly, the court rejected two arguments claiming that the Colorado Air Division had already decided the emissions are non-fugitive—one based on statements to that effect by an inspector, and one based on the fact that the mine just applied for a Title V permit. This order crystalizes the issue on fugitives and indicates the judge is likely to rule on it and could have the potential to set precedent on the applicability of "major source" permitting requirements for underground coal mines under the Title V and PSD programs. In a recent consent decree, the company agreed to use flaring to control methane and VOC emissions from the mine. The mine operator will have to follow the Mine Safety and Health Administration's ventilation plan until the operator receives an operating permit, after which it will comply with the Title V permit for two years.

The PSD program also presents a separate issue with respect to whether fugitive emissions count in determining whether a major source performs a "major modification"—see the summary of New Source Review provided above. Under the Obama Administration, EPA proposed a rule in response to the *UARG* decision to establish a GHG "significant" threshold for "major modifications" (*see* 81 Fed. Reg. 68,110 (Oct. 3, 2016)). That rule has yet to be finalized, but it will only be relevant to underground coal mines that are first determined to be a "major source" due to non-fugitive emissions of a non-GHG pollutant (i.e., greater than 250 tpy). EPA's Fall semi-annual regulatory agenda lists "Revisions to the Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Permitting Regulations and Establishment of a GHG SER for GHG Emissions Under the PSD Program" as a "long-term action." No timeline is provided for this rulemaking.

AIR QUALITY MODELING

PRIORITY C – EPA

Background:

EPA's air models are used to demonstrate compliance with the NAAQS for six criteria pollutants including fine particulate ($PM_{2.5}$), nitrogen dioxide (NO_2) and sulfur dioxide (SO_2). Current modeling techniques (EPA's preferred model for regulatory applications is the AERMOD system) have been shown to over-predict impacts from haul roads and other low-level sources

hampering or blocking permit expansions at many mining operations. Because the NAAQS are becoming increasingly stringent, it is important to refine the models and assumptions to minimize the over prediction of impacts. Additionally, EPA is considering a "hybrid" modeling/monitoring approach to attainment designations for SO_2; historically, attainment designations have been based solely on monitoring data.

NMA submitted comments to EPA calling for significant revisions and updates to EPA's AERMOD model, and submitted comments supporting a "monitoring first" approach to area designations. On Dec. 24, 2013, EPA released updated versions of AERMOD and AERMET. These versions reflected improvements to the existing low wind speed options, the addition of a new option for modeling NO_2, and new capabilities for including directionally varying background concentrations. However, all the new options required case-by-case approval by the state agency and EPA. This approval process significantly increased the time and cost involved with completing the compliance demonstration. The EPA "Guidance for $PM_{2.5}$ Permit Modeling" memo issued on May 21, 2014, and the Supreme Court decision remanding the use of the Significant Impact Level and Significant Monitoring Concentration for $PM_{2.5}$, further hampered the ability of permit applicants to demonstrate compliance with the NAAQS and PSD Increment for $PM_{2.5}$.

NMA, working with the NAAQS Implementation Coalition, sought to secure EPA approval to modify existing air dispersion models to eliminate known over-prediction errors and remove the requirement for case-by-case applicability determinations for the new options introduced in the AERMOD modeling system. NMA assisted in the development and funding of a virtual facilities study the purpose of which is to provide the EPA modeling team an understanding of the real-world implications of applying existing guidance and the AERMOD modeling system to support air permit applications and SO_2 non-attainment designations.

Study results were provided to EPA staff and discussions/meetings held to further discuss how best to address the modeling irregularities. EPA agreed that improvements needed to be made to the modeling system and guidance. During the Feb. 2, 2015, meeting, EPA modelers stated several times that they appreciated the work the NAAQS Implementation Coalition had completed as it helped them to more fully understand the hurdles being faced by permit applicants and gave them some real (though virtual) data for comparing options. They indicated that several of the suggestions put forth by the NAAQS Implementation Coalition would be incorporated in the revision to Appendix W.

They requested additional assistance in three areas:

1. Preparing examples of modeling requirements and how these operating scenarios affect the overall results.

2. A review of emission factors that are typically used (AP42, WebFire) to see if they accurately reflect actual emissions. If more accurate emission factors are available, they would like to have them submitted and documented so that the EPA factors can be updated.

3. Suggestions for modifying the averaging period in the NAAQS. Specifically, how long of an averaging period would be required to smooth out the impact of infrequent intermittent emissions that make it difficult to demonstrate compliance with the one-hour average

standards. This information would help them when the SO_2 and NO_2 NAAQS are up for review again; i.e. suggest a longer averaging period (probably with a lower concentration), if it would provide the same protection as well as give industry more operational flexibility. This work informed the agency as it developed revisions to Appendix W.

Appendix W Revisions:

On July 29, 2015, EPA proposed revisions to Appendix W. 80 Fed. Reg. 45,340. NMA submitted comments as a NAAQS Implementation Coalition member as well as individual comments focusing on issues of particular concern to the mining industry.

On Jan. 17, 2017, EPA published amendments to Appendix W in a final rule with an effective date of Feb. 16, 2017**.** 82 Fed. Reg. 5182. Because of the Presidential directive issued through the Assistant to the President and Chief of Staff, entitled "Regulatory Freeze Pending Review," the effective date of this rule was changed to March 21, 2017. 82 Fed. Reg. 8499 (Jan. 26, 2017). Under that directive, regulations that were published in the *Federal Register* but not taken effect as of Jan. 20, 2017, received an extra 60 days for implementation so that the new Administration could review any questions of fact, law, or policy that they raise.

EPA adopted several technical revisions supported by NMA and/or the NAAQS Implementation Coalition such as additional options to increase accuracy at low wind speeds, more realistic NO_2 modeling, and incorporation of the buoyant line and point source model into AERMOD. EPA, however, dismissed NMA's recommendations to speed up the clearinghouse process by establishing a maximum review time, establishing a mechanism to resolve scientific modeling questions by the American Meteorological Society/Environmental Protection Agency Regulatory Model Improvement Committee, and defining guidance terms that establish thresholds for clearinghouse action.

AERMOD Updates:

On Sept. 19, 2017, EPA issued a memorandum that includes white papers on planned activities related to the AERMOD modeling system. According to EPA, the agency "identified a number of planned areas for updates to the AERMOD modeling system based on areas with known science updates related to dispersion modeling and areas to address known issues or limitations in the currently available and/or applicable models for various regulatory needs." The white papers cover the following areas of EPA's planned science updates: (1) LOW WIND Options; (2) saturated plumes; (3) downwash algorithms; (4) NO_2 modeling techniques; (5) mobile source modeling; and (6) overwater modeling. These white papers were discussed at the 2017 Regional/State/Local Modelers' Workshop.

In June 2018, EPA published an air quality modeling document entitled, "Air Quality Modeling Technical Support Document for the Updated 2023 Projected Ozone Design Values." In the document, EPA describes the air quality modeling performed to project ozone design values at individual monitoring sites to the year 2023. The 2023 air quality modeling described in this document represents an update to the preliminary 2023 air quality modeling which the EPA released as part of the January 2017 Notice of Data Availability. The updated 2023 design values were developed to support interstate ozone transport actions by the EPA and/or states for the 2008 and/or 2015 NAAQS. Additionally, the document describes the air quality modeling platform and the evaluation of model predictions using measured concentrations, and the procedures used for projecting ozone design value concentrations.

Status:

EPA hosted the Twelfth Conference on Air Quality Modeling on **Oct. 2 and Oct. 3, 2019.** EPA organized expert panel discussions and presentations on the following: treatment of low wind conditions, building downwash, mobile source modeling, overwater modeling, prognostic meteorological data, near-field and long-range model evaluation criteria, NO_2 modeling techniques, single source ozone and $PM_{2.5}$ modeling techniques, and plume rise. In addition, EPA accepted public comments until **Nov. 4, 2019,** on potential revisions to the way the agency determines and applies the appropriate air quality models**. NMA did not submit comments.**

NMA continues to monitor for any developments through our participation in the NAAQS Regulatory Review and Rulemaking Coalition. EPA's update on monitoring, modeling and emissions during the Association of Air Pollution Control Agencies Spring 2022 Virtual Meeting is available here. EPA also held a virtual EPA Regional, State, and Local (Dispersion) Modelers' Workshop in July 2022. The presentations at this workshop are available here.

NAAQS: Pb AND CO

PRIORITY C – EPA

Background:

EPA was also in the processing of reviewing NAAQS for lead (Pb) and carbon monoxide (CO). On December 19, 2014, EPA proposed to retain the current NAAQS for lead. Comments were due on April 6, 2015.

On Sept. 16, 2016, EPA signed a final rule that retains the primary and secondary standards for lead (0.15 microgram per cubic meter) as requisite protection of public health with an adequate margin of safety, including protection of at-risk populations.

Status:

CO: EPA has not publicized its plans for the next NAAQS review round for CO.

Lead: On July 7, 2020, EPA published a notice on a call for information for the Integrated Science Assessment, kicking off the next NAAQS review for lead. Comments were due Sept. 8, 2020. On Sept. 8, 2021, EPA published a notice requesting nominations of scientific experts for an ad hoc review panel of the CASAC. The panel will be charged with reviewing the science and policy assessments, and related documents, that form the basis for EPA's review of the lead NAAQS and will provide advice through the chartered CASAC. On Dec. 6, 2021, EPA announced the formation of the 19-member lead review panel.

On Mar. 10, 2022, EPA published notice of Volumes 1 and 2 of the Integrated Review Plan (IRP) for the Lead NAAQS. Both volumes of the IRP can be downloaded here. **EPA solicited comment on the second volume by Apr. 4, 2022.** The IRP presents the schedule for the entire review, the process for conducting the review, and the key policy-relevant science issues that will guide the review. CASAC met on Apr. 8, 2022, to review Volume 2 and released its consultation report on Apr. 22, 2022.

On May 6, 2022, EPA announced a webinar workshop to obtain input on initial draft materials for the lead Integrated Science Assessment. The webinar will be held in four sessions on May 26, June 7, June 22, and June 29, 2022. Additional information regarding these workshops are available here.

EPA is planning on a third volume of the IRP to be released in early 2023. An external review draft of the Integrated Science Assessment is also expected in early 2023, with an external draft of the Policy Assessment in Fall 2023. A proposed rule is targeted for early 2025 and final rule in early 2026 (beyond the 5-year review deadline for completing review of the prior October 2016 decision to retain the standards). These deadlines are merely targets and subject to change.

The lead NAAQS is a long-term action on the Fall semi-annual regulatory agenda.

NAAQS: NO_2

PRIORITY C – EPA

Background:

On July 15, 2009, EPA published a proposed rule for establishing the NO_2 NAAQS. 74 Fed. Reg. 34,404. EPA proposed a standard for NO_2 ranging from 80-100 ppb. EPA announced a final rule Jan. 22, 2010 (published Feb. 9, 2010, effective April 12, 2010), establishing a new one-hour maximum primary standard for NO_2 at 100 ppb and retained the existing 53 ppm annual primary standard. 75 Fed. Reg. 6,474. On July 12, 2011, EPA proposed to retain the current NO_2 secondary standards and to establish additional one-hour secondary standards of 100 ppb for NO_2. 76 Fed. Reg. 46,084 (Aug. 1, 2011). The public comment period closed on Oct. 10, 2011 and the rule became final March 20, 2012.

On March 14, 2012, EPA initiated the next review of the NO_2 NAAQS. At that time, the latest research on nitrogen oxides (NOx) emissions showed health harms at exposure levels far below existing regulatory limits and found stronger associations between NOx exposure and adverse effects. An update of the NO_2 NAAQS was to be completed in April 2015. EPA's failure to do so resulted in several environmental organizations suing the agency to expedite EPA's review earlier than the 2019 anticipated completion timeframe. EPA and the litigants reached a settlement obligating EPA to issue a proposed rule in July 2017 with a final rule by April 2018.

On July 26, 2017, EPA published a proposed rule to retain the primary NO_2 NAAQS. 82 Fed. Reg. 34,792. On Sept. 25, 2017, NMA, as part of the NAAQS Implementation Coalition, filed comments in support of the proposed rule. On April 6, 2018, EPA published a final rule to retain the 1-hour and annual primary NAAQS for NO_2. The rule, which was finalized pursuant to a consent decree, is consistent with EPA's CASAC that found the current standard adequately protective of public health. NMA, via its participation in the NAAQS Implementation Coalition, supported retaining the current standard.

Status:

EPA has not publicized its plans for the next NAAQS review round. However, EPA on Dec. 9, 2022, announced a call for information on the Integrated Science Assessment for the review of the primary (health-based) NAAQS. EPA is interested in research studies and data that have

been published in peer-reviewed scientific literature, accepted for publication, or presented at a public scientific meeting since May 15, 2015. This marks the start of EPA's review. Comments were due on Feb. 7, 2023.

NAAQS: SO_2

PRIORITY C – EPA

Background:

On Dec. 8, 2009, EPA published a proposed rule to revise the primary SO_2 NAAQS. 74 Fed. Reg. 64,810. On June 22, 2010, EPA issued a final rule establishing a new 1-hour SO_2 standard at a level of 75 ppb and revoking both the existing 24-hour and annual primary SO_2 standards. 75 Fed. Reg. 33,520. On Aug. 1, 2011, EPA proposed to retain the current SO_2 secondary standards and to establish additional 1-hour secondary standards of 75 ppb for SO_2. 76 Fed. Reg. 46,084 (Aug. 1, 2011). On April, 3, 2012, EPA issued a final rule retaining the secondary standard, but declined to impose the additional 1-hour secondary standards that were proposed. 64 Fed. Reg. 20,218. On July 20, 2012, the D.C. Circuit ruled that EPA did not act arbitrarily in setting the level of SO_2 emissions. *Nat'l. Envtl. Dev. Assn's. Clean Air Project v. EPA*, No. 10-1252 (D.C. Cir.).

As for implementation of the NAAQS and nonattainment designations, EPA was considering a "hybrid" modeling/monitoring approach to attainment designations and future implementation for SO_2. NMA submitted comments to EPA calling for significant revisions and updates to EPA's AERMOD model, and submitted comments supporting a "monitoring first" approach to area designations. EPA designated certain areas measuring nonattainment with the standard as nonattainment in July 2013, while not classifying large areas of the country otherwise. Environmentalists challenged EPA's decision, and NMA intervened as part of the NAAQS Implementation Coalition. On June 2, 2014, after negotiations with environmentalists, EPA proposed a consent decree that provided deadlines for designating sources throughout the country. The consent decree also required a first-round designation of certain large SO_2 sources within 16 months of lodging the consent decree with the court.

An update of the SO_2 NAAQS was to be completed in August 2015. EPA's failure to meet the 5-year statutory deadline to update the NAAQS resulted in several environmental organizations suing the agency to expedite EPA's review earlier than the 2020 anticipated completion timeframe. EPA and the litigants reached a settlement committing the agency to issue a proposed rule by May 2018 with a final rule by January 2019.

On Nov. 24, 2015, EPA announced the availability of a "Draft Integrated Science Assessment (ISA) for Sulfur Oxides – Health Criteria." 80 Fed. Reg. 73,183. The notice provided a 60-day period for the submission of comments on the draft assessment. In response to requests, EPA on Dec. 24, 2015, extended the comment period until Feb. 24, 2016. 80 Fed. Reg. 80,359. NMA, as a participant in the NAAQS Implementation Coalition provided comments on the Draft Health Criteria Assessment.

On March 30, 2017, EPA released the Integrated Review Plan for the secondary NAAQS for ecological effects of oxides of nitrogen, oxides of sulfur and particulate matter. On Sept. 19, 2017, EPA issued a notice in the *Federal Register* on the release of draft documents related to the review of the primary NAAQS for sulfur oxides, including the draft Risk and Exposure

Assessment (REA) and the draft Policy Assessment. 82 Fed. Reg. 43,756. The REA and ISA supported the staff recommendation that EPA retain the 75 ppb standard. On Dec. 13, 2017, EPA issued a notice in the *Federal Register* on the release of the final, "Integrated Science Assessment for Sulfur Oxides—Health Criteria." 82 Fed. Reg. 58,600.

On August 9, 2018, NMA filed comments on the EPA proposed rule to retain the current primary NAAQS for SO_2. NMA's comments supported EPA's proposal to retain the primary NAAQS for SO_2 at 75 parts per billion (ppb) based upon the most current scientific information available. In the proposal, EPA demonstrated that retaining the current primary standard for SO_2 will adequately protect public health while allowing an adequate margin of safety. A further reduction of the standard would have negatively impacted various sectors of the mining industry, forcing the installation of costly environmental controls, and possibly causing the premature retirement of coal-fired EGUs.

The final rule for the primary NAAQS for SO_2 was originally required to be signed by January 25, 2019 in accordance with a consent decree. However, the consent decree gave EPA an automatic extension during the federal government shutdown. On Mar. 18, 2019, EPA published a final rule that retains the current primary (health-based) NAAQS for SO_2 without revision.

Status:

EPA has not publicized its plans for the next NAAQS review round.

SECTION 112: RECLASSIFICATION OF MAJOR SOURCES ("ONCE-IN-ALWAYS-IN")

PRIORITY C – EPA

Background:

Guidance:

On Jan. 25, 2018, EPA issued a guidance memorandum withdrawing the "once-in always-in" policy for the classification of major sources of hazardous air pollutants (HAPs) under section 112 of the CAA. Accordingly, "a major source which takes an enforceable limit on its [potential to emit (PTE)] and takes measures to bring its HAP emissions below the applicable threshold becomes an area source, no matter when the source may choose to take measures to limit its PTE. That source, now having area source status, will not be subject thereafter to those requirements applicable to the source as a major source under CAA section 112, including, in particular, major source MACT standards – so long as the source's PTE remains below the applicable HAP emission thresholds." On Feb. 8, 2018, EPA published a notice in the *Federal Register* announcing this new guidance and rescinding the memorandum issued on May 16, 1995, "Potential to Emit for MACT Standards—Guidance on Timing Issues," which set forth the "once in, always in" policy.

On Mar. 26, 2018, several environmental organizations filed a petition for review in the D.C. Circuit challenging the guidance. The State of California also filed a petition for review. These cases were consolidated in *California Communities Against Toxics. v. EPA*, 18-1085 (D.C. Circuit). Petitioners filed their opening briefs on Oct. 1, 2018. EPA filed its brief defending the

guidance on Dec. 21, 2018. On Jan. 14, 2019, four industry intervenors, including the Utility Air Regulatory Group, filed a brief in support of the government. Petitioners' response brief is due on Feb. 8, 2019. Oral argument was held on April 1, 2019. On Aug. 20, 2019, the D.C. Circuit in a 2-1 split decision held that the guidance was not a final action subject to judicial review. On Oct. 4, 2019, Petitioners filed for rehearing or rehearing en banc. On Jan. 22, 2020, the D.C. Circuit denied petitioners motions for rehearing.

Rulemaking:

On July 26, 2019, EPA published a proposed rule, "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act." 84 Fed. Reg. 36,304 (July 26, 2019). This proposal would codify the guidance memo at issue in the D.C. Circuit case. This rule is significant in that certain sources that take measures to become "area sources" (*e.g.*, through implementation of pollution prevention and control measures) would no longer be subject to a maximum achievable control technology standard under CAA Section 112, provided that the sources satisfy EPA's proposed criteria for establishing "legally and practicably enforceable" limits on the potential to emit HAP. Importantly, the proposed rule would eliminate the time limitation in the previous policy on when reclassification can occur. The proposed rule would also amend existing regulations to define "legally and practicably enforceable" to include non-federally enforceable limits, such as state limits.

According to EPA: "Reclassified sources may be exempt from the requirement to obtain an operating permit under title V of the CAA and may be subject to CAA section 112 area source requirements rather than major source requirements." As of March 2019, 34 sources had taken advantage of the guidance memorandum and reclassified or were in the process of reclassifying into "area source" status from the following industries: coating sources, oil and gas, fuel combustion/boilers, chemicals, and heavy industry. **This regulatory reform effort will not impact coal-fired electric generating units (EGUs) subject to EPA's final MATS rule**. In that CAA Section 112 final rule, EPA did not distinguish between "major" and "area" sources and instead applied the same set of standards to all fossil-fuel-fired utility boilers over 25 megawatts regardless of a facility's potential to emit HAP. As a result, rescission of this policy is not expected to benefit coal-fired EGUs subject to MATS.

Comments on the proposed rule were due on Nov. 2, 2019 (extended from Sept. 24, 2019). NMA members did not identify issues for comment.

On Oct. 1, 2020, EPA announced its final rule allowing for a source classified as a "major source" of HAP under section 112(a) of the CAA to reclassify as an "area source." EPA's press release may be accessed here. With the final rule, branded as the "Major MACT to Area" (MM2A), EPA codified the withdrawal of the "once-in-always" policy and provided the requirements that apply to major sources choosing to reclassify, including reclassification that occurs after the first substantive compliance date of an applicable MACT standard. EPA's Fact Sheet may be accessed here. On Nov. 19, 2020, the final rule was published in the *Federal Register*. 85 Fed. Reg. 73,854. The rule went into effect on Jan. 19, 2021.
The final rule adopts much of the proposal and does not automatically reclassify any major source or require any major source to reclassify to area source status. Rather, it merely provides a voluntary pathway for a major source that is able to limit its "potential to emit" HAP to below the 10 and 25 ton per year major source thresholds, provided certain conditions are met, and enforceable limits are set in place in the source's air permit. Any major source reclassifying to area source status remains subject to any applicable standard until the limit necessary for

reclassification becomes effective. After the reclassification becomes effective, the source becomes subject to any applicable area source standard, if any apply to that category of sources. Certain major sources may even be able to qualify as "true" area sources when, after permanently removing equipment or changing processes, such sources no longer have the potential to emit HAP at major source levels even without a new permit limit.

The final rule, however, does not revise the EPA's view on how to determine "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design." The final rule also does not finalize all aspects of the MM2A proposal. For example, in the MM2A proposal, the EPA proposed specific criteria that permit limits must meet for these limits to be effective and also proposed to amend the definition of "potential-to-emit" by removing the requirement for "federally enforceable" limits and requiring instead that such limits meet the effectiveness criteria of being both "legally enforceable" and "practicably enforceable," and provided proposed definitions of each criteria. EPA is still considering these aspects of the proposal and how its proposed updates may affect other CAA programs, for which those concepts are also relevant.

Litigation:

***California Communities Against Toxics v.* EPA, No. 21-1024 (D.C. Cir.)**. On Jan. 15, 2021, 10 environmental organizations filed a petition for review challenging this rule in the D.C. Circuit. Petitioners include California Communities Against Toxics, Downwinders at Risk, Environmental Defense Fund, Environmental Integrity Project, Hoosier Environmental Council, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, Sierra Club, and Texas Environmental Justice Advocacy Services. On Jan. 19, 2021, the State of California, along with Massachusetts, Pennsylvania, Virginia, California, Delaware, Illinois, Maryland, New Jersey, New York, Oregon, Rhode Island, Washington, and the cities of Chicago and New York, also filed a petition review. *California v. EPA*, No. 21-1034 (D.C. Cir.). On Jan. 27, 2021, the D.C. Circuit consolidated these cases. Petitioners' statements of issues were filed on Feb. 22, 2021 (NGOs) and Feb. 25, 2021 (states). Prior to those filings, on Feb. 17, 2021, EPA filed a motion to hold these cases in abeyance with the agency submitting 90-day status reports. The court directed parties to file status reports starting on June 21, 2022, and motions to govern future proceedings by Sept. 19, 2022. In that filing, EPA told the court it "ha[d] not completed [its] review and believe[d] that after conducting additional review it [would] be in a better position to determine how it [would] proceed." EPA asked the court to keep the case in abeyance with motions to govern further proceedings due on Mar. 20, 2023 (and an interim status report on Dec. 19, 2022). The court granted EPA's motion.

On Feb. 18, 2021, several industry trade associations filed a motion to intervene in support of EPA's rule, including: The Brick Industry Association, American Wood Council, Air Permitting Forum, Auto Industry Forum, Portland Cement Association, and the American Chemistry Council. NMA is not involved in this case.

Status:

Biden Administration Reconsideration:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the

President's priorities and consider suspending, revising, or rescinding those actions. The Biden transition team included this rule on its initial list of environmental policy actions for review.

According to EPA's Fall semi-annual regulatory agenda, EPA plans on issuing a proposed rule in April 2023 (a 2-month delay) and a final rule in February 2024.

OSM OVERSIGHT

PRIORITY A – OSM

Background:

The Trump administration reversed several Obama-era policies and directives that had significantly eroded state primacy under SMCRA and efficient permitting and enforcement of coal mining operations in primacy states. In response to NMA's advocacy, DOI issued revised versions of INE-35 and REG-8 in May 2019 which replaced the previous versions issued in 2011. The new directives make a number of changes. Specifically, the changes for INE-35 include:

- The new version of INE-35 states that SMCRA confers State RAs with exclusive jurisdiction within their borders.
- The new version specifies that OSM should not substitute its judgment for that of the State RA when reviewing a State's response to a TDN.
- The revised version of INE-35 states that OSM officials "shall avoid duplication or redundancy of investigatory or enforcement activity with the RA" and if the RA has investigated the matter or is currently doing so, consider the RA's action in formulating a response. The new INE-35 also directs OSM to provide a "reasonable amount of time" to complete its investigation before determining if a violation exits.
- The revised version of INE-35 does not address state permitting decisions. It does not classify permitting decisions as potential violations for which a TDN may be issued, as the 2011 version of INE-35 did, nor does it clarify that permitting decisions are excluded from the scope of TDNs and must be resolved at the state level, as is the law under SMCRA.

Changes to REG-8 include:

- Elimination of mandatory, independent, unannounced inspections by OSM of mine sites in states with approved SMCRA programs. Independent inspections by OSM are permitted but the state RA must be invited to participate.
- The same formula for inspections is used in the revised version of REG-8 as was used in the previous version, however, all inspections now count towards the total number of annual inspections where previously, only specific inspections would qualify.
- New language is included to limit the number of inspections conducted beyond the number targeted in the OSM-State Performance Agreement to "the fewest amount of additional inspections necessary to evaluate a State or Tribal program."

Proposed revisions to TDN regulations:

In May 2020, OSM proposed significant improvements to its TDN regulations to reduce the abuse of TDNs restore state primacy under SMCRA. NMA had engaged directly with DOI officials to outline specific reforms necessary to end the duplication of efforts that often resulted from the TDN process as well as the weaponization of TDNs instituted by the previous administration. NMA's June 15 comments strongly supported OSM's proposed reforms but also raise specific additional steps the agency can take to fully restore the authority of SMCRA primacy states.

Status:

OSM issued its final TDN rule on Nov. 24, 2020. It is already under legal challenge by the Citizens Coal Council. The case is stayed while OSM reconsiders the 2020 rule According to the Fall 2023 regulatory agenda, a proposed rule is scheduled for Feb. 2023 with a 60-day comment period.

COAL MORATORIUM/FEDERAL COAL LEASING REVIEW

PRIORITY A – BLM

Background:

On Jan. 15, 2016, former Secretary Jewell issued Secretarial Order 3338 imposing a three-year moratorium, with exceptions, on further coal lease sales pending completion of a Programmatic Environmental Impact Statement (PEIS) analyzing potential leasing and management reforms of the Federal coal program. NMA mounted a multi-prong strategy to oppose the moratorium.

In June 2018, the DC Circuit Court of Appeals upheld a 2015 lower court decision by the Federal District Court for the District of Columbia rejecting a 2014 challenge by ENGOs seeking an update to the federal coal program PEIS, based on the age of the PEIS and alleged insufficiency to account for climate change impacts stemming from implementation of the program. NMA previously filed an amicus brief in support of the existing program and PEIS in 2015. The Circuit Court found that because no change had been proposed for the federal coal leasing program, no federal agency action had taken place that would compel an update to the PEIS under NEPA. However, in March 2017 ENGOs and several states filed a similar suit in federal district court in Montana challenging Secretary Zinke's Secretarial Order 3348 discontinuing the coal leasing mortarium and accompanying PEIS. NMA intervened in the suit in defense of the decision to lift the moratorium.

In April 2019, the Montana District Court held in a disappointing and legally suspect decision that DOI violated NEPA by failing to conduct the appropriate analysis before lifting the federal coal leasing moratorium put in place by former Secretary Jewell. The court found that the order issued by Secretary Zinke to reverse the Jewell order was a "major federal action" that triggered the NEPA process. The Court declined to order DOI to prepare a PEIS and left it to the discretion of DOI whether to prepare an EIS, or an environmental assessment (EA). As a result, BLM issued a draft EA in May 2019, followed by a final EA and finding of no significant impact in Feb. 2020. Environmental groups subsequently challenged the sufficiency of the EA and the court allowed them to amend their challenge, rather than filing a new lawsuit. The lawsuit has been paused while the BLM conducts a new review of the federal coal leasing program. The court recently rejected the BLM's request to extend the stay of litigation, forcing the government to move forward with its scheduled brief opposing the environmental groups' contentions. NMA supported the BLM's motion, and independently moved for the case to be dismissed as moot. Our position is that the controversy ended when the Biden administration revoked the Zinke order that was the basis of the environmental groups' challenge. Briefing on the mootness motions concluded in mid-February.

While President Biden issued an executive order calling for a moratorium on federal oil and gas leasing, the moratorium has not been extended to coal, reportedly due to the lessened interest in federal coal leases. That same executive order, however, calls for a review of royalty rates for

coal. Furthermore, in April 2021, DOI Secretary Haaland rescinded the Zinke order that reversed the Jewell order but similarly did not reinitiate a coal moratorium.

In August 2021, Interior released a notice of intent to conduct a review of the federal coal leasing program. NMA submitted comments in Oct. 2021 to push back upon the notion that wholesale changes to the Federal Coal Leasing Program are needed. Due to the similarity in issues addressed, NMA's comments build upon the 2016 comments and commissioned report we submitted in response to efforts to prepare a programmatic environmental impact statement (PEIS) while new coal leasing was paused. NMA's comments stress, among other things, that the royalty rate for federal coal ensures more than a fair return for taxpayers; that current climate and environmental impact reviews are effective; and that federal coal is vital to fulfilling the nation's energy needs. The comments also stress the appropriate measures for coal valuation and defend the use of the lease-by-application method. In Dec. 2021, the BLM released a document that summarizes the more than 80,000 comments received and recaps previous efforts. BLM is still reviewing the comments, that are expected to inform any potential next steps.

Status:

In August 2022, an activist judge in the U.S. District Court for the District of Montana issued an order reinstating the coal leasing program moratorium established by the Jewell Order. The order manufactures an unprecedented novel and indefinite nationwide injunction against federal coal leasing until the BLM completes "sufficient" NEPA analysis of the 2017 revocation of the moratorium. The NMA intervened in the litigation in support of the lifting of the moratorium, and appealed this egregious decision to the U.S. Court of Appeals for the Ninth Circuit. Briefing of the case began in mid-February 2023.

HIGH HAZARD DAMS

PRIORITY B – OSM

Background:

Under the Obama administration, OSM was contemplating a proposal to require emergency actions plans for impoundments at high hazard dams before a problem is detected. Based on Inspector General report on BLM, Reclamation Bureau and OSM, about 300 dams were anticipated to be impacted by the rule. The Trump administration withdrew the proposal in March 2017 and removed it from the Unified Regulatory Agenda.

Status:

In the recent Fall 2023 regulatory agenda, OSM included emergency preparedness for impoundments, with a proposed rule in May 2023. NMA will monitor any developments as the rule the Obama-era OSM was preparing would have imposed extraordinarily costly new burdens on the industry.

BOND RELEASE, AVAILABILITY, AND ALTERNATIVES

PRIORITY B – OSM

Background:

During the Nov. 2021 Coal Subcommittee Priority Call , several companies expressed frustration over the varying requirements under state regulatory programs. Issues ranged from length of time between bond release application submittals and actual releases, to duplicative processes that should be streamlined.

Status:

NMA continues to solicit information and examples and is evaluating with members options for state outreach. In addition to information on bond release, NMA asked for additional information on state regulatory authorities and their escalation values or factors that have increased dramatically in certain states. For example, the Utah Division of Oil, Gas and Mining increased its escalation factor from 1.78 percent in 2018, to 8.12 percent in 2023. Nevada announced an overall increase of nearly 15% from 2021, primarily attributable to an increase in materials, equipment, and labor costs. California updates its costs annually.

MINE PLACEMENT OF COAL COMBUSTION RESIDUALS

PRIORITY C – OSM

Background:

In December 2014, EPA issued its final coal ash rule reflecting many of the recommendations put forth in NMA's comments on the proposed rule, including the regulation of coal combustion residuals (CCRs) under Subtitle D of Resource Conservation and Recovery Act (RCRA) as a non-hazardous waste, clarification that the rule does not apply to CCR use at mine sites, and the exclusion of underground and surface mines from the "CCR Landfill" definition. EPA had initially indicated that it intends to work with OSM to develop effective federal regulations to ensure the placement of CCRs in minefill operations is adequately regulated under SMCRA. However, due to OSM's publication of the proposed SPR, OSM's development and publication of an accompanying CCR was delayed.

The Obama OSM was in the process of moving forward a proposed rule that while not banning the use of CCRs at mine cites specifically, would have significantly reduced the scope of allowable and feasible use. It would have placed significant emphasis on baseline monitoring impacts to groundwater from CCR use and extend the period for which such impacts must be monitored. While bonding was not intended to be address directly, such an expansion of monitoring requirements could have the result of increasing bonding periods by operation of existing law. Additionally, it likely would have drawn a distinction between "disposal" and "allowable use", prohibiting placements OSM perceives as based on discarding of CCR material, while defining allowable uses to include "structural fills which provide a quantifiable reclamation benefit that could not otherwise be provided." OSM was preparing to include a list of 8 specified uses that meet this definition and leave to the states the determination of others.

Status:

The Trump administration withdrew the rulemaking in March 2017 and removed it from the Unified Regulatory Agenda. Notwithstanding the withdrawal, EPA's CCR framework still leaves the regulation of CCR placement at mine cites to OSM. If the Biden administration revives the rulemaking, NMA will look for opportunities to engage on the appropriate scope of allowable uses at mine sites for proposal to the agency. Upon revival of the rulemaking, the subcommittee will consider elevating this issue to an A priority.

BLASTING

PRIORITY C – OSM

Background: On April 14, 2014, the WildEarth Guardians (WEG) filed a petition requesting that OSM promulgate a rule prohibiting the production of visible nitrogen oxide emissions during blasting at surface coal mining operations. Specifically, WEG, citing the formation of visible nitrogen oxide emissions at surface coal mining operations, alleged that the rulemaking is needed to protect public and mine worker health, welfare and safety, and prevent injury to persons. WEG alleged that whenever these visible clouds are formed, nitrogen dioxide concentrations exceed federal health standards. The regulatory language sought by WEG would have required operators to conduct blasting so as to prevent visible emissions of nitrogen oxides, including nitrogen dioxide. OSM requested comment on WEGs' petition by September 25, 2014 (extended from Aug. 25, 2014).

On September 25, 2014, NMA submitted comments urging OSM to reject WEG's petition. NMA's comments argued that WEG's proposed rule language would create an unlawful, unnecessary, and unattainable emissions standard under OSM's federal regulatory program. Specifically, NMA urged OSM to reject the petition because: (1) WEG's proposed regulation is outside OSM's regulatory authority under SMCRA; (2) WEG ignores the federal and state regulations currently implemented that adequately protect human health and safety from blasting operations; (3) WEG's proposed performance standard for no visible emissions is unattainable; (4) WEG wrongly equated visibility with harm; and (5) WEG ignored the extensive operational controls adopted by operators to minimize risk to public health.

On Dec. 12, 2014, OSM announced Director Joseph Pizarchik's decision to pursue a rulemaking to revise regulations under SMCRA on blasting operations. In his letter to WEG, Pizarchik stated that OSM "intend[s] to propose a definition for 'blasting area' and to also make it clear toxic gases and fumes are one of the dangers posed by blasting which must be addressed in order to protect people." Pizarchik also decided to broaden the scope of the rulemaking beyond what WEG requested. WEG provided proposed regulatory text that focused on the prevention of visible emissions of nitrogen oxides, including nitrogen dioxide, as well as certain monitoring requirements. According to the letter to WEG, OSM's proposed rule would address "the health and safety of all blast generated fumes and toxic gases," not solely nitrogen oxide emissions released during blasting.

Status: While the Trump administration formally withdrew the OSM's blasting rulemaking on March 27, 2017, we anticipate WEG may resubmit its petition for consideration by the Biden administration. In that event, the subcommittee will consider elevating this issue to an A priority.

SMCRA BIOLOGICAL OPINION

PRIORITY C – OSM

Background:

On February 16, 2017 President Trump signed H.J.Res 38 voiding the Stream Protection Rule (SPR) and its related environmental impact statement and biological opinion (BiOp). This action reinstated the 1983 Stream Buffer Zone rule. Following the voiding of the 2016 BiOp, the Office of Surface Mining and Enforcement (OSM) signaled its intent to reinitiate Section 7 consultation with U.S. Fish and Wildlife Service (FWS) to develop a BiOp to replace the 1996 BiOp for long term ESA compliance. In April 2017, OSM issued a Section 7(d) determination under the Endangered Species Act (ESA) affirming that implementation of Title V of the Surface Mining Control and Reclamation Act (SMCRA), including permit issuance, permit renewals, and significant permit revisions during programmatic consultation with FWS "would not make an irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives…" This determination allows continued coverage for potential incidental take under the ESA during reinitiated consultation.

Throughout 2019 and 2020 NMA engaged with DOI officials to provide our analysis of how the BiOp should be crafted to support existing SMCRA rules and state primacy while addressing the scientific information that has been made available since the development of the previous BiOp. NMA also coordinated with the Interstate Mining Compact Commission (IMCC) in response to OSM's request for feedback on both the draft biological assessment and the BiOp.

OSM and FWS completed the Section 7 consultation process in early October 2020 and FWS issued its "Final Biological Opinion on the Office of Surface Mining and Enforcement's Implementation of Title V of the Surface Mining Control and Reclamation Act" (2020 BiOp) on Oct. 16. Unfortunately, while the 2020 BiOp is much improved over the 2016 BiOp that accompanied the SPR, it does not address all of industry's concerns.

The most problematic issue remains the incidental take coverage if there is no agreement between the state regulatory authority (RA) and FWS at the conclusion of the dispute resolution process and the RA issues the permit. The 1996 BiOp was silent on whether take protection applied where a dispute existed and the permit was issued. NMA unsuccessfully advocated for a similar approach in the 2020 BiOp but the Incidental Take Statement explicitly states that "if the dispute resolution concludes with the State regulatory authority rejecting the proposed resolution and issuing the permit without Service concurrence, the Service recognizes that the State regulatory authority may decide to issue the permit, ***but any prohibited take of listed species incidental to that permit action will not be exempted through this incidental take statement."*** BiOp at p. 84.

In discussing this issue with IMCC, it appears that the states and OSM capitulated to FWS on this issue because many of the states believe that if no agreement can be reached at the end of the dispute resolution process, including elevation to the Secretary, the permit would likely be too controversial to issue. Additionally, the states were appeased by changes to the dispute resolution process including the 60-day time clock for completion of the elevation process and additional clarification that the FWS could not trump any decision by the Secretary.

Status:

Given that the FWS ultimately achieved most of the Service's objectives for the 2020 BiOp, the BiOp may be insulated from receiving much attention from the Biden administration. NMA, however, will continue to monitor for any future changes that could further erode state primacy. Notably, an environmental group submitted a Freedom of Information Act request to OSM inquiring about the dispute resolution portion of the BiOp, and if there have been any to date. Additionally, NMA monitored a recent lawsuit that attempted to resurrect the SPR by arguing that the CRA is unconstitutional. *Citizens for Constitutional Integrity v. OSM.* The District Court dismissed the suit on the basis that environmentalists failed to state a claim. Subsequently, the 10th Circuit Court of Appeals upheld the District Court ruling, and rejected environmentalists claims that the CRA was unconstitutional.

COAL VALUATION

PRIORITY C – ONRR

Background:

In July 2016, ONRR published its final rule on federal and Indian coal valuation. Despite extensive comments by NMA regarding the proposed rule's legal deficiencies, the final rule was substantially similarly to the proposal and went into effect on Jan. 1, 2017. The final rule eliminated the use of benchmarks to value coal sold under non-arms-length contracts. Instead, requiring lessees to value the coal at the first arms-length sale. Additionally, the agency rejected the idea of allowing lessees the option to base the value of coal on an index price (as is allowed for oil and gas valuation).

After NMA and other mining interests challenged ONRR's valuation rulemaking, the rule was stayed on Feb. 22, 2017, and the effective date of the rule was postponed. ONRR proposed repeal of the rule on April 4, 2017, and NMA submitted comments in support of the proposal during the comment period. The rule was repealed on Aug. 7, 2017. The repeal of the 2016 rule was successfully challenged by California and New Mexico and struck down in March 2019. As a result, the 2017 repeal rule was vacated and the 2016 Valuation Rule was reinstated.

NMA filed a challenge to the newly reinstated 2016 Obama rule in April 2019.NMA's arguments echoed those raised in our original 2016 complaint that was dismissed when the Obama rule was repealed in 2017. NMA argued that promulgation of the 2016 rule was arbitrary and capricious, exceeded ONRR's authority under the applicable statutes, and was unworkable as a method for calculating royalties. In a victory for the mining industry, On October 10, 2019, the U.S. District Court for the District of Wyoming granted NMA's motion to preliminarily enjoin the coal valuation provisions of the 2016 rule. As a result of this early procedural win, all federal and Indian coal lessees are excused from complying with those provisions while litigation on the merits of the 2016 rule is ongoing.

On Oct. 1, 2020, ONRR proposed to revise its 2016 coal valuation regulations. The revisions were intended to address in part the Wyoming court's decision but do not go far enough to address the totality of NMA's concerns with the 2016 rule and NMA's comments opposed the revisions. The 2020 revisions were finalized on Jan. 15, 2021 but on Feb. 12, 2021, the Biden

administration published a notice to delay the effective date of the rule. The 2020 rule was rescinded in Sept. 2021.

Status:

In Oct. 2021, the U.S. District Court for the District of Wyoming vacated the coal valuation provisions of ONRR's July 2016 Consolidated Federal Oil & Gas and Federal Indian & Coal Valuation Rule, and the government did not file an appeal to the decision. As a result, the pre-2016 valuation provisions, including the benchmarks, govern the valuation of federal coal and ONRR intends to implement the court's order by recodifying these pre-2016 regulations in early 2023.

PERMITS NOT STARTED

PRIORITY C – OSM

Background:

Under the text of SMCRA, if a permit has not begun operations within three years of issuance, the permit "terminates" (i.e. suggesting that it is automatically revoked). However, recent court reviews of SMCRA's provisions relating to permits not started are of disparate opinions on whether SMCRA permits automatically terminate or whether they require an affirmative action on behalf of the regulator to terminate. In the summer of 2016 the U.S. District Court for the District of Alaska held that OSM had no basis for concluding that the Alaska Department of Natural Resources (DNR) had shown "good cause" for not taking corrective action in the face of a ten-day notice (TDN) alleging that permits for Usibelli Coal Mine, Inc.'s Wishbone Hill project had expired based on failure to begin mining operations within three years. DNR, OSM, and Usibelli took the position that SMCRA and corollary state laws, in this case the Alaska program, require an affirmative action on the part of the regulatory authority in order to terminate a permit after not starting operations within three years. The court disagreed, finding that the statue is unambiguous and self-executing, and does not require the regulatory authority to take any action in order for forfeiture to occur. This opinion is contrary to past OSM internal guidance which takes the position that the law discourages automatic forfeitures and that SMCRA lacks the necessary specificity to trigger them.

In a separate case in West Virginia in December, 2016, OSM cited the Alaska District Court ruling as ground for moving the D.C. District Court to vacate an earlier OSM memo stating that permit terminations under Section 1256(c) require an affirmative action by the RA. The court granted that vacatur Dec. 26, 2016 and the matter is now back before OSM on West Virginia's original request for informal review.

In NMA's regulatory review submission to DOI, we highlighted the former administration's interpretation of SMCRA with respect to permits not yet started as inconsistent with SMCRA and in need of clarification to reflect the law against automatic forfeitures.

In July 2018, OSM issued a determination regarding the Markfork Coal Company's Eagle No. 2 permit, which deviated from the agency's 2016 position that Sec. 506(c) of SMCRA is unambiguous and results in the automatic termination of permits not started within 3 years, returning to OSM's previous 2013 position that permits do not automatically terminate after 3

years of not having been started and can be extended after the 3 year mark. However, in issuing the opinion OSM adopted the limitation on this stated by the Alaska District Court in the Usibelli case that while permit extensions can be granted after 3 years, they cannot be implicitly extended by granting a permit renewal, rather, they can only be extended if one of the two statutory circumstances is demonstrated, 1) litigation precluding commencement of operations or threatening substantial economic loss to the permittee, or 2) conditions exist which are beyond the control and without the fault or negligence of the permittee which preclude commencement of operations. OSM's determination also included a footnote misconstruing SMCRA and suggesting that almost any dispute raised under a citizen complaint that a permit does not follow the correct procedures or include a specific requirement is subject to review by OSM, rather than the exclusive province of state SMCRA regulators as a permitting decision.

On November 29, 2018 the Alaska Department of Natural Resources (DMR) issued a decision retroactively renewing Usubelli's Wishbone Hill permits and lifting the stay that was on the permits. The decision concluded by asserting that, because, like the SMCRA provision related to termination of permits after not having commenced mining within 3 years, the Alaska state statue does not include a requirement that a written decision be issued for extensions of time to commence mining, the continued inspections, renewals, transfers, and revisions all granted over the life of the permits can only indicate that extensions of time to commence mining were granted and that the permits are valid.

In August 2019, a federal district court in West Virginia dismissed an action filed against a coal operator for mining with a permit that allegedly terminated as a matter of law because of the "not started" issue. The court dismissed the case as a collateral attack on a permit and rejected the notion that the operator was mining without a permit. Instead, the court observed that the essence of the plaintiff's claim was that the permit was issued or extended in violation of the statute; not that the operator was operating in violation of its permit. Since this case, there have not been any additional lawsuits on this issue in West Virginia.

Status:

It is unclear whether and when the Biden administration may tackle this issue but NMA will continue to advocate that SMCRA does not provide for automatic permit forfeitures absent a direct action by the regulatory authority with jurisdiction over the permit.

TIMBERING SMCRA VIOLATIONS

PRIORITY C – OSM

Background:

OSM has issued a number of TDNs to state SMCRA regulators and notices of violation and cessation orders to operators for alleged SMCRA violations stemming from timbering activity at SMCRA mine sites. In 2014, the Pennsylvania state regulatory authority received a TDN from OSM for perceived mining activity without a permit on behalf of Amerikohl Mining Company. The TDN alleged that the timber harvesting activity of the separate surface owner was mining activity for purposes of the SMCRA, and that this activity was being done in violation of SMCRA as the site had not yet been permitted. The PA regulator responded to the TDN explaining that: (1) as a primacy state, the PA program controls, not the federal SMCRA program; and that (2)

the timber harvesting was not mining activity for purposes of the state program. The state made this determination based on past cases drawing the distinction between activity in preparation for mining and separate surface use outside the scope of the state program. Here, the timber harvesting was pursued for the separate economic gain of the surface owner/timber company, and did not involve "grubbing and stumping"—the complete removal of tree stumps which must be done prior to mining and the absence of which actually makes mining more difficult. Consistent with the TDN interpretations of the prior administration, OSM did not accept the explanation and deemed PA's response arbitrary and capricious and not entitled to deference because it was different than OSM's interpretation of the program. OSM subsequently issued a notice of violation and cessation order to the operator. Amerikohl appealed the NOV and cessation order to the Interior Board of Land Appeals and the administrative law judge found in favor of OSM.

In a contrary 2008 Virginia case, OSM under the second Bush Administration chose not to take enforcement action against an operator where timbering had occurred on the surface prior to permit activation. The U.S. District Court for the Western District of Virginia found for OSM against the plaintiff environmental litigator, reasoning that the removal of timber was not incident to the extraction of coal and that OSM's deference to the Virginia state regulator in the interpretation of their program was appropriate in this case.

Status:

On Aug. 30, 2017, the Interior Board of Land Appeals upheld the decision of the ALJ in the Amerikohl case finding that because the record shows that timbering was limited to the mine permit area, done in coordination with the permittee, and intended to facilitate anticipated mining, the activities were subject to SMCRA requirements and that the Pennsylvania SMCRA Department of Natural Resources determination otherwise was arbitrary and capricious and not subject to deference under SMCRA. The Biden administration is unlikely to change the current position but if the circumstances arise, NMA will continue to urge a clarification that timbering for separate economic gain and not incidental to the extraction of coal is not mining activity for purposes of SMCRA.

ADMINISTRATION BUDGET

PRIORITY C – OSM

Background:

The budget process provides industry an opportunity to try to shape the OSM budget to reflect industry priorities. For example, through the budget process we have reversed proposed cuts to Title V regulatory grants for state programs, successfully pushed for reductions in OSM's budget and highlighted the misallocation of coal industry fees under the Abandoned Mine Lands (AML) program and the need to allow the AML fee reductions.

Status:

Given the change in control of the administration and Congress, we will likely have fewer opportunities through the appropriations process but will continue to weigh in as appropriate. Regarding AML fees and reauthorization, NMA will advocate for bipartisan legislation to reduce

the AML fee, including the need to direct funds toward high priority projects, and garner support for fee reduction and program reforms from industry allies.

At the end of September 2021, Congress passed a continuing resolution to fund the federal government through December 3, 2021 but the measure failed to address the expiration of the AML fee. The Infrastructure Investment and Jobs Act eventually passed in Nov. 2021, and included a reauthorization of the AML fee through 2034 with a 20% reduction in fees paid by production companies. OSM posted a notice that although collection authority under the program lapsed from Oct 1, 2021 to the enactment of the Infrastructure Act, that companies were responsible for the fees during that period, but with the new incoming rates. OSM published an interim final rule in Jan. 2022, implementing the new AML fee and reduction.

GOOD SAMARITAN

PRIORITY A – EPA & CONGRESS

Background:

For more than a decade, NMA has actively engaged in discussions with both the legislative and executive branches on commonsense legislation and administrative policies that are needed to remove the legal liability obstacles that continue to impede voluntary cleanup projects by companies and community partners. In Jan. 2018, NMA formed a working group comprised of member company representatives to begin discussions on opportunities to advance administrative and legislative concepts that could, if adopted, provide reasonable and meaningful liability protection to qualified third parties, including mining companies, undertaking voluntary remediation efforts at abandoned mine land (AML) sites.

Administrative:

EPA launched the Superfund Task Force in 2017, which among other things, renewed the agency's focus on cleanup of AMLs. NMA met with EPA's Superfund Task Force to discuss the recommendations it publicly released on how the agency could streamline and improve the Superfund program, including opportunities to identify barriers and opportunities related to cleanup and reuse of Superfund sites. At that time, EPA's Superfund Task Force staff expressed interest in receiving information from mining industry stakeholders on new approaches within the construct of existing laws (*e.g.*, the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)) to spur voluntary AML cleanup projects.

To assist in this ongoing dialogue, the first project the working group completed was a review of several EPA administrative policies, including : (1) "Interim Guiding Principles for Good Samaritan Projects at Orphan Mine Sites and Transmittal of CERCLA Administrative Tools for Good Samaritans" (2007); and (2) "Clean Water Act § 402 National Pollutant Discharge Elimination System (NPDES) Permit Requirements for 'Good Samaritans' at Orphan Mine Sites" (2012) and related Question and Answer document. The working group also reviewed the agency's model comfort letter and model settlement agreement, available here. NMA shared the recommendations from this internal review with agency staff.

EPA subsequently scheduled a workshop in April 2019 to continue discussions with interested stakeholders on how the agency can incentivize third parties to take on the remediation of AMLs under existing statutory and regulatory authorities. NMA and several mining companies participated in this workshop. The agency was particularly interested in learning more about administrative policies that are hindering voluntary cleanup efforts by Good Samaritans, including mining companies, at AMLs that do not require active water treatment.

On June 6, 2019, EPA sent a letter to the meeting participants outlining the agency's next steps, including: (1) near-term steps to encourage projects at relatively simple source control or "dirt" sites that can begin that year; and (2) longer-term strategies relating to more complex sites that involve more extensive legal and policy analysis. Not surprising, EPA categorized the liability issues raised by NMA during the meeting as "longer-term strategy considerations." However, EPA did ask whether companies had identified (or were planning on identifying) any source control or dirt projects that would meet the agency's near-term goals (*e.g.*, fully funded and

could be completed in less than 30 days). EPA did not publicly release any plans to address the mining industry's liability concerns raised during the 2019 workshop.

On Sept. 2, 2020, EPA launched a western lands-focused Office of Mountains, Deserts and Plains (OMDP) "to focus on the complex and unique issues related to hardrock mining cleanup" in EPA Regions 6, 7, 8, 9 and 10. According to EPA's announcement, the office will "drive accountability, streamline cleanup efforts, and better facilitate coordination with states, local and tribal partners." Among other things, this office was established to support efforts of conservation organizations to voluntarily undertake projects to improve conditions at abandoned mines. NMA initiated a dialogue with the Office Director, Shahid Mahmud, on how industry can effectively engage with this office.

On Dec. 2, 2020, Administrator Wheeler sent an internal letter providing additional details on the role of the OMDP, including streamlining procedures and processes for Good Samaritan cleanup efforts and promoting Good Samaritan cleanup projects at abandoned hardrock mining sites in the West. More specifically, the OMDP was expected be the lead program in the agency for reviewing requests for Good Samaritan cleanups. The OMDP would coordinate with the Regions and Office of Enforcement and Compliance Assurance to evaluate existing practices at the agency for reviewing and approving Good Samaritan proposals and would propose, and implement if approved, process improvements to ensure projects are not unreasonably delayed.

Legislative:

On Dec. 6, 2018, Senator Cory Gardner (R-Colo.) and Congressman Scott Tipton (R-Colo.) introduced the "Good Samaritan Remediation of Orphan Hardrock Mines Act of 2018" (S. 3727/H.R. 7226). The NMA-supported legislation would require EPA to establish a pilot permitting program to authorize the remediation of up to 15 abandoned or inactive mine sites. Importantly, the legislation incorporated the key elements advocated for by the mining industry over the last two decades.

In March 2019, Trout Unlimited spearheaded an informal dialogue among various stakeholders to try and develop consensus recommendations that would resolve certain outstanding issues that have blocked the successful passage of Good Samaritan legislation. While Trout Unlimited supported the Gardner/Tipton bill, securing bipartisan support was difficult given Earthworks' opposition. NMA, Trout Unlimited, and AEMA ultimately drafted a compromise draft bill that Senator Gardner's staff was considering for introduction. However, Senator Gardner lost his re-election.

Status:

Administrative:

No actions to date during the Biden Administration. The OMDP remains in place but is understaffed and has not publicly shared information on its priorities or actions to date.

Legislative:

NMA worked successfully with Trout Unlimited and AEMA on introducing bipartisan legislation that would create a Good Samaritan pilot project program. On Feb. 3, 2022, Senator Heinrich (D-N.M.) and Senator Risch (R-Idaho) introduced the "Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2022" (S. 3571), which requires the EPA to establish a 7-

year pilot program for 15 Good Samaritan remediation projects of abandoned mine sites on Federal, State, Tribal and private lands. The pilot program is designed for environmentally lower risk projects and involves activities designed to result in remediation of the abandoned hardrock mine sites. The bill incorporates key legislative elements including: provides meaningful protections from potential CERCLA and CWA liability, sets environmental improvement goals for water and soil quality rather than strict standards, provides for the establishment of remediation goals and activities on a site-by-site basis, and allows for reprocessing of historic waste if profits are first used to defray the cost of remediation and any government oversight costs incurred. Importantly, this is the first bipartisan Good Samaritan legislation to be introduced since 2009. This legislation has 18-co-sponsors.

On Sept. 29, 2022, the Senate Environment and Public Works Subcommittee on Chemical Safety, Waste Management, Environmental Justice, and Regulatory Oversight and the Subcommittee on Fisheries, Water, and Wildlife held a joint legislative hearing on the bill. Witnesses for the majority were Lauren Pagel (Policy Director at Earthworks) and Misael Cabrera (Director of the Arizona Department of Environmental Quality). Witnesses for the minority were Chris Wood (President and CEO of Trout Unlimited) and Jim Ogsbury (Executive Director of the Western Governors' Association). NMA sent a letter of support in advance of the hearing.

There was no action in the House of Representatives.

NMA is working to reintroduce this bill in the 118th Congress.

COAL ASH: UTILITY DISPOSAL RULE

PRIORITY A – EPA

Background:

Following the issuance of its May 2000 Bevill regulatory determination, EPA began developing regulations under RCRA Subtitle D for landfill and surface impoundment facilities that manage coal ash generated by electric utilities. In Dec. 2009, after the Tennessee Valley Authority impoundment failure in Kingston, pressure increased to further regulate the disposal and use of coal ash.

2015 Final Rule:

EPA issued a proposed rule on June 21, 2010. The proposed rule was a co-proposal of two regulatory options: (1) reversal of the regulatory determination, listing coal ash as a “special waste” and implementing hazardous waste regulations; or (2) implementing non-hazardous waste regulations. EPA stated that it was not addressing the placement of coal ash in mines or non-minefill uses of coal ash at mine sites in this rule. On Nov. 19, 2010, NMA filed extensive comments on the proposed rule, addressing definitional issues that made it uncertain as to whether the rule would unintentionally apply to uses of coal ash at underground and surface coal mines. In Aug. 2013, EPA issued a NODA on several new categories of information, including new information for defining "large scale fill." In Sept. 2013, NMA submitted comments on the NODA, urging the agency to not include the placement of coal ash at surface coal mining operations as "large scale fill.”

On Dec. 19, 2014, EPA announced the first national regulations for the disposal of coal ash (also called coal combustion residuals (CCR)) from electric utilities and independent power producers under RCRA. EPA published the final rule in the *Federal Register* on Apr. 17, 2015. 74 Fed. Reg. 21,302. Importantly, EPA finalized these regulations under the solid waste provisions (Subtitle D) of RCRA and not the hazardous waste provisions (Subtitle C) opposed by industry. Additionally, the final rule does not apply to placement of coal ash at active or abandoned underground or surface coal mines. EPA deferred to the U.S. Department of the Interior (DOI) to take the lead on this issue through a separate rulemaking under the Surface Mining Control and Reclamation Act. The final rule also explicitly excluded underground and surface mines from the "CCR Landfill" definition, which addressed NMA's concerns that the term "large scale fill" would wrongly be interpreted to include surface coal mining operations. Finally, EPA added a definition on "beneficial use" to distinguish between beneficial use and disposal. Applications of coal ash that do not meet a four-part test in the final rule could be considered a "CCR landfill" and thus subject to comprehensive new regulations.

2015 Final Rule Litigation: *USWAG v. EPA*, No. 15-1219 (D.C. Cir.)

In July 2015, the Utility Solid Waste Activities Group (USWAG) filed a petition for review in the D.C. Circuit opposing the final rule. USWAG originally challenged EPA's regulation of inactive impoundments, requirements for groundwater monitoring requirements and other restrictions and assessments in the final rule. Additionally, other industry petitioners filed challenges to EPA's regulations on ash "piles" intended for beneficial use. Earthjustice also filed a challenge that raised issues related to liner requirements and regulation of inactive sites. Notably, Earthjustice did not seek to overturn EPA's "non-hazardous" Subtitle D determination. NMA did not file a challenge given the favorable outcomes for the coal mining industry. Over the course of the litigation, EPA reached agreement with the petitioners that some of the provisions were either procedurally or substantively flawed. As a result, the D.C. Circuit narrowed the scope of issues it would consider and remanded several provisions of the rule back to the agency.

On Aug. 21, 2018, the D.C. Circuit issued a decision denying EPA's request to hold the case in abeyance while the agency decided whether to make changes to the 2015 final rule in response to new legal authority under the Water Infrastructure Improvements for the Nation Act (WIIN Act) (see below for more information). The D.C. Circuit also vacated certain aspects of the 2015 rule that environmental petitioners argued did not meet RCRA's protectiveness standard (e.g., "no reasonable probability of adverse effects on health or the environment"). *USWAG v. Wheeler*, No. 15-1219 (D.C. Cir. 2015).

First, environmental petitioners challenged the final rule's provision that existing, unlined surface impoundments may continue to operate until they cause groundwater contamination. The D.C. Circuit agreed, holding that "the final rule's approach of relying on leak detection followed by closure is arbitrary and contrary to RCRA." Second, environmental petitioners challenged the final rule's regulation of "clay-lined" surface impoundments. Similar to existing, unlined impoundments, the D.C. Circuit held that the final rule's approach of leak detection and response violated RCRA's protectiveness standard. Third, environmental petitioners challenged the agency's exemption of inactive impoundments at inactive facilities (e.g., legacy ponds). The D.C. Circuit rejected EPA's legacy pond exemption as unreasoned and arbitrary and capricious, emphasizing that the administrative record demonstrated the threats posed by legacy ponds and the ability of the agency to identify responsible parties. All three provisions were remanded back to the agency for consideration.

The D.C. Circuit granted EPA's motions to voluntary remand the provisions in the final rule pertaining to: (1) the definition of "coal residual piles"; (2) the 12,400-ton beneficial use threshold; and (3) the alternative groundwater protection standards at 40 C.F.R. 257.95(h)(2) for constituents without an MCL. Industry lost most of its challenges with the court holding that the agency: (1) has statutory authority to regulate inactive impoundments; (2) provided sufficient notice of its intention to apply aquifer location criteria to existing impoundments; (3) did not arbitrarily issue location requirements based on seismic impact zones; (4) did not arbitrarily impose temporary closure procedures.

State Permit Programs:

- **WINN Act**: The Senate Environment and Public Works Committee lead by Senator Inhofe (R-Okla.) negotiated a scaled down amendment to the Water Resources Development Act (S. 2848) that directed EPA to review and approve state permitting programs for coal ash disposal units, making EPA's final rule a federally enforceable program. This amendment, however, stripped out the language from previous bills prohibiting EPA from regulating coal ash at mine sites. On Dec. 16, 2016, President Obama signed the WIIN Act with the coal ash amendment in the bill package. Importantly, EPA's rule and decision to not regulate coal ash mine placement and defer to OSM remains intact regardless of WIIN's silence on the issue.

- **EPA Guidance:** On Aug. 10, 2017, EPA released the Interim Final Coal Combustion Residuals State Permit Program Guidance with a 30-day comment period. The guidance provides information on the processes and procedures EPA generally intends to use to review and make determinations on state coal ash permit programs as required under the WIIN Act.

- **State Permits**: **Oklahoma** and **Georgia** were the first to submit applications for delegated RCRA authority to permit coal ash disposal. EPA first approved Oklahoma's permit application. On Jan. 10, 2020, EPA approved Georgia's partial permit program. On June 28, 2021, EPA finalized **Texas'** permit program, which went into effect on July 28, 2021. Twenty states are reportedly in the process of developing their own permit programs, including Alabama, North Carolina, and Missouri. However, the Missouri Department of Natural Resources on Aug. 1, 2022, announced the withdrawal of a proposed draft general coal ash permit, stating that the underlying eligibility conditions were largely misunderstood, among other reasons. Additional information available here.

Phase One, Part One Revisions to the 2015 Final Rule:

Rulemaking:

On May 12, 2017, USWAG petitioned the EPA for rulemaking to reconsider certain provisions of the final rule. USWAG also requested that EPA extend certain compliance deadlines and that the agency seek to hold the underlying litigation in abeyance during reconsideration. USWAG's petition for reconsideration may be accessed here. USWAG advocated for site-specific, risk-based provisions for coal ash management and disposal, as well as the modification of inflexible requirements that unnecessarily impose significant compliance costs (e.g., groundwater monitoring and corrective action standards; inability to tailor corrective action to the individual characteristics of the site). On Sept. 13, 2017, EPA granted the industry petitions for reconsideration of the 2015 final rule.

On March 15, 2018, EPA published the proposed rule, known as the "Phase One Remand Rule," addressing four provisions in the final rule that were remanded back to the agency by the D.C. Circuit (e.g., addition of boron to Appendix IV, alternative closure requirements, clarifying the type and magnitude of non-groundwater releases that would require corrective action, and performance standards for slope stability), proposing six provisions to allow states with approved permit programs (or EPA where it is the permitting authority) to set alternative performance standards, and proposing an additional revision to respond to comments received after the final rule was published on use of coal ash during certain closure situations. 83 Fed. Reg. 11,584.

On April 30, 2018, NMA submitted comments on the proposed rule. NMA's comments aligned with the positions taken by the USWAG, focusing on several key issues that have the greatest impact on the electric utility sector's compliance with the current federal program and the continued use of coal to power our nation's energy grid. Specifically, NMA: (1) urged EPA to extend the impending compliance dates for the groundwater monitoring program and location restrictions; (2) supported EPA's proposal to incorporate risk-based criteria into the rule; (3) opposed adding boron to Appendix IV of the rule's groundwater monitoring program; (4) urged EPA to allow CCR units subject to forced closure to continue to manage non-coal ash wastes; and (5) supported EPA's proposal to allow limited corrective action procedures for non-groundwater releases.

On July 30, 2018, EPA published the "Phase One, Part One" final rule. 83 Fed. Reg. 36435 EPA recognized that there are "urgent concerns presented by facilities" regarding "quickly approaching compliance deadlines that may require substantial investments and impact operational decision-making." However, the agency chose not to finalize all the proposed revisions due to concerns expressed during the public comment period related to the scientific support for alternative standards and meeting RCRA's protectiveness standard. EPA decided that it needed more time to "evaluate a number of technical issues raised in comments" before pursuing certain proposed revisions. Consequently, the final rule was limited to: (1) extending the deadline to Oct. 31, 2020, by which facilities must cease placement of waste in CCR units closing for cause under two situations; (2) revising the groundwater protection standards for constituents that do not have an established drinking water standard; and (3) finalizing just two alternative performance standards (e.g., suspending groundwater protection standards for "no migration" sites and allowing state and EPA certifications in lieu of requiring a third-party certification from a qualified professional engineer).

Litigation:

***Waterkeeper Alliance v. Wheeler*, No. 18-1289 (D.C. Circuit)**: On Oct. 22, 2018, Waterkeeper Alliance, Inc. (on behalf of five other environmental groups) filed a petition for review challenging EPA's "Phase One, Part One" rule. On Nov. 26, 2018, environmental petitioners filed their non-binding statement of issues, outlining nine specific issues, including challenges to EPA's: (1) extension of the deadlines for closure at unlined surface impoundments violating groundwater standards and impoundments that do not meet certain location restrictions; (2) decision to authorize state agencies or EPA to suspend groundwater monitoring requirements at sites where the operator certifies that there is "no potential for migration" of pollutants into groundwater; and (3) interpretation of groundwater monitoring deadlines in existing regulations. The USWAG and several companies filed to intervene in support of the government.

On Dec. 17, 2018, environmental petitioners filed a motion requesting that the court stay (and expedite consideration and briefing of this case), or in the alternative, vacate those provisions of

the "Phase One, Part One" rule that extended the deadlines to initiate closure or retrofit of unlined surface impoundments that have violated groundwater standards or location restrictions. Environmental petitioners argued that the decision in *USWAG v. Wheeler*, No. 15-1219, on the 2015 final rule invalidated the deadline extensions in the "Phase One, Part One" rule and claimed that the court's stay of the deadline extensions would not harm utilities.

In contrast, EPA filed a motion the same day requesting a voluntary remand without vacating the deadline extensions, stating that this action would allow the agency to take administrative action consistent with *USWAG* and, if warranted, to reexamine other aspects of the "Phase One, Part One" rule. EPA told the court that if the "Phase One, Part One" rule was vacated, "coal-fired power plants across the country would have to cease immediately placing [coal ash] and non-[coal ash] waste into certain [coal ash] impoundments." EPA asserted that this would result in "widespread disruptive consequences, potentially impacting the continued operation of these power plants, and the reliability of the power grid." On Jan. 22, 2019, industry intervenors supported the government's motion, arguing that environmental petitioners' request "would cause regulatory uncertainty and significant disruption to the Nation's power supply."

On Mar. 13, 2019, the D.C. Circuit issued an order granting EPA's motion for voluntary remand of the "Phase One, Part One" reconsideration rule without vacating critical compliance extensions given to utilities operating certain surface impoundments and landfills closing for cause.

Reconsideration Rulemakings & New Rules:

The D.C. Circuit decision on the 2015 final rule and the challenge to the "Phase One, Part One" final rule complicated EPA's plan for regulatory reforms during the Trump Administration as the agency was required to remedy the provisions struck down or remanded by the court. EPA advanced the following rules.

1. ***Closure Part A Rule & Revision to Deadline to Initiate Closure*:**

Rulemaking:

On Nov. 4, 2019, EPA announced several proposed changes to the regulations (called the "Holistic Approach to Closure Part A Rule"). The proposed rule responded to the unfavorable D.C. Circuit decision on the 2015 final rule, which rejected EPA's leak detection approach for unlined and clay-lined surface impoundments, stating that it violated RCRA's protectiveness standard. The proposed rule also addressed the court's separate remand of the 2018 "Phase One, Part One" rule that, among other things, extended the deadline by which facilities must cease placement of waste in surface impoundments that are closing for cause. EPA published the rule on Dec. 2, 2019. 84 Fed. Reg. 65,941. Comments were due on Jan. 31, 2020. Member companies did not raise any concerns regarding this proposed rule. Accordingly, NMA did not file comments.

On July 29, 2020, EPA announced five amendments to the 2015 RCRA rule that were published on Aug. 28, 2020. 85 Fed. Reg. 53,516. EPA's fact sheet may be accessed here.

- **Classifying Clay-Lined Surface Impoundments as Unlined:** In response to the *USWAG* decision, EPA changed the classification of compacted-soil lined or clay-lined surface impoundments from "lined" to "unlined."

- **Deadline to Cease Receipt of Waste**: EPA finalized a new deadline of Apr. 11, 2021 (as compared to Oct. 31, 2020), for the initiation of closure deadlines for unlined impoundments and for units that failed the aquifer location restriction. These units must cease receipt of coal ash and non-coal ash waste and initiate closure by this date. If facilities can cease receipt of waste more quickly, they are required to do so.

- **Alternative Deadlines to Cease Receipt of Waste**: EPA finalized revisions to the alternative closure provisions to grant certain facilities additional time to develop alternative capacity to manage their waste streams (both coal ash and non-coal ash) before they are required to cease receipt of waste and initiate closure of their surface impoundments. These new alternative closure provisions do not amend the implementation schedules for groundwater monitoring and corrective action.

  EPA finalized a **new site-specific alternative due to lack of capacity** with a deadline to initiate closure no later than Oct. 15, 2023 (maximum of five years after *USWAG* decision mandate date). EPA allowed qualified unlined surface impoundments unexpectedly forced into closure due to *USWAG* to request an alternative compliance deadline no later than Oct. 15, 2024. Notification, documentation, certification of compliance, and progress reports were required.

  EPA finalized a **new site-specific alternative due to permanent cessation of coal-fired boilers** with two deadlines to complete closure: (1) no later than Oct. 17, 2023, for surface impoundments 40 acres or smaller; and (2) Oct. 17, 2028, for surface impoundments larger than 40 acres. According to EPA, "facilities that are converting their boilers to natural gas or a different fuel source (non-coal) are eligible for the provision." Certain documentation and other requirements applied.

EPA maintains a website listing those facilities that submitted demonstrations.

Litigation:

***Labadie Environmental Organization v. EPA*, D.D.C. No. 1:20-cv-1819**. On Nov. 24, 2020, Earthjustice filed a petition review on behalf of 9 organizations in the D.C. Circuit challenging the Part A Rule. USWAG and a number of utilities filed motions to intervene in support of EPA. Specifically, this filing alleges, among other things: (1) EPA violated RCRA's protectiveness standard and the court's mandate in *USWAG*, and acted arbitrarily and capriciously, by extending deadlines to commence closure of unlined coal ash impoundments; (2) EPA violated RCRA and acted arbitrarily and capricious by establishing deadlines for commencement of closure or unlined coal ash impoundments based on a vague definition of "technological feasibility" rather than risks to health or the environment; and (3) EPA violated RCRA and acted arbitrarily and capricious by continuing to authorize state agencies or EPA itself to suspend groundwater monitoring requirements at sites where the operator certifies that there is "no potential for migration" of pollutants into groundwater.

On Feb. 22, 2021, EPA filed a motion to put this case in abeyance for 90 days while the Biden Administration undertook its reconsideration process. On March 5, 2021, the court granted the motion, directing parties to file motions to govern future proceedings by July 6, 2021. EPA subsequently received a 14-day extension to file the motion.

On July 20, 2021, EPA and the petitioners filed a joint motion to hold the case in abeyance for an additional 60 days to "allow Petitioners to assess whether EPA has begun making proposed

decisions on facility extension requests under the challenged rule and, if so, whether those proposed decisions are consistent with EPA's statement that implementing the challenged rule is 'the most environmentally protective course,' before the parties commit significant resources to litigation of the challenged rule." On Sept. 21, 2021, EPA and the petitioners filed another motion for abeyance for an additional 60 days, since EPA had not yet issued any proposed decisions on the facility extension requests. On Sept. 22, 2021, the court granted the request to stay the case until Nov. 22, 2021. The case remains in abeyance.

2. ***Closure Part B Rule & Alternate Demonstration for Unlined Surface Impoundments & Implementation of Closure*:**

Rulemaking:

On Feb. 19, 2020, EPA announced additional proposed revisions and flexibilities to the regulations that were published on Mar. 3, 2020. 85 Fed. Reg. 12,456 (called the "Holistic Approach to Closure Part B" rule). Specifically, EPA proposed: (1) an alternate liner demonstration process for certain unlined surface impoundments that would allow their continued operation; (2) two co-proposed options to allow the use of coal ash during unit closure; (3) an additional closure option for CCR units being closed by removal of coal ash; and (4) requirements for annual closure progress reports. Comments were due on Apr. 17, 2020.

NMA reached out to USWAG on coordinating comments on this proposed rule. Based on that collaboration, NMA decided that the most impactful proposal to prevent premature closure of coal-fired power plants was the allowance for alternate liner demonstrations. Based on information provided by USWAG, NMA filed comments that supported this proposed mechanism for allowing facilities to continue operating certain unlined surface impoundments that do not pose a risk to human health or the environment. NMA also offered several recommendations to clarify and improve the actual process for securing an alternate liner demonstration, including timing, tolling of closure obligations, application requirements, eligibility standards, duration of demonstrations, and authorizations.

On Oct. 16, 2020, EPA announced the finalization of the alternative liner demonstration provisions proposed in the Part B rule, which was published on Nov. 11, 2020. 85 Fed. Reg. 72,506. EPA's fact sheet may be reviewed here. EPA's final rule establishes a two-step process to allow utilities to demonstrate to the agency, or a participating state director, that based on ongoing groundwater monitoring data and the design of the impoundment the unit has and will continue to have no probability of adverse effects on human health or the environment and therefore should be allowed to continue to operate.

The two-step process includes: (1) an application step (due by Nov. 30, 2020) that allows a utility company to show that an impoundment meets certain minimum requirements (e.g., on compliance, groundwater monitoring, and design, location, and construction standards); and (2) a comprehensive final demonstration (due by Nov. 30, 2021) that includes documentation characterizing site hydrogeology, evaluating the potential for infiltration through any liners and underlying soils, and showing that the unit has remained in detection monitoring for the duration of the demonstration, as well as modeling results of long-term unit performance.

Litigation:

***Alliance for Affordable Energy v.* EPA, No. 21-1059 (D.C. Circuit).** On Feb. 11, 2021, the Alliance for Affordable Energy, Penn Environment, Inc., and Sierra Club filed a petition review in

the D.C. Circuit. Petitioners' statement of interests was due on Mar. 15, 2021. On Feb. 25, 2021, petitioners filed a motion to voluntarily dismiss this litigation. No reasons were given in the filing. On March 2, 2021, the D.C. Circuit granted the motion and dismissed the case.

3. ***Proposed Rule on Federal Coal Ash Permitting Program*:**

On Dec. 19, 2019, EPA announced its proposed federal permitting program for the disposal of coal ash in surface impoundments and landfills. On Feb. 20, 2020, EPA published the proposed rule in the *Federal Register*, opening the 60-day comment period. 85 Fed. Reg. 9940. EPA extended the comment period by 30-days to May 20, 2020. EPA's proposed rule includes requirements for federal coal ash permit applications, content and modification, as well as procedural requirements. The federal permitting program will apply directly in Indian Country and at coal ash units located in states that have not submitted their own coal ash permit program for approval. Existing surface impoundments, new coal ash surface impoundments and inactive coal ash surface impoundments that are classified as "high hazard" would be required to submit a federal permit application no later than 18 months after the effective date of the final rule. NMA collaborated with USWAG in drafting comments on this proposed rule, providing high-level comments on applicability, permitting procedures, permitting conditions, effect of the permits, compliance schedules, and expiration dates.

4. ***Legacy Units*:**

On Oct. 14, 2020, EPA published an ANPRM to start the rulemaking process for how it may regulate coal ash in inactive surface impoundments at inactive electric utilities (also known as "legacy units"). 85 Fed. Reg. 65,015 (Oct. 14, 2020). EPA's fact sheet may be accessed here. On Dec. 14, 2020, EPA granted a comment extension request from USWAG. Comments were due by Feb. 12, 2021. EPA's ANPRM seeks additional information on a variety of topics to inform the agency's "thinking on any future proposed rulemaking." Specifically, EPA sought information on: (1) any known surface impoundments at inactive power plants as of the effective date of the 2015 RCRA rule (Oct. 19, 2015) to determine the size of the regulated universe; (2) three potential definitions of a legacy coal ash surface impoundment; and (3) the agency's regulatory authority and the timeframes to come into compliance with those regulations. NMA did not submit comments on this rule.

5. ***Proposed Rule on Coal Ash Beneficial Use and Piles*:**

On July 30, 2019, EPA announced targeted changes to the 2015 final rule related to beneficial uses and piles. The rule was published on Aug. 14, 2019. 84 Fed. Reg. 40,353. EPA proposed to revise part of the coal ash "beneficial reuse" definition related to unencapsulated coal ash placed on land in non-roadway applications. Specifically, EPA proposed to eliminate the mass-based numerical threshold (12,400 tons or more) that currently triggers an environmental demonstration requirement and replace it with location-based criteria. EPA also proposed changes to the requirements for managing coal ash piles (*e.g.*, "non-containerized accumulation of solid, non-flowing [coal ash] that is placed on the land"). EPA proposed a single regulatory mechanism applicable to all temporary placement of coal ash on the land regardless of location and whether the coal ash is subsequently destined for disposal or beneficial reuse.

Finally, EPA proposed three additional targeted changes to the 2015 final rule: (1) revisions to the annual groundwater and corrective action report requirements, including a requirement to summarize the results in an executive summary; (2) establishing an alternative risk-based groundwater protection standard (GWPS) of 4,000 micrograms per liter for boron that would go

into effect if EPA added boron to the list of constituents for assessment monitoring (also known as Appendix IV); and (3) revisions to the coal ash website requirements to ensure that relevant facility information required by the regulations is immediately available to the public.

On Oct. 15, 2019, NMA filed comments responding to the agency's proposals to: (1) revise the coal ash beneficial use definition; (2) adopt a single approach for regulating the temporary storage of coal ash in piles; and (3) establish an alternate risk-based groundwater protection standard for boron. Specifically, NMA argued that EPA's proposal imposes unlawful and unnecessary barriers to beneficial use of coal ash that are not supported by the record. NMA's comments were drafted to preserve our interests against a volumetric- or location-based criteria for unencapsulated beneficial uses (*e.g.* coal ash placed on the land in non-roadway applications) in the event there are future attempts to apply the beneficial use definition and associated criteria to beneficial use practices at mining operations.

NMA also argued that EPA's proposal to revise requirements applicable to coal ash piles exceeds its statutory jurisdiction and if finalized must include additional compliance flexibilities. Finally, NMA reiterated its opposition to adding boron to the ground water monitoring program, while agreeing that if the agency pursues this action, it must establish an alternative risk-based standard. NMA conditioned its support of the proposed 4,000 micrograms per liter standard on EPA also allowing states (or the agency under a federal permitting program) to allow different risk-based standards on a case-by-case basis.

Originally, we expected a final rule in April 2020. However, EPA signaled in the Spring 2020 semi-annual regulatory agenda that it was starting over with this aspect of its reconsideration of the 2015 RCRA rule by putting it on the agency's "long-term action" list. On Dec. 9, 2020, EPA announced a notice of data availability (NODA) seeking information and data related to the agency's reconsideration of the beneficial use definition and provisions for coal ash accumulation in piles, which was published on Dec. 22, 2020. 85 Fed. Reg. 83478. Comments were originally due on Feb. 22, 2020. On Mar. 12, 2021, EPA extended the public comment period an additional 60 days to May, 11, 2021, responding to a request from Earthjustice for more time. NMA members did not identify any concerns with this NODA or information to share. Accordingly, NMA did not file comments.

Status:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions. The Trump Administration's coal ash rules ("Phase One, Part One;" Part A Closure Deadlines; Part B Alternative Demonstrations) were identified on the Biden transition team's initial list of environmental policy actions for review. Without fanfare, EPA in July posted an update on its coal ash website saying it had completed its review of the three coal ash rules in response to Executive Order 13990. According to the agency, it "determined that the most environmentally protective course is to implement the rules."

Rulemakings:

1. ***Closure Part A Rule & Revision to Deadline to Initiate Closure*:**

Fifty-nine coal-fired power plants originally applied for deadline extensions, although now only 54 extension requests are actively being pursued. Of this total, 31 plants requested deadline extensions due to technical infeasibility and 23 plants requested deadline extensions because they have decided to stop burning coal.

- EPA's Preliminary Decisions:

First Round: On Jan. 11, 2022, EPA announced proposed decisions on 9 facilities in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New York, and Ohio. EPA determined that four of the demonstrations submitted were incomplete, one was ineligible, and the rest were complete. Additional information is available here, including a complete listing of facilities that submitted demonstrations and are awaiting the agency's decisions. EPA accepted public comment on 5 of these decisions until Mar. 25, 2022, and 4 of these decisions until Feb. 23, 2022. NMA and America's Power submitted four letters to the rulemaking dockets open for the Dallman Power Station here, Clifty Creek Power Station here, Gavin Power Plant here, and Ottumwa Generating Station here. These letters urged EPA to grant these facilities' extension requests to avoid jeopardizing the reliability and resilience of the grid caused by forced idling or premature retirements of coal plants.

Second Round: On July 12, 2022, EPA posted on its website a second announcement proposing conditional approvals for the Calaveras Power Station (here) and Mountaineer Power Plant (here). Comments were due on these proposals from July 26 to Sept. 26, 2022 (following a 30-day extension). NMA filed comments urging EPA to grant these extension requests and recommending that EPA address certain reliability and process concerns.

Third Round: On Oct. 19, 2022, EPA opened public comment on a preliminary conditional approval for the A.B. Brown facility in Indiana. The NMA filed comments on Dec. 19, 2022, strongly encouraged the agency to reconsider its woefully inadequate approach to addressing the legitimate reliability issues raised by several stakeholders over the course of the last year.

- EPA's Final Decisions:

Gavin Power Plant (Ohio): On Nov. 18, 2022, EPA announced its decision to deny the extension request submitted by the Gavin Power Plant in Ohio. EPA's reasons include: (1) one of the unlined coal ash impoundments closed with waste sitting in groundwater; (2) the groundwater monitoring systems are inadequate because the power plant failed to conduct appropriate statistical analyses, failed to support alternative source demonstrations, and monitoring wells were placed too far apart to detect all potential pathways of groundwater contamination. EPA published the final decision on Nov. 28, 2022.

EPA claims that the "final decision recognizes the importance of maintaining grid reliability and establishes a process for Gavin to seek additional time if needed to address demonstrated grid reliability issues." Gavin is required to submit any request for a planned outage to PJM by Dec. 14, 2022 (the required 15 days from the final decision's publication). Gavin has until Apr. 21, 2023 (135 days from the effective date of the denial) to cease placing waste in its unlined landfill. EPA acknowledges in the final decision document that "it is possible that temporarily

taking Gavin offline could have an adverse impact on electric reliability (e.g., voltage support, local resource adequacy) and we are establishing a process by which Gavin can work with PJM to quickly evaluate the reliability impacts that identified."

- Litigation:

***Labadie Environmental Organization v. EPA*, No. 20-1467 (D.C. Circuit) (challenging the Part A Rule)**: This case remains in abeyance. Most recently, the parties filed a motion to govern and unopposed motion for further abeyance in this case for an additional 90 days to allow petitioners to "assess EPA's implementation of the challenged rule." In particular, the motion recognizes EPA's first formal denial of an extension request submitted by the Gavin Power Plant in Ohio. The court granted this motion. The next filing date is Feb. 20, 2023.

***USWAG v EPA*, No. 22-1058 (D.C. Circuit) & *Electric Energy Inc. v. EPA*, No. 22-1056 (D.C. Cir.) (challenging EPA's actions related to the extension requests and letters to states interpreting the Part A program)**: On Apr. 8, 2022, USWAG and a collection of individual utilities filed challenges in the D.C. Circuit alleging that EPA unlawfully revised aspects of its regulation when it acted on utility requests for extensions of the "cease receipt" deadlines for unlined surface impoundments. The lawsuits claim that EPA's actions changed the substance of the regulation without proper opportunities for public notice and comment. These cases were consolidated.

On May 6, 2022, three conservation groups filed a motion for leave to intervene in *Electric Energy, Inc. v. EPA*, in order to defend against allegations made by power sector plaintiffs. The same day, three other environmental groups separately filed a motion to intervene in support of EPA in this case. On May 9, 2022, state of Texas and the Texas Commission on Environmental Quality filed a motion to intervene in the case. Texas is one of three states that have an approved coal ash permitting program. On July 7, 2022, the court granted all motions to intervene.

Statement of issues were originally due on May 12, 2022. With a court approved extension, the plaintiffs filed their statement of issues on June 13, 2022. Among other issues, the petitioners raised: (1) whether EPA's revision to its closure performance standard -- which now prohibits any liquid passing into or through a CCR unit by filtering or permeating in any direction, including the sides and bottom of the unit -- was issued without notice and comment in violation of the APA; (2) whether EPA's requirement that all groundwater be removed from a CCR unit prior to installation of a final cover system is in violation of the APA due to a lack of notice of comment; (3) questions on EPA's revised definition of an "inactive CCR surface impoundment" to now include units drained and removed from service prior to the rule's 2015 effective date, if they remained in contact with groundwater; and (4) questions on whether EPA violated the APA by revising the definition of a "CCR surface impoundment" to include self-supporting tank systems.

On July 21, 2022, the State of Texas and the Texas Commission on Environmental Quality filed statement of issues including, among other things, whether EPA acted in excess of its statutory authority or otherwise not in accordance with the law because its actions are contrary to the plain meaning of RCRA, including the WIIN Act, which "gives states the primary role to develop solid waste management plans in accordance with federal guidelines set by EPA and to regulate disposal of nonhazardous wastes in landfills and dumps."

On Dec. 6, 2022, the petitioners filed their opening brief. EPA's brief is due on Mar. 17, 2023. Petitioners reply brief is due on May 5, 2023. Final briefs due on May 31, 2023.

***Electric Energy, Inc. v. EPA*, No. 23-1035 (D.C. Cir.) (challenge to Gavin Part A denial)**. On Feb. 16, 2023, a group of utilities, including Electric Energy, Inc., Luminant Generation Company LLC, Coleto Creek Power, LLC, Miami Fort Power Company LLC, Zimmer Power Company LLC, Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC, Kincaid Generation, L.L.C. protectively petitioned the D.C. Circuit to review EPA's final denial of the alternative closure deadline for the James M. Gavin Plant. Utility Solid Waste Activities Group (No. 23-1036) and Gavin Power, LLC (No. 23-1038) did the same. Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and Wheeling Power Company (No. 23-1037) also filed. Petitioners disagree with EPA's statement that challenges to the final decision must be filed in the D.C. Circuit. Instead, petitioners argue that the denial is appropriately heard in a U.S. district court. This petition for review protects petitioners' ability to challenge the final decision if the D.C. Circuit determines it has exclusive jurisdiction. On Feb. 17, 2023, the D.C. Circuit consolidated the cases.

2. ***Closure Part B Rule & Alternate Demonstration for Unlined Surface Impoundments & Implementation of Closure:***

- EPA's Response to Demonstrations:

Eight facilities submitted demonstrations in Arizona, Louisiana, Michigan, North Dakota, Pennsylvania, and Texas. On Jan. 11, 2022, EPA determined that the eight applications were complete and said it would "announce decisions on these applications as expeditiously as possible." On Jan. 25, 2023, EPA announced it is proposing to reject application requests from six plants in Arizona, Louisiana, Michigan, North Dakota, Pennsylvania, and Texas. EPA is proposing these denials because the owners and operators of the coal combustion residual (CCR) units "fail to demonstrate that the surface impoundments comply with requirements of the CCR regulations." **Comments on EPA's proposed denials are due on Mar. 10, 2023.** If EPA finalizes these denials, the facilities will have to either stop sending waste to these unlined impoundments or submit applications to EPA for extensions to the deadline to stop receiving waste.

- Closure Part B Additional Rulemaking:

EPA did not finalize the rest of the Part B rule, including: (1) two co-proposed options to allow the use of coal ash during unit closure; (2) an additional closure option for units being closed by removal of coal ash; or (3) requirements for annual closure progress reports. EPA continues to evaluate comments received on these proposals and will address them in a subsequent rulemaking action. According to the Fall semi-annual regulatory agenda, EPA is targeting August 2023 for a final rule (another 5-month delay).

3. ***Proposed Rule on Federal Coal Ash Permitting Program*:**

According to the Fall semi-annual regulatory agenda, EPA plans on issuing a final rule in July 2023 (another 9-month delay).

4. Legacy Units:

According to EPA's Fall semi-annual regulatory agenda, EPA anticipates issuing a proposed rule in June 2023 (another 7-month delay) and a final rule in June 2024 (a 7-month delay). Until EPA finalizes amendments to the regulations to effectuate the D.C. Circuit's order, facilities are not legally required to take any action to comply with the 2015 RCRA rule.

5. *Beneficial Reuse & Piles*:

EPA's Fall semi-annual regulatory agenda continues to treat this rule as a long-term action with no date certain for final action. NMA will reconsider engagement when EPA issues a new proposed rule.

6. Inactive CCR Landfills

***Statewide Organizing for Community Empowerment v. EPA* (D.D.C.) (1:22-cv-02562)**: On Aug. 25, 2022, a group of environmental organizations filed a lawsuit in the U.S. District Court for the District of Columbia seeking to compel EPA to regulate inactive landfills. The plaintiffs seek: (1) a determination that EPA's failure to review, and if necessary, revise the 2015 RCRA regulation exempting inactive CCR landfills (40 C.F.R. § 257.50(d)) violates the agency's duty under RCRA Section 2002(b); and (2) an order compelling EPA to take this required action in accordance with an expeditious deadline. Earthjustice claims there are approximately 300 landfills in 38 states that are currently exempted from CCR standards.

On Oct. 27, 2022, the parties requested a stay until Feb. 6, 2023, due to settlement negotiations. On Feb. 6, 2023, the parties filed a joint status report stating that they reached a settlement in principle. On Feb. 3, 2023, EPA published in the Federal Register a consent decree establishing a three-month period to decide whether to propose first-time rules regulating hundreds of "inactive" landfills containing CCRs. These landfills, which stopped receiving waste before Oct. 17, 2016, are currently exempt from the RCRA disposal regulations. The 30-day comment period ends on March 6, 2023, at which time EPA will consider and address, if appropriate, any adverse comments, and determine whether entering into the consent decree is warranted and whether the parties should move to enter the consent decree. The parties therefore seek to continue the stay, including Defendants' obligation to serve a response to the complaint, for an additional 120 days, up to and including June 6, 2023. On or before June 6, 2023, the parties will file a joint status report. In their report, the parties will propose appropriate next steps for the litigation.

State Programs

Arizona is the latest state to announce its plans to propose a coal ash permitting program for the state by the end of the year.

Potential National Enforcement & Compliance Priority

On Jan. 12, 2023, EPA published a notice requesting public comment on the existing and potential new National Enforcement and Compliance Initiatives (NECIs) for fiscal years 2024-2027. EPA requested public comment on whether a NECI is needed in the future for addressing CCRs. According to EPA, "[t]he impact or harm to human health and environment from CCR noncompliance is significant and can occur through direct exposure to impoundment wastewater or consumption of contaminated drinking water." EPA asked whether the agency

should pursue a CCR-focused NECI to reduce noncompliance in this sector. Comments are due on Mar. 13, 2023.

TSCA REFORM & IMPLEMENTATION

PRIORITY B – EPA

Background:

Legislative:

On March 10, 2015, Senator Udall (D-N.M.) and David Vitter (R-La.) introduced bi-partisan, compromise legislation to modernize the Toxic Substances Control Act (TSCA). "The Frank R. Lautenberg Chemical Safety for the 21st Century Act" (S. 697) was the result of nearly two years of deliberations and negotiations. On April 28, 2015, the Senate Environment and Public Works Committee approved a manager's amendment to the bill on a 15 to 5 bipartisan vote. The manager's amendment added three sections to the bill on persistent, bioaccumulative, and toxic (PBT) criteria that were of concern to the mining industry, because they would have increased the likelihood that metals would be chosen as high priority chemicals for assessment.

On May 12, 2015, the House Energy and Commerce Committee released revised discussion draft legislation, the "TSCA Modernization Act of 2015," which focused on targeted reforms to specific provisions of TSCA instead of an overhaul of the entire law like the Senate version. NMA proactively reached out to the House Energy and Commerce Committee staff to inform them of our concerns about the Senate PBT provisions and the inappropriateness of using PBT criteria to prioritize metals and metal substances. This outreach effort resulted in a new section in the bill that explicitly excluded metals and metal compounds from the PBT special assessment process.

The House Energy and Commerce Committee passed the bill (H.R. 2576) by a vote of 47-0 with one Congresswoman abstaining. On June 23, 2015, the House passed the bill on a vote of 398 to 1 with 36 not voting. The Senate bill (S. 697) passed on Dec. 17, 2015. The Senate legislation included an NMA-backed amendment that explicitly directs EPA to use its Framework for Metals Risk Assessment when prioritizing and assessing metals and metal compounds.

Starting in December 2015, key House and Senate members spent months in informal conference discussions reconciling the two bills. NMA repeatedly met with key Congressional staff to push for the House prioritization and assessment language. In May 2016, Senator negotiators and House Republicans struck a deal to reform TSCA. NMA was successful in preserving our successes in the Senate and House bills. Specifically, the final compromise bill directs EPA to use the Framework for Metals Risk Assessment when prioritizing and evaluating metals and metal compounds instead of an expedited rulemaking process for PBT substances. Both the House and Senate subsequently passed H.R. 2576 and President Obama signed it into law on June 22, 2016.

Rulemakings**:**

EPA is now implementing the new law. Further information may be found here. Major actions are summarized below.

- ***TSCA Inventory***:

On Feb. 19, 2019, EPA released the first major update to the TSCA Inventory in 40 years. Less than half of the total number of chemicals on the current TSCA Inventory (47 percent or 40,655 of the 86,228 chemicals) were identified as currently in commerce. The public version of the TSCA Inventory update may be accessed here.

- ***Pre-Prioritization Approaches***:

On Sept. 27, 2018, EPA released its plan, "A Working Approach for Identifying Potential Candidate Chemicals for Prioritization," which laid out the agency's near-term and long-term approaches for identifying potential chemicals for prioritization. On Oct. 5, 2018, EPA published a notice of this plan in the *Federal Register*. 83 Fed. Reg. 50,366. EPA's near-term approach looked to the 2014 Update to the TSCA Work Plan for Chemical Assessments for high-priority potential candidates, since TSCA requires that 50 percent of the chemicals undergoing risk evaluation as of Dec. 2019 must come from the 2014 TSCA Work Plan.

Of particular interest to the mining sector, antimony and antimony compounds, arsenic and arsenic compounds, cadmium and cadmium compounds, chromium and chromium compounds, cobalt and cobalt compounds, lead and lead compounds, molybdenum and molybdenum compounds, and nickel and nickel compounds are on the 2014 TSCA Work Plan. In addition, EPA sought comment on a longer-term risk-based approach for considering the larger TSCA active chemical universe. EPA accepted comments on this plan until Nov. 15, 2018.

NMA submitted joint comments on the plan with the North American Metals Council, urging EPA to explicitly reference the agency's "Framework for Metals Risk Assessment" in the Working Approach Document, and include an express statement acknowledging its statutory requirement to use this document for the prioritization and risk evaluation of metals and metal compounds. Additionally, we made the case for why metals and metal compounds should not be selected in the first round of prioritization based on the factors outlined in the agency's near-term approach.

- ***Procedures for Prioritization of Chemicals for Risk Evaluation under TSCA***:

EPA published the final rule on July 20, 2017. 82 Fed. Reg. 33,753. The Prioritization Rule established the agency's prioritization process for identifying high-priority chemicals for risk evaluation and low-priority chemicals for which risk evaluation is not currently warranted. EPA favorably addressed concerns raised by NMA during the public comment period regarding the proposal. Specifically, NMA opposed certain language EPA proposed to implement the Congressional mandate to use the Framework when prioritizing and evaluating the risk of metals and metal compounds. The language contradicted clear statutory language and congressional direction on the treatment of metals and metal compounds under TSCA that NMA had successfully obtained during legislative negotiations. The regulatory language is now clear regarding the congressional mandate to use the Framework for Metals Risk Assessment the prioritization process for metals and metal compounds.

- ***Procedures for Chemical Risk Evaluation Under the Amended TSCA***:

EPA published the final rule on July 20, 2017. 82 Fed. Reg. 33,726. The Risk Evaluation Rule established the agency's process for evaluating high-priority chemicals and determining whether

they present an unreasonable risk to human health or the environment under conditions of use. Similar to the prioritization rule, this final rule addresses issues of concern raised by NMA in comments on the proposal. Specifically, EPA suggested that the agency could rely on other undefined options during the risk evaluation process outside of the Framework. The regulatory language is now clear regarding the congressional mandate to use the Framework in the risk evaluation processes for metals and metal compounds.

- ***Prioritization & Risk Evaluation***:

By Dec. 22, 2019, EPA was required to designate at least 20 chemical substances as high-priority for risk evaluation, and 20 chemical substances as low-priority for which risk evaluation is not currently warranted. EPA opened dockets for the 73 remaining chemicals on the 2014 TSCA Work Plan to provide a venue for the public to submit use, hazard, and exposure information. These dockets remained open until Dec. 1, 2019.

On Mar. 21, 2019, EPA published a notice in the *Federal Register* announcing that it had initiated the prioritization process for 20 chemical substances as candidates for designation as "High Priority" for risk evaluation and 20 chemical substances as candidates for designation as "Low Priority" for risk evaluation. 84 Fed. Reg. 10,491. The 20 "High Priority" candidate chemicals included seven chlorinated solvents, six phthalates, four flame retardants, formaldehyde, a fragrance additive, and a polymer pre-cursor. The 20 "Low Priority" candidate chemicals came from the agency's Safe Chemicals Ingredients List. **Importantly, EPA did not identify any metals or metal compounds as candidates for designation as "High Priority Substances" for this first round of prioritization.**

- **Low-Priority Chemicals:**

On Aug. 15, 2019, EPA published a notice identifying the same 20 chemical substances that it initiated prioritization on in March as "Low Priority" and proposing to designate them as "Low Priority" substances. 84 Fed. Reg. 41,712. A final designation of "Low Priority" means that the risks associated with the chemical substances are low, and risk evaluation for that chemical substance is not warranted at this time. EPA's docket contains the screening review and rationale for the designations. EPA also released its "Approach Document for Screening Hazard Information for Low-Priority Substances Under TSCA," which describes the literature review process for the information used in the screening review for each proposed "Low Priority" chemical substance. On Feb. 20, 2020, EPA announced the final list of low-priority chemicals. This designation means that risk evaluations are not warranted at this time. All 20 chemicals are on EPA's Safer Chemicals Ingredients List.

- **High-Priority Chemicals:**

On Dec. 20, 2019, EPA announced the final list of the 20 high-priority chemicals that will undergo risk evaluation under TSCA. On Dec. 30, 2019, this list was published in the *Federal Register*. 84 Fed. Reg. 71,924. A three-year risk evaluation process began when EPA finalized these designations. EPA's first step involved taking public comment on scoping documents for each of the 20 chemicals, which included the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations the agency expected to consider during each chemical's risk evaluation. For more information on the risk evaluation process visit EPA's webpage. In April 2020, EPA finished the scoping documents for these 20 chemicals. In June 2020, EPA released the final risk evaluation for methylene chloride, the first risk evaluation to be

completed under amended TSCA. For the status of all chemicals undergoing risk evaluation visit EPA's webpage.

- ***TSCA Fees*:**

TSCA Section 26(b) authorizes EPA to collect fees to defray 25 percent of the administrative costs for various activities under TSCA (e.g., testing, new chemical substances, existing chemical substances, and confidential business information) or $25 million per year (whichever is lower). In addition, EPA may charge fees to defray up to 50 percent or the full amount of the costs for conducting manufacturer-requested risk evaluations under Section 6 related to existing chemical substances.

On Sept. 27, 2018, EPA announced that it had finalized the TSCA user fees, which was published on Oct. 17, 2018. 83 Fed. Reg. 52,694. The fees were: $1,350,000 for EPA-initiated risk evaluations, $1,200,000 for manufacturer-requested risk evaluations on chemicals included on the TSCA Work Plan, and $2,600,000 on manufacturer-requested risk evaluations on a chemical not included in the TSCA Work Plan. In addition, EPA included a new process for identifying manufacturers subject to fee obligations for TSCA Section 4 test rules and TSCA Section 6 EPA-initiated risk evaluations. EPA's Frequently Asked Questions may be accessed here. EPA began requiring payment of fees for fee-triggering events that occurred on or after Oct. 1, 2018, sending invoices within 30 days of the effective date of the final rule.

On Jan. 27, 2020, EPA identified companies that it believed were manufacturing or importing the 20 "high priority" chemical substances undergoing EPA-initiated risk evaluations and thus subject to a mandatory share of the $1.35 million fee for each substance. There was a 60-day comment period ending March 27, 2020, during which all manufacturers and importers of the 20 high-priority chemicals were required to "self-identify" through EPA's Central Data Exchange. **EPA later extended this comment period to May 27, 2020**.

This requirement to self-identify applied: (1) regardless of whether a company was on the preliminary list; and (2) to anyone who imported any of these substances as part of an article or who manufactured or imported any of the substances as an impurity or byproduct. Failure to comply with the self-reporting obligation could result in civil or criminal penalties. NMA reviewed the preliminary lists of manufacturers and importers of all 20 chemicals and notified member companies that were identified on those lists. On Sept. 4, 2020, EPA released the final list of companies subject to fees for the 20 chemicals designated as high-priority substances for risk evaluation.

On March 25, 2020, EPA announced its plan to develop a proposed rule that would look at potential exemptions to the TSCA Fees rule, responding to stakeholder concerns about implementation challenges. Specifically, EPA flagged possible exemptions to the current rule's self-identification requirements for EPA-initiated risk evaluations for manufacturers that: (1) import the chemical substance in an article; (2) produce the chemical substance as a byproduct; and (3) produce or import the chemical substance as an impurity.

EPA posted "frequently asked questions" regarding how this announcement impacted the deadline and requirement for manufacturers to self-identify for TSCA fees. According to EPA, "[the agency] is no longer expecting [these] three categories of 'manufacturers' of one of the twenty high-priority substances to self-identify under the TSCA fees rule." Along with the agency's announcement to proceed with an additional rulemaking exempting certain manufacturers from the fees requirement, EPA also issued a "no action assurance" stating that

it would not pursue enforcement action against entities in the three proposed exemption categories for failure to self-identify under the TSCA Fee rule.

On Jan. 11, 2021, *EPA* published *a proposed rule to update and adjust the TSCA fees. 86 Fed. Reg. 1890.* The proposed rule included significant changes for fiscal years 2022 through 2024, including: (1) new fee exemptions for manufacturers subject to fees for EPA-initiated risk evaluations under TSCA section 6(b) (e.g., importers of articles containing a high-priority substance, manufacturers of a substance produced as a byproduct, manufacturers and importers of substances produced or imported as an impurity); (2) an increased fee for EPA-initiated (from $1.35 million to $2.65 million) and manufacturer-requested chemical risk evaluations; and (3) changes to implementation procedures. Comments were originally due on Feb. 25, 2021, but EPA provided a 30-day extension (Mar. 27, 2021). NMA did not file comments given that members did not identify any concerns with the proposal.

The Biden Administration decided not to finalize this proposal, stating that it failed to include the cost of rulemaking.

Separately, on Nov. 23, 2021, EPA announced legally mandated changes to the fee requirements (a routine increase that TSCA directs EPA every three years to adjust the fees). The adjustment went into effect on Jan. 1, 2022, applying to all TSCA fees. The fee adjustment will not be retroactive and will not impact previous fee invoicing. According to EPA's TSCA Fees Table, consistent with the formula in the 2018 final rule, EPA will increase fees by the inflation rate, calculated to be 18.9 percent.

TSCA Tiered Data Reporting Rule

On July 14, 2021, EPA announced that it is developing a tiered data reporting (TDR) rule to help inform each step of the TSCA risk evaluation and risk management processes. EPA held a public webinar revealing additional details on the TDR rule proposal currently under consideration and soliciting initial feedback from the public. EPA's webinar slides are available here. According to EPA, it "is interested in ensuring that data collection strategies provide information to better meet chemical data needs related to exposure, health, and eco-toxicity."

EPA currently relies on the Chemical Data Reporting process for exposure-related information, which is used along with other data sources to support risk screening, chemical prioritization, risk evaluation, and risk management activities. EPA believes this data could be enhanced to provide more specific or relevant data to meet the exposure-related needs of the existing chemicals program. The TDR rule would be a separate TSCA reporting obligation for candidate chemicals if finalized.

EPA plans on using TSCA section 8(a) to require manufacturers and processors to report information known to or reasonably ascertainable by them including information on chemical identity and structure, manufacture, use, exposure, disposal, and health and environmental effects, and to maintain records of such information. EPA plans on using TSCA section 8(d) to require manufacturers, processors, and distributors to submit health and safety study information to the agency, including information on significant adverse health effects, consumer allegations, occupational disease or injury, and complaints of injury to the environment.

Written comments on the pre-rule announcement were due by Aug. 16, 2021. NMA members did not identify any issues or concerns with the proposal.

Litigation**:**

Prioritization & Risk Evaluation Rules:

On Sept. 11, 2017, NMA joined 16 other trade associations in filing motions to intervene in support of EPA in lawsuits filed by several environmental organizations that challenge the agency's Prioritization and Risk Evaluation Rules. The lawsuits, which were originally filed in three separate courts of appeals, were first consolidated in the U.S. Court of Appeals for the Ninth Circuit (for the Prioritization Rule) and the U.S. Court of Appeals for the Fourth Circuit (for the Risk Evaluation Rule). EPA subsequently filed a motion to transfer the lawsuit challenging the prioritization rule from the Ninth Circuit to the Fourth Circuit, arguing that it is in the interest of judicial economy for the same court to hear the challenges to both EPA rules. The environmental organizations filed a motion requesting that the cases instead be consolidated in the Ninth Circuit. The Ninth Circuit granted environmental petitioners' motion. *See Safer Chem. Healthy Families v. EPA*, No. 17-72260.

Petitioners did not challenge the revisions in the rule that were favorable to the mining industry regarding the treatment of metals and metal compounds. However, petitioners argued, among other things that: (1) EPA's rules violated TSCA's mandate that risk evaluations consider all of a chemical's condition of use; (2) EPA's use-by-use approach to risk determinations contravened TSCA's requirement that EPA make a holistic risk determination for each chemical; and (3) EPA unlawfully wrote the statutory definition of "conditions of use" to omit certain uses and disposals, including legacy disposal practices. NMA commented on these matters during the rulemaking process, supporting the more pragmatic approach that the agency ultimately adopted.

On Nov. 14, 2019, the Ninth Circuit issued its decision. The court granted petitioners' challenge to EPA's exclusion of "legacy uses" and "associated disposals" from the definition of "conditions of use" and those portions of the risk evaluation rule's preamble were vacated. The court reasoned that "TSCA's definition of 'conditions of use' clearly includes uses and future disposals of chemicals even if those chemicals were only historically manufactured for those uses." The court did not grant petitioners' challenge to EPA's exclusion of legacy disposals (or "those disposals that have already occurred"). The court held that "TSCA unambiguously does not require past disposals to be considered conditions of use." EPA did not seek en banc review of this decision.

Inventory Notification:

On Oct. 2, 2017, NMA joined 13 other trade associations in filing a motion to intervene in support of EPA in lawsuits filed by several environmental organizations that challenged the agency's Inventory Notification Rule in the D.C. Circuit. *Environmental Defense Fund v. EPA*, No. 17-1201. The D.C. Circuit granted our motion to intervene. Petitioners argued that the final rule, among other things, withheld information from the public that is required to be disclosed and illegally allowed manufacturers and processors to assert certain new claims for nondisclosure of specific chemical identities. On April 26, 2019, the D.C. Circuit issued its opinion in this case. The court held that "EPA's elimination of [confidentiality substantiation] questions pertaining to reverse engineering was arbitrary and capricious." The court remanded this issue back to the agency for further consideration without vacating the Inventory Notification Rule. The court denied the petitioners' four other challenges to the rule.
Status:

TSCA Inventory:

On Feb. 16, 2023, EPA announced the latest TSCA Inventory update. The TSCA Inventory now contains 86,685 chemicals, of which 42,170 are active in U.S. commerce. EPA plans on updating the inventory approximately every 6 months.

Rulemakings:

Future Prioritization & Risk Evaluations:

Although EPA must designate additional high-priority chemicals upon completion of a risk evaluation, additional designations are not expected until EPA completes the risk evaluations for the 20 high-priority chemicals that are currently undergoing risk evaluation. TSCA evaluations are supposed to take no more than 3.5 years, meaning the current set of 20 are due to be finalized no later than June 2023. Not surprisingly there are delays in this program. Out of its first set of 10 TSCA evaluations (on PBTs) the agency met TSCA's 3.5-year deadline for just one, methylene chloride, and released the remaining nine over a period of less than two months in late 2020 and early 2021. EPA has not released any risk evaluations for the 20 high-priority chemicals. Assistant Administrator Michal Freedhoff has publicly stated that without additional Congressional funding, EPA would only more forward with 5 of the 20 high-priority chemicals. She also stated that they would not be able to complete half of the 20 risk evaluations until 2025 or beyond.

On Mar. 28, 2022, EPA released its Strategic Plan for Fiscal Years (FY) 2022-26, which outlines the following goals for the TSCA program: (1) by the end of FY26 complete at least eight TSCA risk evaluations annually within statutory timelines; and (2) initiate all TSCA risk management actions within 45 days of the completion of a final existing chemical risk evaluation.

In the Fall semi-annual regulatory agenda, EPA maintained that it will revise the 2017 risk evaluation rule and that it is in the process of reconsidering the rule in keeping with new executive orders on equity, scientific integrity, and climate. A proposed rule is planned for May 2023 (an 8-month delay).

Current Risk Evaluations & Biden Reconsideration:

On Feb. 5, 2021, EPA announced that it was reviewing actions under the Trump Administration and would take any needed steps to ensure that they protect human health and the environment. EPA acknowledged that that the risk evaluations for the first 10 chemicals were completed in June 2020 and that the agency immediately began the risk management process for each of these chemicals. EPA stated that stakeholder engagement on risk management activities would continue to move forward. However, EPA was also "actively reviewing the final risk evaluations in light of statutory obligations and policy objectives related to use of the best available science and protection of human health and the environment, in accordance with the Executive Orders and other direction provided by the Biden-Harris Administration."

On Mar. 8, 2021, EPA announced it was beginning an immediate reevaluation of five of the PBT rules that were issued on Jan. 6, 2021. EPA requested public comment for 60 days on: (1) whether the rules sufficiently reduce exposure to these chemicals, including exposures to potentially exposed or susceptible subpopulations, and the environment; (2) newly raised compliance issues associated with one assessment and the compliance dates for certain

regulated articles; and (3) whether to consider additional or alternative measures or approaches. Additional information is available here and here.

Currently, only EPA's determinations on uses it says do not constitute unreasonable risks are open to suit as "final actions." The agency's findings on which uses do carry unreasonable risks -- which industry associations and firms are likely to challenge as too strict -- will not be final until EPA crafts risk management rules based on them.

- Systematic Review

On Feb. 16, 2021, EPA announced that the agency is refining its approach to selecting and reviewing the scientific studies that are used to inform TSCA chemical risk evaluations (known as systematic review), which also applied to the agency's broader efforts to review the first 10 TSCA risk evaluations. EPA's announcement occurred the same day the National Academy of Sciences (NAS) issued a scathing report of the TSCA systematic review approach. The NAS press release may be accessed here. On Dec. 20, 2021, EPA announced a three-day peer review virtual public meeting of the Science Advisory Committee on Chemicals (SACC) on April 19-21, 2022, to consider and review the draft TSCA Systematic Review Protocol. Meeting minutes and final report are available here.

EPA also solicited public comments on the draft protocol that is based on a revised, generic approach to systematic review, accounting for comments from prior SACC reviews of chemical risk evaluations and more recent recommendations from the NAS.

The agency is in the process of reviewing feedback from the meeting and will modify the proposed approach, as appropriate. EPA intends to issue its response to the SACC's recommendations along with any revisions to the approach in 2023.

- TSCA Screening Level Approach for Assessing Ambient Air and Water Exposures

On Jan. 21, 2022, EPA announced the availability of and solicited public comments on the "Draft TSCA Screening Level Approach for Assessing Ambient Air and Water Exposures to Fenceline Communities Version 1.0." 87 Fed. Reg. 3294. EPA used the screening level methodology to evaluate potential chemical exposures and associated potential risks to fenceline communities in 6 of the 10 TSCA risk evaluations first completed. For the next 20 chemicals undergoing risk evaluation and beyond, EPA plans to expand this first version of the framework to address broader potential environmental justice concerns.

EPA held a virtual peer review meeting of the SACC on Mar. 15-17, 2022, to consider and review the methodology and to present results of applying it to 1-bromopropane (1-BP) (air pathway), N-methylpyrrolidone (NMP) (water pathway), and methylene chloride (MC) (air and water pathway). The SACC's final report is available here. In particular, the SACC stated that version 1.0 of the methodology should only be used "as part of a tiered approach to evaluate risk to fenceline communities and should not be used to evaluate risks in isolation." According to the SACC: "While the screening level approach may be protective for the specific exposure pathways included, it may not be protective overall because potential key exposure pathways are excluded and because cumulative exposures, multiple source exposures, aggregate exposures, and double/aggregate and occupational exposures from workers living near and working at the facilities were not considered."

- Cumulative Risk Assessment under TSCA

On Dec. 21, 2022, EPA requested nominations of ad hoc expert reviewers to assist the SACC with peer review of a draft document related to cumulative risk assessment under TSCA. On Feb. 24, 2023, EPA published the Draft Proposed Principles of Cumulative Risk Assessment Under the Toxic Substances Control Act, which discusses what cumulative risk assessment is and how it could be used in the scientific and regulatory context of TSCA. EPA asserts that: "[W]hen chemicals are sufficiently similar toxicologically and are found to present co-exposures—meaning people are exposed to multiple chemicals at the same time—a cumulative risk assessment may be appropriate. The SACC will review this document at a public virtual meeting on May 8-11, 2023.

TSCA Fees:

On Nov. 16, 2022, the EPA published a supplemental notice of proposed rulemaking (SNPRM) that further adjusts the 2018 fees rule used to administer certain programs under TSCA. Notably, fees for an EPA-initiated risk evaluation under TSCA section 6(b) would nearly quadruple, from $1,350,000 in the 2018 fees rule to $5,081,000. For manufacturer-initiated risk evaluations, EPA treats the TSCA fees differently if the chemical is on the TSCA Work Plan. For chemicals on the TSCA Work Plan, the total fee would increase from $945,00 to $1,497,000. For those chemicals not on the TSCA Work Plan, the total fee would increase from $1.89 million to $2,993,000. EPA also proposes to narrow a proposed fee exemption for byproducts and includes self-identification requirements for manufacturers (including importers) of chemical substances with production volumes less than 2,500 pounds.

On Jan. 17, 2023, NMA joined and assisted a coalition of consortia that submitted comments on EPA's SNPRM. The comments oppose aspects of the proposed rule that increase TSCA fees and strongly questions the basis for EPA's cost estimates and fee adjustments regarding TSCA Sections 4, 5, and 6.

According to EPA's Fall semi-annual regulatory agenda, a final rule is targeted for Sept. 2023.

Tiered Data Reporting Rule

On July 6, 2022, EPA invited small businesses to participate as small entity representatives (SERs) for a Small Business Advocacy Review (SBAR) Panel on the agency's development of the proposed TDR rule. EPA is seeking self-nominations directly from small entities that may be subject to the rule's requirements. Self-nominations were due by July 20, 2022. Additional information on this SBAR are available here.

NMA will reengage with the Subcommittee when a proposed rule is released for comment. According to the Fall regulatory agenda, EPA plans to issue a proposed rule in January 2024 (an 8-month delay) and a final rule in May 2025. EPA also moved this rulemaking to the long-term action list.

ASBESTOS: TSCA REPORTING

PRIORITY B – EPA

Background:

Under TSCA Section 8(a), EPA is planning to propose requiring manufacturers, importers, and processors of asbestos, including mixtures and articles containing asbestos (including as an impurity) to report certain information such as: quantities of asbestos used in making products, employee exposure data, and waste disposal data. EPA and other federal agencies would use this information in considering the regulation of asbestos.

EPA is undertaking this rulemaking due to a settlement agreement. Democratic-led states and environmental organizations petitioned EPA during the Trump administration to add asbestos to the Chemical Data Reporting (CDR) program. EPA denied those petitions. Asbestos Awareness Organization, several other organizations, and the states filed a lawsuit in the U.S. District Court for the Northern District of California seeing declaratory and injunctive relief. *Asbestos Disease Awareness Organization v. EPA*, No. 19-CV-00871 & *State of California v. EPA*, No. 19-CV-03807. The district court granted summary judgment to the plaintiffs and ordered EPA to amend its CDR rule. *Asbestos Disease Awareness Org. v. Wheeler*, No. 19-cv-00871, 2020 U.S. Dist. LEXIS 241041 (Dec. 22, 2020). On June 7, 2021, the parties and government entered into a settlement agreement to conduct this rulemaking.

Separately, EPA is conducting a TSCA risk-management rule for chrysotile asbestos, which was sent to OMB for interagency review on Dec. 16, 2021. EPA is also conducting a "part 2" evaluation for other fiber types and discontinued "legacy" uses of the material and released a draft scoping document on Dec. 29, 2021. EPA specifically mentioned talk as a priority in that analysis. Specifically, EPA stated: "Additionally, another commercially mined substance, talc, has been implicated as a potential source of asbestos exposure. Talc can also be co-located geologically with asbestos, where asbestos can remain in small or trace amounts following extraction. Thus, EPA will determine the relevant conditions of use of talc, including but not limited to any 'legacy use' and 'associated disposal', where asbestos is implicated."

Status:

On May 6, 2022, EPA *published a* proposed rule *to require a one-time reporting obligation under TSCA for certain information related to asbestos. 88 Fed. Reg. 27060. EPA's press release may be accessed* here. Using TSCA Section 8(a), EPA is proposing to require certain persons that manufactured (including imported) or processed asbestos and asbestos-containing articles (including as an impurity) in the four years prior to the date of publication of the final rule to electronically report certain exposure-related information that is known to or reasonably ascertainable by those entities.

Notably for the mining sector, EPA is proposing reporting requirements for asbestos that is being mined or milled as an intentional or non-intentional impurity. EPA anticipates that companies that are mining, milling or importing talc, vermiculite or another bulk material where asbestos can be found as an impurity would report under this new program. Ultimately, EPA and other federal agencies would use the reported information in considering potential actions on asbestos, including EPA's TSCA risk evaluation and risk management activities. Comments were due on July 5, 2022.

NMA believes that as drafted, the likely scope of the reporting requirements may be much broader than EPA intended, and the additional information retrieved would not advance the purposes of the rulemaking or EPA's further work on asbestos under its TSCA authorities. Accordingly, the NMA recommended in comments that EPA include a narrowly tailored exemption for naturally occurring chemical substances to remove unnecessary reporting obligations for hardrock mining activities that are not the subject of EPA's current TSCA actions on asbestos. Alternatively, the NMA urged EPA to adopt a one percent applicability threshold to limit the scope of the proposed rule.

NMA also highlighted the burdens associated with reporting on imported articles containing asbestos, which EPA does not adequately assess in the proposed rule. Finally, NMA requested that EPA allow at least nine months from the final rule's effective date to commence the reporting period and urges the agency to consider extending the reporting period to at least a four-month period.

According to EPA's Fall semi-annual regulatory agenda, the agency is anticipating a final rule in May 2023.

CERCLA FINANCIAL ASSURANCE

PRIORITY B – EPA

Background:

Rulemaking:

On Dec. 1, 2017, EPA signed a final notice declining to impose financial assurance regulations on the hardrock mining industry under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). According to EPA's press release, "After careful analysis of public comments, the statutory authority, and the record for the rulemaking, EPA is confident that modern industry practices, along with existing state and federal requirements address risks from operating hardrock mining facilities. . . . Additional financial assurance requirements are unnecessary and would impose an undue burden on this important sector of the American economy and rural America, where most of these mining jobs are based." On Feb. 21, 2018, EPA published the "final action" in the *Federal Register*. 83 Fed. Reg. 7556. Parties had 90 days to petition the D.C. Circuit for review pursuant to CERCLA § 113 (42 U.S.C. § 9613).

Litigation**:**

On May 16, 2018, Earthjustice filed a lawsuit in the D.C. Circuit challenging EPA's final action. *Idaho Conservation League v. Wheeler*, No. 18-1141 (D.C. Cir.). Earthjustice filed the petition for review on behalf of the Idaho Conservation League, Earthworks, Sierra Club, Amigos Bravos, Great Basin Resource Watch, and Communities for a Better Environment.

On June 8, 2018, NMA filed a motion to intervene in the lawsuit in support of the government. Six other industry parties also filed motions to intervene in support of the government, including: Albemarle Corporation and Albemarle U.S., Inc.; American Iron and Steel Institute; ASARCO LLC; Comstock Mining Inc. and Comstock Mining LLC; The Fertilizer Institute; and Freeport-McMoRan Inc., Freeport Minerals Corporation, and Freeport-McMoRan Safford Inc. The New

Mexico Energy, Minerals and Natural Resources Department, the New Mexico Environment Department and 12 additional states – Alaska, Arkansas, Colorado, Louisiana, Michigan, Montana, Nevada, South Carolina, South Dakota, Utah, Wisconsin and Wyoming – joined the Arizona Department of Environmental Quality's motion to intervene. The D.C. Circuit granted all motions to intervene.

On June 18, 2018, the petitioners filed their non-binding statement of issues, outlining four arguments. Petitioners opening brief, filed on Sept. 14, 2018, aligned with the statement of issues. Specifically, petitioners challenge EPA's final action on four grounds: (1) the final action is contrary to CERCLA and arbitrary because the agency ignored risks to health and the environment posed by hardrock mines as evidenced in the technical documents supporting the proposed rule; (2) the final action is contrary to CERCLA and arbitrary because EPA ignored many of the financial risks posed by hardrock mines (*e.g.*, bankruptcy and long-term water treatment); (3) the agency arbitrarily decided not to require financial assurance for hardrock mines based on a mischaracterization of the costs and without considering the benefits to health and the environment; and (4) the agency violated the Administrative Procedure Act by not providing an opportunity to comment on aspects of the final decision that are not a logical outgrowth of its proposed rule.

The case was put on an expedited briefing schedule. The government filed its response brief on Nov. 14, 2018. NMA, Freeport McMoRan and other industry stakeholders filed a joint intervenor brief on Nov. 30, 2018, in support of the government. State intervenors also filed a brief the same day. On Nov. 21, 2018, American Exploration & Mining Association filed an amicus ("friend of the court") brief to provide additional perspective on the defensibility of EPA's final action. AEMA was joined by the following state mining associations: Alaska, Arizona, Colorado, Idaho, Minnesota, Montana, New Mexico, Nevada, Utah, and Wyoming. Petitioners filed their reply brief on Dec. 21, 2018. Final briefs were filed on Jan. 18, 2019 (delayed a few days because of the federal government shutdown). The D.C. Circuit held oral argument on Mar. 13, 2019.

On July 19, 2019, in a sweeping victory for the mining industry, the D.C. Circuit on July 19, 2019, upheld EPA's final action. The D.C. Circuit's ruling endorses the reasoning NMA advanced to successfully persuade EPA to abandon its initial proposal and, instead, decide that additional financial assurance requirements on hardrock mines are unwarranted. The D.C. Circuit explained that even though the statute's primary purpose is to address health and the environment, CERCLA Section 108(b) "may nonetheless serve the narrower purpose of ensuring that the EPA can recover the costs of cleanup from responsible parties" and that it is "plausible" Congress intended the agency to consider only financial risks when determining whether to issue any financial responsibility requirements. On the consideration of financial risks, the D.C. Circuit rejected all four of petitioners' claims, relying on the administrative record we built to successfully persuade EPA to abandon its initial proposal. The court also unequivocally rejected petitioners' claim that the final action should be vacated because it is not a "logical outgrowth" of the proposed rule.

Petitioners did not seek a rehearing in the D.C. Circuit or file a cert petition for Supreme Court review.

Status:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an

immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions. The Biden transition team included this rule on its initial list of environmental policy actions for review. Despite the call for review, EPA did not choose to reconsider this rulemaking (or the three other CERCLA financial assurance rules for other sectors). The Fall regulatory agenda is silent in both the main agenda and long-term action list. For now, this issue remains closed.

However, NMA is watching this closely given the White House's announcement on Feb. 22, 2022, on their next steps to "Securing a Made in America Supply Chain for Critical Minerals." To that end the White House released the "Biden-Harris Administration Fundamental Principles for Domestic Mining Reform." The Department of the Interior has created an Interagency Working Group (IWG) to lead the effort on "legislative and regulatory reform of mine permitting and oversight." The IWG is supposed to deliver legislative recommendations to Congress by November and work with the relevant agencies to propose updated regulations by the end of the year. The IWG missed those deadlines.

One of the principles is to "establish strong responsible mining standards," to "create a level playing field by establishing strong environmental, sustainability, worker, health and safety, Tribal consultation, and community engagement standards for mineral exploration and development." According to the White House: "This includes establishing specific up-to-date, **financial assurance**, operational, performance, and reclamation standards, which require protection of the environment during exploration, discovery, active mining, reclamation, and post-closure. These standards should also reduce the risk and consequences of legacy pollution, decrease the likelihood of catastrophic events, such as tailings impoundment failures and protect taxpayers against companies that go bankrupt and leave operations inadequately closed."

On Aug. 30, 2022, NMA filed extensive comments on the IWG's request for information (RFI) on federal hardrock mining laws, regulations, and permitting. NMA again makes the case as to why CERCLA financial responsibility requirements are unnecessary for the industry.

INORGANIC ARSENIC IRIS REVIEW

PRIORITY B – EPA

Background:

In 2010, EPA proposed to dramatically increase the cancer slope factor for inorganic arsenic from 1.5 per mg/kg/day (the current IRIS value) to 25.7 per mg/kg/day in a draft cancer risk assessment under the IRIS program. 75 Fed. Reg. 7477 (Feb. 19, 2010). EPA's proposed revision would have had significant federal and state regulatory implications, particularly in relation to drinking water and soil cleanup standards. The Science Advisory Board (SAB) held a series of public meetings and teleconferences on the draft IRIS assessment in 2010 and released its final report on March 1, 2011. Before EPA could finalize the cancer risk assessment, a conference report for the 2012 Consolidated Appropriations Act included language requiring the National Academy of Sciences (NAS) to peer-review EPA's assessment of possible cancer and non-cancer risks from oral exposure to inorganic arsenic.

EPA contracted with NAS to conduct a multi-part review of the IRIS assessment. NAS convened several meetings during 2013. NAS released its interim report on Nov. 7, 2013, providing

recommendations and guidance to EPA on performing the IRIS assessment of inorganic arsenic. While NAS found that EPA's draft plan includes improved approaches for evaluating evidence and conducting analyses, it rejected EPA's current default methods for estimating risk and recommended alternative statistical approaches instead. This was an important development since EPA's use of the linear default approach in the 2010 draft IRIS assessment resulted in the controversial cancer slope factor described above. By rejecting the linear approach and recommending a data-driven strategy for modeling the dose-response curve at lower levels, NAS addressed a major concern raised by industry regarding the 2010 cancer assessment. Although this is a positive development, EPA's new assessment will include both cancer and non-cancer health endpoints. NAS supported the expanded list of health endpoints of concern and encouraged EPA to consider early-life exposure. These approaches could again result in conservative risk estimates.

EPA posted Draft Development Materials for the IRIS assessment of inorganic arsenic in April 2014 and convened a public meeting in late June 2014 to discuss a number of science policy questions derived from those materials. The EPA draft assessment was scheduled to be released for public comment by the end of 2014 and transmitted to the NAS for peer review. EPA did not release the draft assessment.

On Dec. 2-3, 2015, the National Research Council held the 4th meeting of the committee formed to review the IRIS assessment of inorganic arsenic. For that meeting, EPA provided the assessment development plan and various presentations on issues such as approach to systematic review, hazard identification, conceptual mechanistic models, toxicokinetics, and dose-response methods. During this meeting, EPA continued to insist on a linear no threshold approach to cancer and non-cancer endpoints. EPA was expected to have its arsenic assessment ready for public comment within 6 to 9 months. However, that timeframe moved with additional delay within the agency.

On May 31, 2018, the NAS put out a call for nominations for a committee to evaluate the "protocol" and associated documents for the toxicological review of inorganic arsenic. The committee will evaluate the revised scope of the assessment and determine whether the proposed methods are appropriate to synthesize the scientific evidence and develop conclusions.

On May 28, 2019, EPA published a notice regarding the release of the updated problem formulation and protocol for the inorganic arsenic IRIS assessment.

- The updated protocol has four major parts: (1) an updated scoping and problem formulation; (2) a discussion of the systematic review methods used to prioritize health outcomes for dose-response analysis; (3) a description of the physiologically based pharmacokinetic model; and (4) an outline of the dose-response assessment (*e.g.*, initial screening analyses, estimating intake doses, modeling dose-response data, and deriving reference values).

- EPA identified the following health outcomes for potential dose-response analyses: (1) cancers of the bladder, lung, kidney, liver, and skin; and (2) noncancer effects on the circulatory system, reproductive system, developmental outcomes, endocrine system, immune system, respiratory system, and skin.

- EPA plans to rely primarily on epidemiological evidence to prioritize health outcomes for the dose-response analysis. Animal and mechanistic evidence will be considered as supplemental evidence in the assessment. One of the most controversial aspects of the protocol is EPA's decision that a mode-of-action (MOA) analysis is not essential for addressing potential differences in response across human populations.

On **July 16, 2019,** the NAS convened an ad hoc committee meeting to evaluate the protocol and its associated documents. EPA provided several charge questions to the NAS ad hoc committee for consideration, including asking committee members to comment on the appropriateness of its MOA approach. The Arsenic Science Task Force (ASTF) raised several issues of concern at this meeting, including: (1) reliance on high-dose epidemiology studies for extrapolation to low-dose exposures; and (2) ignoring MOA, which supports a threshold for the dose-response relationship for both cancer and non-cancer effects.

On Oct. 31, 2019, NAS released its "Review of EPA's Updated Problem Formulation and Protocol for the Inorganic Arsenic IRIS Assessment (2019)." Disappointingly, the NAS largely backed EPA's plans for its assessment. On the matter of MOA, the NAS report states: "Because EPA will rely on epidemiological data and will be performing dose-response analyses within the range of observation, the majority of the committee agreed that MOA data were unnecessary for determining the shape of the dose-response curve unless EPA finds it necessary to extrapolate to lower levels. One member felt that MOA data are still required for performing the dose-response assessment." The dissenting opinion stated: "The EPA's decision to not use [MOA] data to define the shape of the dose-response curve is wrong, MOA data should be employed," explaining how this could be properly done.

From the beginning, NMA has coordinated with the ASTF as they have led the advocacy strategy on this issue. ASTF has funded pertinent scientific research for both cancer and non-cancer endpoints that could influence the outcome of the peer-review process. ASTF has repeatedly pressed IRIS to consider MOA data in the assessment, which will support a conclusion that the dose-response relationship for carcinogenicity of inorganic arsenic has a threshold. A threshold determination means that exposure to the low levels of arsenic in drinking water, which commonly exists in the U.S., does not pose a risk to human health. ASTF has also secured the assistance of several technical consultants to review the studies EPA is relying on in its draft assessment. For example, EPA hired Dr. Paolo Boffetta to address the strong reliance of IRIS on epidemiological data.

On direct advocacy, NMA joined members of the ASTF on Feb. 5, 2020, at a meeting with senior level and career staff in EPA's Office of Research and Development to express concerns regarding the NAS review and EPA's protocol. Dr. Sam Cohen (University of Nebraska) gave a presentation on the importance of understanding MOA for toxicological assessment. Joyce Tsuji (Exponent) gave a presentation on inorganic arsenic at low doses in epidemiological studies and critical details in assessing dose response. On June 26, 2020, NMA joined ASTF, Dr. Cohen and Dr. Tsuji in a virtual meeting with EPA's Office of Water, Office of Land & Emergency Management, and Office of Chemical Safety & Pollution Prevention to discuss the same issues. Dr. Cohen and Dr. Tsuji once again presented scientific evidence on the lack of effects at low doses. ASTF urged program office leadership to engage with the IRIS staff and advocate for inclusion of MOA in the IRIS assessment. ASTF developed a response to a request for information from the EPA Office of Water regarding the science supporting MOA.

The ASTF has offered financial support for a petition to the Office of Pesticide Programs (OPP) for a reassessment of the cancer risks of inorganic arsenic under its statutory authorities. The

petition to OPP will open a parallel path forward on the risk assessment of arsenic that holds more promise for a scientifically sound approach than can realistically be expected from the IRIS program.

Status:

According to EPA's "IRIS Program Outlook" (updated February 2023), EPA will issue the public comment draft in the third quarter of fiscal year 2023 (which continues a persistent delay from the previous revised commitment of the fourth quarter of fiscal year 2022), and an external peer review in the fourth quarter of FY2023. On Nov. 22, 2022, EPA's Science Advisory Board requested public nominations of scientific experts to form a panel to review the draft EPA IRIS Toxicological Review of Inorganic Arsenic. Nominations were due on Dec. 9, 2022. On Jan. 23, 2023, the SAB announced a 20-day public comment period on the list of candidates. Comments were due Feb. 10, 2023.

ASTF is developing an extensive advocacy strategy in advance of the draft assessment's release and will submit written comments at all stages of the process. While the ASTF has made important strides in highlighting the flaws and shortcomings in the planned approach by IRIS, we have little cause to be confident that the draft will reflect the current state of the science. NMA will support ASTF's efforts to vigorously advocate against faulty science.

NMA, along with ASTF, will also continue to brief the Senate and House Committees of jurisdiction on our ongoing concerns with the assessment. In the 2021 reconciled Omnibus Appropriations bill, the following language was inserted into the Committee Report: "The Committees understand that a revised risk assessment of inorganic arsenic is currently under development by the Agency. The Committees note the importance of a robust evaluation of all relevant scientific data, including mode of action data. The Committees direct the Agency to brief the Committees if and when the revised risk assessment is completed." The explanatory statement for the 2022 Interior and Environment appropriations bill includes the following language: "The Committee directs the Agency to continue the IRIS program within the Office of Research and Development to support risk assessment decisions across the Agency and to enable the Agency to use rigorous scientific review to inform and provide the basis for policymaking to protect human health and the environment."

INTERNATIONAL LEGALLY BINDING INSTRUMENT ON MERCURY (MINAMATA CONVENTION)

PRIORITY B – EPA & STATE DEPARTMENT

Background:

At the February 2009 United Nations Environmental Program (UNEP) Governing Council meeting, the U.S. announced support for launching negotiations for a comprehensive legally binding instrument on mercury to be completed by 2013. The intergovernmental negotiating committee (INC) met in June 2010 for its first session. Key issues for negotiation included: (1) reducing mercury supply and enhancing capacity for environmentally sound storage; (2) reducing mercury demand in products and processes; (3) reducing international trade in mercury; (4) reducing atmospheric emissions of mercury; and (5) addressing mercury-containing waste and remediation of contaminated sites.

The parties met 4 additional times, with INC5 concluding negotiations on the text of the legally binding instrument on Jan. 18, 2013. NMA, in collaboration with the North American Metals Council (NAMC), the International Council on Mining and Metals (ICMM), Euromines, the Mining Association of Canada and the World Coal Association, participated in several industry stakeholder briefings with the State Department, organized separate meetings with the State Department and EPA to address mining specific concerns and filed several comments prior to each INC session.

The instrument - the Minamata Convention on Mercury - opened for signature at a diplomatic conference in Japan in October 2013. The United States signed the treaty (no implementing legislation needed and thus no Senate ratification necessary). The convention entered into force on Aug. 16, 2017.

In the beginning, the following two implementation issues were of most interest to the mining industry : (1) the UNEP expert working group established to develop guidance on best available techniques (BAT) and best environmental practices (BEP) for controlling mercury air emissions; and (2) the UNEP expert working group established to develop guidance on defining thresholds for mercury waste. The expert working group on air emissions completed its work first. Guidance on BAT and BEP for coal-fired power plants and coal-fired industrial boilers may be accessed here. The guidance on BAT and BEP for smelting and roasting processes used in the production of non-ferrous metals (lead, zinc, copper and industrial gold) may be accessed here. The guidance on mercury thresholds in waste is ongoing (as discussed below).

The first Conference of the Parties occurred the week of Sept. 25, 2017, in Geneva, Switzerland. NMA participated in a State Department stakeholder meeting in advance to voice interest in working with the EPA on the development of guidance that would include thresholds for defining mercury waste. Article 11 of the convention explicitly exempts tailings, waste rock, and overburden from requirements related to the control of mercury waste, provided that they do not exceed a yet-to-be defined threshold limit of mercury. COP-2 was held Nov. 19-23, 2018 in Switzerland. In advance of COP-2, NMA provided comments on the three ICMM submissions to the expert working group on mercury wastes, emphasizing that mining wastes are excluded unless or until the COP determines the relevant thresholds.

COP-3 was held on Nov. 25- 29, 2019 in Geneva, Switzerland. Materials for this meeting may be accessed here. Prior to this meeting, intersessional work continued regarding the handling of mining waste under Article 11. There is general agreement to exclude overburden and waste rock. The focus is on tailings, with discussion around possibly using a two-tiered approach for determining which tailings are subject to Article 11. The first tier would be based on total concentration of mercury. The second tier would be based on a yet-to-be defined leaching threshold. A threshold of 25 mg/kg had been put forward, causing significant debate among the parties. The United States was not supportive of that threshold.

There was also ongoing work to implement Article 9, which “concerns controlling and, where feasible, reducing releases of mercury and mercury compounds . . . to land and water from the relevant point sources not addressed in the other provisions of this Convention.” Article 9 requires parties to establish an inventory of releases from relevant sources. The Conference of the Parties must also adopt guidance on the best available techniques and environmental practices to control releases from relevant sources, as well as guidance on a methodology for preparing inventories of releases.

A party with relevant sources must "take measures to control releases and may prepare a national plan setting out the measures to be taken to control releases and its expected targets, goals and outcomes." The preliminary list of potentially relevant point source categories includes: coal combustion in power plants, coal combustion in coal-fired industrial boilers, other coal use, coal mining, gold (and silver) extraction with mercury amalgamation processes, zinc extraction and initial processing, copper extraction and initial processing, lead extraction and initial processing, gold extraction and initial processing by methods other than mercury amalgamation, and other non-ferrous metals extraction and processing.

Status:

Notable outcomes from COP-3 and COP-4 are provided below. COP-4 was bifurcated into a virtual session on Nov. 1 – 5, 2021, focused on the draft program of work and budget for the 2022-2023 biennium, and a second in-person meeting (COP-4.1) held in March 2022 to discuss specific implementation issues and the intersessional work on wastes and releases.

- **Waste**: Overburden and waste rock remain out of scope. Tailings will be subject to two thresholds: one on total concentration and a further one based on leaching, should the total concentration be exceeded. Cinnabar is no longer considered a mercury waste. The first call of the waste expert groups with observers occurred in June 2020. Following those discussions, the Minamata Secretariat requested for a selection of experts with mining relevant expertise to come together to develop the two thresholds approach for tailings that had been agreed at COP-3. The ICMM mercury working group's technical sub-group was reactivated to support these discussions. The following proposal was put forward at COP-4: **(1) Tier 1 – 25 mg/kg total content; and (2) Tier 2 – 0.15 mg/l leaching concentration with L/S ratio of 10:1.** This proposal was formally approved at COP-4. The expert group recognized the need for further work on the collection of data on mercury content in mine tailings and guidance on applying this threshold for different test methods and exposure conditions. A proposal to develop this guidance was supported at COP-4. The expert group was also tasked to work through an issue regarding Category C wastes (contaminated with mercury) during the intersessional period to COP 5 to establish a threshold. Parties could not agree on a proposed 25 mg/kg threshold. NMA is monitoring this work and any implications for the mining industry.

- **Releases**: Under Article 9, each party must identify and then control *significant* point sources of mercury releases to land and water that are not addressed by other provisions of the Convention. The first phase of the work will focus on inventory creation. A second phase will be the development of guidance on BAT/BEP. The expert group was seeking clarity around what release sources (e.g., wastewater discharges, releases from leaching and other production operations, wastewater from wet gas cleaning, and releases from mine tailings) are in scope. No agreement had been reached on whether mining wastes that are not defined as mercury waste under Article 11 should be addressed by Article 9 on releases instead. This point of disagreement was tabled at COP-4 for Parties to decide upon and inform the way forward. However, during COP-4 this open issue was closed by pointing to the fact that each Party must ascertain significant release sources themselves and thus are able to address it at a national level. The expert group will now develop BAT/BEP guidance.

NMA continues to coordinate with the ICMM and NAMC on this issue. NMA also conducts outreach to EPA and the State Department as appropriate.

PFAS: CERCLA & RCRA REGULATIONS

PRIORITY B – EPA & CONGRESS

Background:

PFAS are a group of man-made chemicals that includes perfluorooctanoic acid (PFOA), perfluorooctanesulfonic acid (PFOS), GenX, and many other chemicals. PFAS are a class of biologically and environmentally persistent compounds that have been manufactured and used in a wide variety of industries since the 1940s. For the mining industry, certain firefighting foam (aqueous film-forming foam concentrates or AFFF) is the largest potential source of PFAS. Other sources may include some flotation and electrowinining chemicals, hydraulic fluids, or bio-solids used in reclamation.

Trump Administration:

In Feb. 2019, EPA published its PFAS Action Plan announcing four actions it would take, including beginning the necessary steps to propose designating PFOA and PFOS as "hazardous substances" through one of the available statutory mechanisms identified in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

In Feb. 2020, EPA released an updated PFAS Action Plan, providing a multi-media, multi-program, national research, and risk communication plan to address the emerging environmental challenges associated with this large class of chemicals. EPA has continued to provide technical assistance on site-specific PFAS challenges across the country, including using CERCLA and other authorities, as appropriate, to investigate sites.

On Jan. 14, 2021, EPA signed an advance notice of proposed rulemaking (ANPRM) to seek public comments and data relevant to whether EPA should consider proposing to designate as hazardous substances under section 102(a) of CERCLA, PFOA and PFOS, including their salts and structural isomers, to assist in the potential development of future regulations pertaining to this designation, including the scope of impacts (benefits and costs) related to such an action. EPA was also planning to seek comments and data relevant to evaluating the nature and extent of potential sources of wastes containing PFOA and PFOS, as part of any scoping effort on listing particular wastes or chemicals as hazardous waste under subtitle C of the Resource Conservation and Recovery Act. The ANPRM was not published in the *Federal Register*.

Legislation:

In the House, Rep. Dingell (D-Mich.) introduced the "PFAS Action Act of 2019" (H.R. 535) that, among other mandates, would require EPA to designate PFOA and PFOS as hazardous substances under CERCLA within one year of enactment. Additionally, EPA would be required within 5 years of enactment to determine whether to designate all PFAS as hazardous substances and make the results of that determination public within 60 days. The bill had 66 co-sponsors and passed the House by a vote of 247-159 on Jan. 10, 2020. The bill was referred to the Senate Environment & Public Works Committee, but no action followed.

Status:

Biden Administration

The ANPRM was subject to the Regulatory Freeze Pending Review Memorandum that White House Chief of Staff Ronald Klain issued on Jan. 20, 2021.

Separately, on Dec. 18, 2020, EPA released new interim guidance on destroying and disposing of certain PFAS and PFAS-containing materials for public comment. Specifically, the new interim guidance outlines the current state of the science on techniques and treatments that may be used to destroy or dispose of PFAS and PFAS-containing materials from non-consumer products, including aqueous film-forming foam for firefighting. The interim guidance generally describes thermal treatment, landfill and underground injection technologies that may be effective in the destruction or disposal of PFAS and PFAS-containing materials, as well as considerations for potentially vulnerable populations. EPA published a notice in the *Federal Register* requesting public comment on the interim guidance until Feb. 22, 2021. NMA did not receive any member interest in commenting on this interim guidance.

President Biden's "Plan to Secure Environmental Justice and Equitable Economic Opportunity" commits to "tack[ling] PFAS pollution by designating PFAS as a hazardous substance." On Oct. 18, 2021, EPA announced the agency's PFAS Strategic Roadmap, laying out a whole-of-agency approach to addressing PFAS. EPA's Office of Land and Emergency Management is planning to:

- Propose to designate certain PFAS as CERCLA hazardous substances to require reporting of PFOA and PFAS releases, enhance the availability of data, and ensure agencies can recover cleanup costs.

- Issue an advance notice of proposed rulemaking on various PFAS under CERCLA to seek public input on whether to similarly seek CERCLA designation of other PFAS.

- Issue updated guidance on destroying and disposing PFAS to reflect public comments on interim guidance and to reflect newly published research results.

Separately, on Oct. 26, 2021, EPA responded to a petition filed by New Mexico Gov. Michelle Lujan Grisham (D) agreeing to address PFAS under RCRA including:

- Initiating a rulemaking process to propose adding PFOA, PFOS, PFBS, and GenX as RCRA hazardous constituents under 40 CFR Part 261 Appendix VIII by evaluating the existing data for these chemicals and establishing a record to support such a proposed rule. According to EPA's Fall semi-annual regulatory agenda, a proposed rule is expected in August 2023.

- Initiating a rulemaking to clarify in regulations that the RCRA Corrective Action Program has the authority to require investigation and cleanup for wastes that meet the statutory definition of hazardous waste, as defined under RCRA section 1004(5).

On Aug. 26, 2022, EPA announced a proposed rule to designate PFOA and PFOS, including their salts and structural isomers, as hazardous substances under CERCLA. On Sept. 6, 2022, EPA published the proposed rule. 87 Fed. Reg. 54415. EPA accepted comment on this proposal through Nov. 7, 2022**.**

Significantly, this rulemaking would allow EPA to impose CERCLA's strict joint and several liability scheme on parties responsible for releases of these chemicals. For example, owners of sites with PFOA and PFOS contamination from historical use could be held responsible for the cleanup of legacy contamination on their properties. EPA has pledged to use enforcement discretion to ensure fairness for minor parties. During a recent stakeholder briefing, a representative of the enforcement office said the agency would use existing "equities and fairness" tools. However, EPA did not provide any further detail on these tools or which parties, beyond potentially public service entities or entities using biosolids, that would benefit from such discretion. Finally, EPA asserted in the proposal that consideration of cost is not required to designate PFOA and PFOS as a hazardous substance under CERCLA.

NMA joined a broad industry coalition in opposing the rule. The coalition's comments are available here. Notably, the coalition argues that a listing under CERCLA Section 102(a) raises multiple policy concerns including: (1) a liability regime that cannot be effectively tailored to address the unique challenges of PFOA and PFOS; (2) subjecting numerous new and reopened sites to liability without identifying adequate and cost-effective treatment or destruction methods; (3) EPA's failure to identify specific cleanup targets or limits that would trigger remedial activities; and (4) EPA's overreliance on enforcement discretion. Importantly, the coalition's comments make the case for why CERCLA Section 102(a) requires consideration of cost in making the listing decision and why EPA's economic assessment is grossly inadequate. According to EPA's Fall semi-annual regulatory agenda, a final rule is targeted for August 2023. EPA also planned in Feb. 2023 to issue an advance notice of proposed rulemaking to seek public feedback on further PFAS-related designations under CERCLA. That rule is delayed, but currently at OMB for interagency review.

PFAS: TSCA REPORTING

PRIORITY C – EPA

Background:

On June 28, 2022, EPA proposed reporting and recordkeeping requirements for PFAS under TSCA section 8(a)(7). 86 Fed. Reg. 33,926. This proposal was statutorily required after the enactment of the National Defense Authorization Act for Fiscal Year 2020, which requires certain persons that manufacture (including import) or have manufactured these chemical substances in any year since Jan. 1, 2011 (a 10-year look-back period), to electronically report information regarding PFAS uses, production volumes, disposal, exposures, and hazards. The proposal did not exempt byproducts or small manufacturers or processors from the requirements. Articles containing PFAS, including imported articles containing PFAS (such as articles containing PFAS as part of surface coatings), are included in the scope of reportable chemical substances. EPA acknowledges that it is possible that an importer, particularly an importer of articles containing PFAS, may not have knowledge that they have imported PFAS and thus not report under this rule, even after they have conducted their due diligence under this reporting standard as described in this paragraph. Such an importer should document its activities to support any claims it might need to make related to due diligence. NMA joined coalition comments highlighting regulatory burden issues related to requiring reporting on articles.

Status:

On Feb. 2, 2022, EPA announced it was establishing a small business advocacy review panel on this rule. Nominations were due by Feb. 16, 2022.

On Nov. 25, 2022, EPA announced the a notice of data availability of and solicited comment on an Initial Regulatory Flexibility Analysis (IRFA) and Updated Economic Analysis that was developed after the SBAR panel issued its recommendations. EPA now estimates the costs for the proposed rule at approximately $875 million (compared to $10.8 million), with updated agency costs increasing from $948,078 to $1.5 million. The IRFA also includes scenarios that address certain SBAR recommendation regarding the rule's requirement that companies report information to the extent it is "known or reasonably ascertainable." Comments were due on Dec. 27, 2022. EPA denied a request from industry on Dec. 6, 2022, including NMA, to extend the comment period. On Dec. 27, 2022, NMA joined an industry coalition in responding to the EPA's IRFA which can be found here.

According to EPA's Fall semi-annual regulatory agenda, the agency is targeting March 2023 for a final rule. EPA is unlikely to meet this deadline given that OMB has not begun its review.

PFAS: TRI REPORTING

PRIORITY C – EPA

Background:

Rulemaking:

For reporting year 2022 (reporting forms due by July 1, 2023), 180 PFAS are reportable under the TRI program. The manufacturing, processing, and otherwise use thresholds for each of the listed PFAS is 100 pounds. The de minimis exemption of 1 percent applies for TRI-listed PFAS (except for 0.1 percent for PFOA) in mixtures and products.

In the PFAS Strategic Roadmap, EPA claims that existing exemptions and exclusions "significantly limited the amount of data that EPA received for these chemicals in the first year of reporting." Consequently, EPA included in its rulemaking plans a regulatory change that would categorize PFAS as "Chemicals of Special Concern," which would eliminate the de minimis exemption and option to use Form A, as well as limit the use of range reporting**.** EPA also indicated it would remove the de minimis eligibility from supplier notification requirements for these chemicals.

Litigation:

Despite EPA's planned PFAS rulemaking, the National PFAS Contamination Coalition, the Sierra Club, and Union of Concerned Scientists filed a complaint for declaratory and injunctive relief in the U.S. District Court for the District of Columbia, arguing that EPA unlawfully applied the de minimis exemption and alternate reporting threshold exemptions and limits to the statutorily listed PFAS chemicals. *National PFAS Contamination Coalition v.* EPA, No. 1:22-cv-00132-JDB (D.D.C. filed Jan. 20, 2020). Notably, the petitioners also claimed more generally that the de minimis and alternate threshold exemption "falls outside the narrow set of exemptions EPA is authorized to allow, and is not permitted by EPCRA." Among other requests

for relief, petitioners asked the court to issue a declaratory judgment declaring that EPA's adoption of the TRI PFAS rules violates EPCRA insofar as those rules subject the statutorily listed PFAS to the de minimis and alternate threshold reporting exemptions. On Apr. 5, 2022, EPA requested that the case be put into abeyance until Sept. 30, 2022, given the agency's planned rulemaking.

Status:

Rulemaking:

On Dec. 5, 2022, EPA published a proposed rule to expand reporting requirements under the TRI Program. The proposal includes: (1) reclassifying PFAS substances as chemicals of special concern, effectively eliminating the de minimis exemption for TRI-listed PFAS; and (2) eliminating the de minimis exemption from supplier notification requirements for all chemicals of special concern, including lead and mercury and their compounds. Comments were due on Feb. 3, 2023. NMA joined coalition comments lead by the U.S. Chamber of Commerce.

EPA's Fall semi-annual regulatory agenda targets Nov. 2023 for a final rule.

Litigation:

***National PFAS Contamination Coalition v. EPA*, No. 1:22-cv-00132-JDB (D.D.C.)**: Case is held in abeyance. A Joint status report was filed on Sept. 22, 2022, in which the EPA and environmental organization petitioners told the court they were unable to agree on whether to extend the stay. On Oct. 6, 2022, the parties filed a joint motion to govern with a proposed briefing schedule on the government's stay request and plaintiffs' opposition. On Oct. 24, 2022, EPA filed a motion to temporarily stay litigation pending completion of the rulemaking. Plaintiffs continued to disagree with the continued stay of this litigation. On Jan. 3, 2023, the Court granted the motion and stayed the litigation through July 31, 2023.

TRI REPORTING: METAL MINING

PRIORITY C – EPA

Background:

In 2002, EPA initiated a rulemaking to clarify how the definitions of "manufacturing" and "processing" under Section 313 of the Emergency Planning & Community Right-to-Know Act (EPCRA) apply to the extraction and beneficiation in the mining sector. EPA's rulemaking was a long-delayed response to the decision in *NMA v. Browner*, 2001 U.S. Dist. LEXIS 915 (D. Colo. 2001), which held that naturally occurring undisturbed ores are not "manufactured" within the meaning of EPA's TRI regulations. A subsequent order of clarification from the court set aside and enjoined the agency from enforcing its "definition and interpretation of the term 'process' as including the extraction and beneficiation of naturally occurring, undisturbed ores." The rulemaking was expected to allocate extraction and beneficiation activities between the statutory terms "manufacturing" and "processing."

Obama Administration:

When the agency began the rulemaking process, NMA initiated a proactive advocacy strategy in 2009 through 2011 to educate the agency, OMB, and the SBA on key industry concerns with the TRI program that could have been addressed in the rulemaking. These concerns included: (1) promoting accuracy and certainty in TRI reporting following the *Browner* decision; (2) addressing the unique circumstances the mining industry faces in TRI reporting; and (3) placing in proper context the data that are reported by the industry each year.

Although we saw an opportunity to advance the metal mining industry's concerns regarding the TRI program through this rulemaking, it became apparent during discussions with EPA, OMB, and SBA that the agency was drafting a rule that would significantly increase the industry's reporting burden. For example, NMA was concerned that EPA was going to reinstate via rulemaking a previous guidance interpretation struck down by the U.S. District Court for the District of Columbia that waste rock is ineligible for the regulatory *de minimis* exemption. *Barrick v. Whitman*, 260 F. Supp. 2d 28 (D.D.C. 2003).

On Mar. 7, 2014, EPA ultimately withdrew its proposed rule during OMB's regulatory review process. The rule had languished there since May 13, 2011. According to EPA, the agency decided to withdraw the rule after careful consideration of the full regulatory agenda, current policies, and limited resources. NMA did not pursue this rule again during the Obama Administration given that the outcome of the rule would have likely increased the metal mining sector's reporting burden.

Trump Administration:

With the change in Administration, NMA identified a potential opportunity to pursue clarifying rules and or guidance for the metals mining sector that fully conform with past favorable court decisions, as well as inject other common-sense reforms to reduce reporting burdens and provide the public with accurate data on the risks the TRI program was intended to disclose.

- Improving the Narrative:

NMA focused on two projects as a litmus test for whether EPA's TRI Program, Office of General Counsel, and Office of Enforcement and Compliance Assurance would be willing to consider regulatory changes including: (1) in targeted changes to TRI Form R that would allow mining companies to provide more context to their on-site disposal release numbers; and (2) an interactive metal mining graphic with industry supported narrative for EPA's TRI website.

- **TRI Form R***:* In 2018, EPA approved changes to TRI Form R that reflected some of the recommendations supported by NMA, including adding: (1) a voluntary reporting field in Part II, Section 5.5, to allow a facility to indicate that quantities reported in this section were managed in waste rock piles and may provide the quantity of the chemical managed in such piles; and (2) a new barrier code in Part II, Section 8.11 that allow companies to indicate that source reduction does not appear to be technically feasible at the facility. However, EPA was not willing to adopt NMA's recommendation to add two new subcategories in Form R for "permitted impoundments (federal or state)" and "permitted disposal facilities (federal or state)," which we believe would more accurately describe on-site releases involving waste rock, tailings impoundments, and slag piles.

- **Interactive Graphic on Metal Mining**: NMA worked with EPA on developing an interactive metal mining TRI graphic and narrative; a project that began in 2016. On Feb. 11, 2020, EPA released the new interactive graphic that explains the metal mining data reported under the TRI program. The interactive graphic on metal mines may be accessed here. NMA's goal was to ensure this tool properly reflected how the industry reports under the TRI program, the limitations of using TRI data to assess risk and exposure, and the engineering and permitting controls put in place to minimize and prevent releases to surrounding communities.

  The graphic shows a fictional metal mining facility that reports to the TRI program. The public can click on ten separate areas of the facility to learn about how the facility operates and the TRI-listed chemicals that are typically reported. Importantly, EPA explains that TRI data alone cannot be used in determining the potential risk of an industry sector. EPA also emphasizes that "federal and state regulatory controls apply to many of the TRI-listed chemicals reported." In describing the TRI data reported for waste rock, EPA recognizes that "waste rock piles are subject to engineering controls and regulations and are typically located within the boundaries of the mining facility." Similar statements are included for leach pads and tailings impoundments.

- **Improvements to the National Analysis**: In 2018, NMA responded to EPA's request for recommendations to improve the TRI National Analysis. While EPA did not incorporate all the recommendations we provided, the agency did make several positive changes in the 2017 National Analysis released on March 5, 2019.

- **Mine Tour***:* NMA organized a mine tour with staff from EPA's TRI program office and Smart Sectors program to provide on-the-ground education on what mining companies report under the TRI program and how TRI reportable "releases" are managed and regulated onsite. The mine tour took place in October 2018 at Rio Tinto's Bingham Canyon mine and Newmont's Phoenix Mine.

- Regulatory Reform:

In 2018, NMA relaunched a technical working group to explore regulatory reform options that could provide reporting relief for mining companies under the TRI reporting program and provide better information to the public on TRI data reported by the mining industry. NMA held several conference calls regarding this matter. Based on those discussions, members agreed on three fundamental overarching objectives: (1) clarifying TRI reporting obligations given uncertainty and recent enforcement actions; (2) improving the public's understanding of what mining companies report as "releases" under the TRI program; and (3) preventing misuse of data.

The TRI Working Group also completed several tasks intended to provide a foundation of information from which we could build an outline of potential reform options. These tasks included providing: (1) comments on a 2004 TRI Draft Reporting matrix to reflect how companies view their reporting obligations and identify potential discrepancies; (2) summaries of enforcement inspections and any reporting changes companies made in response; and (3) comments on aspects of the TRI program they would like to see changed through guidance or formal rulemaking. The results of these tasks may be accessed on the TRI Working Group clearinghouse.

Based on this information, NMA developed a white paper that provides various options for engaging with EPA officials to seek changes to the program. NMA also organized a meeting with EPA TRI program staff on July 26, 2018, to educate them on the mining industry's concerns with how TRI data is being misused by the public and press.

On Oct. 17, 2018, NMA held a meeting to provide an additional forum for companies to discuss the reform options presented in the white paper and decide on an advocacy path forward. NMA presented each reform option separately with a specific focus on the situational analysis detailed in the white paper, including an in-depth discussion on opportunities for successful outcomes, obstacles to pursuing program changes, and resource needs (*e.g.*, technical and legal support). Companies acknowledged our success depended on the willingness of EPA leadership to pursue regulatory reforms this year and finding a champion. Lack of interest in the Trump administration and the presidential election shut down the possibility for any regulatory reforms.

Status:

Improving the Narrative:

NMA completed all planned projects and work product to improve the narrative. There are no additional projects planned at this time.

Regulatory Reform:

NMA has no plans to pursue TRI regulatory reform under the Biden administration. Instead, NMA will actively monitor any activity in the TRI Program Office that would impact the mining industry's underlying reporting obligations.

Enforcement:

NMA asks member companies to also keep the association apprised of any enforcement actions that could fundamentally change requirements outside of a formal rulemaking process.

RISK MANAGEMENT PROGRAM

PRIORITY C – EPA

Background:

Obama Administration:

On July 31, 2014, EPA published an extensive Request for Information (RFI) on potential revisions to the accidental release prevention requirements under the Clean Air Act's 112(r) Risk Management Program (RMP). 79 Fed. Reg. 44,604. This action was in response to Executive Order 13650, "Improving Chemical Facility Safety and Security," and was one of the potential rulemakings recommended in a related federal action plan for improving chemical facility safety and security. EPA's RFI solicited comment on 19 topics, covering more than 100 options, including: (1) whether to update the list of RMP regulated substances to include ammonium nitrate and "high explosives;" and (2) adding or changing various management system elements covered by the RMP. On Oct. 29, 2014, NMA filed comments that raised

concerns with the scope of the RFI, opposed adding ammonium nitrate and other "high explosives" to the list of RMP-regulated materials, and addressed several other RMP-specific program elements.

On March 14, 2016, EPA published the proposed rule. 81 Fed. Reg. 13,638. Importantly, EPA abandoned its proposal in the RFI to add ammonium nitrate and high (Division 1.1.) explosives to the list of regulated substances under the RMP. Instead, the proposed rule was a broad re-write of existing regulation, addressing obligations related to incident investigation, third-party compliance audits, safer technology alternatives analysis, emergency, planning and response, and information sharing. NMA vetted the proposal with Subcommittee members. There was not significant objection to the proposal to warrant NMA comments. Instead, NMA engaged with a broad industry coalition to stay up-to-date on the rulemaking and other advocacy efforts.

On Jan. 13, 2017, EPA published the final rule in the *Federal Register*. 82 Fed. Reg. 4594. EPA's summary of the rule amendments may be accessed here. On Feb. 28, 2017, an industry coalition filed a petition for reconsideration with the agency. Two other petitions for reconsideration were filed shortly thereafter by another industry coalition and 11 states. These petitions also requested that EPA delay the various compliance dates in the RMP amendments.

Trump Administration:

Delay of 2017 Rule Effective Date & Litigation:

On March 13, 2017, EPA Administrator Pruitt signed an administrative stay to delay the effective date of the rule until June 19, 2017. On April 3, 2017, EPA published a proposed rule to further delay the effective date of the rule amendments for 20 months. On June 14, 2017, EPA issued a final rule delaying the effective date of the RMP Amendments to Feb. 19, 2019. 82 Fed. Reg. 27,133. According to EPA, the delay would allow the agency an additional 20 months to conduct a reconsideration of the RMP Amendments and take further regulatory action, as appropriate, which could include proposing and finalizing a rule to revise or rescind the regulations.

Environmental and public health organizations and labor unions, as well as several states, filed motions in the D.C. Circuit challenging the final rule extending the effective date, asking the court to stay or vacate it based on various legal grounds. *Air Alliance Houston v. EPA*, D.C. Circuit (No. 17-1155) (June 15, 2017). On August 30, 2017, the D.C. Circuit denied petitioners' motion to either stay or summarily vacate the rule delaying the effective date, finding that they had not satisfied the high hurdle for such relief. On Aug. 17, 2018, the D.C. Circuit vacated the agency's final rule delaying the effective date of the RMP Amendments final rule. *Air Alliance Houston v. Wheeler*, No. 17-1155 (D.C. Cir. decided Aug. 17, 2018). The D.C. Circuit held that EPA's reliance on general rulemaking authority under the CAA to avoid express limitations in the statute was improper and made a "mockery" of the statute's requirements to expeditiously implement accident prevention rules. The D.C. Circuit also held that the agency had not engaged in "reasoned decisionmaking" and therefore EPA's promulgation of the final rule delaying the effective date was arbitrary and capricious. A copy of the D.C. Circuit's decision may be accessed here.

Following this decision, the D.C. Circuit granted petitioners motion for an expedited issuance of its mandate, making those portions of the RMP Amendments rule that had compliance deadlines that had already passed effective immediately. Currently enforceable requirements include certain: (1) emergency coordination provisions; (2) emergency response program

provisions; and (3) prevention program provisions. Additional information on the RMP compliance deadlines may be accessed here.

Reconsideration Rulemaking:

On Nov. 21, 2019, EPA announced that the agency finalized its reconsideration of the RMP requirements. The final rule was published on Dec. 19, 2019. 84 Fed. Reg. 69,834. This final rule rescinded nearly all the significant amendments to the RMP program finalized in the prior Administration (*e.g.*, third party compliance audits, safer technology and alternatives analysis, root cause analyses, training for process supervisors) and allowed delayed effective dates for some provisions that were not deleted. The following requirements were immediately effective: (1) hazard reviews must address opportunities for equipment malfunctions or human errors that could cause an accidental release; (2) training requirements apply to all employees with process operational responsibilities; (3) third-party audits are no longer required, but compliance audits are required every 3 years; (4) incident investigations and reports are required for catastrophic releases or incidents that could have resulted in a catastrophic release and such incidents must be included in the process hazard analysis; (5) risk management plans must provide information, including emergency response plans, action plans, and updated contact information; and (6) responding facilities must consult with local emergency response officials to establish appropriate schedules and plan for field and tabletop exercises.

Litigation:

On Dec. 19, 2019, Earthjustice (on behalf of 13 environmental and citizen groups) filed suit in the D.C. Circuit petitioning the court to review the reconsideration rule. *Air Alliance v. Houston*, No. 19-1260. The court consolidated this challenge with a challenge filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (No. 20-1022) and a challenge filed by the States of New York, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Wisconsin and the District of Columbia and City of Philadelphia (No. 20-1005). The American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and the U.S. Chamber of Commerce filed to intervene on behalf of the government.

Petitioners filed their statement of issues on Mar. 19, 2020, claiming: (1) EPA introduced new rationales to attempt to justify the agency's repeal and weakening of accident prevention, emergency response coordination, and public information availability regulatory requirements for the first time with its final rule; (2) EPA failed to provide data, information, or documents on which the agency relied for the proposed and final rules into the public docket with a meaningful period for public review, comment, and participation of at least 30 days; (3) EPA acted with an "unalterably closed mind" at the direction of decision makers with demonstrated predisposition favoring repeal and weakening of these provisions and with longstanding financial relationships with for-profit corporations seeking to avoid compliance costs, thereby failing to assure a fair consideration of all public comments and facts in the record; (3) EPA's rescission of disaster-prevention measures was arbitrary and capricious; (4) EPA's changes to and delay of emergency response coordination and preparation requirements were arbitrary and capricious; and (5) EPA's repeal of requirements for RMP facilities to provide information to the public upon request is unlawful and arbitrary and capricious.

On Mar. 13, 2020, petitioners filed a motion to hold the case in abeyance for six months, with motions to govern due Sept. 21, 2020, to allow EPA to consider three filed administrative petitions for reconsideration. On May 15, 2020, the D.C. Circuit granted this motion. On Sept. 4,

2020, EPA published a notice of final action denying the three pending administrative petitions in letters to each set of Petitioners. On Sept. 21, 2020, petitioners and EPA filed a joint motion to continue to hold this case in abeyance with motions to govern in these cases due on Dec. 3, 2020. On Oct. 2, 2020, the D.C. Circuit granted the joint motion. On Dec. 3, 2020, petitioners filed an unopposed motion to continue the abeyance and direct parties to file motions to govern these cases on Mar. 20, 2021. The motion emphasized the transition to the Biden Administration.

On Oct. 26, 2020, Earthjustice on behalf of 13 organizations filed a petition for review challenging EPA's denial of their administrative petitions for reconsideration. *Community In-Power & Development Association v. EPA*, No. 20-1430 (Filed Oct. 26, 2020). On Nov. 3, 2020, 16 states, led by New York Attorney General Letitia James, the District of Columbia and two local governments also filed a petition for review. *New York v. EPA*, 20-1437 (Filed Nov. 3, 2020). Separately, on Oct. 30, 2020, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFLCIO/CLC filed a petition review regarding the denial of their administrative petition for reconsideration. *USW v. EPA*, No. 20-1434 (Filed Oct. 30, 2020). These cases are consolidated with the litigation described above.

Status:

Litigation:

***Air Alliance v. Houston*, No. 19-1260 (D.C. Circuit) (challenge to 2019 rule and denial of administrative petitions for reconsideration)**: This case consolidates eight separate lawsuits. These cases are currently in abeyance pending the reconsideration process, with the latest status report filed on Feb. 13, 2023.

Biden Administration Reconsideration:

On his first day in office, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," ordering an immediate review of agency actions taken the last four years that do not align with the President's priorities and consider suspending, revising, or rescinding those actions. This rule was included on the Biden transition team's list of initial environmental policy actions for review.

On May 26, 2021, EPA announced that it had selected this rule for reconsideration and organized two virtual public hearings to "give interested people the opportunity to present information, and provide comments or views pertaining to revisions made to the RMP rule since 2017." EPA emphasized the importance of the RMP program as a "critical piece of [the agency's] work to address environmental justice issues." EPA Deputy Administrator for the Office of Land and Emergency Management characterized the listening sessions as "a first step in considering improvements to the RMP rule, so EPA can better address the impacts of climate change on facility safety and protect communities from chemical accidents, especially vulnerable and overburdened communities living near RMP facilities." EPA held public hearings on June 16 and July 8 and accepted written comment until July 15, 2021. During the first public hearing, Carlton Waterhouse, nominated to be Assistant Administrator for the Office of Land and Emergency Management, told the audience that the rule should be written in a way that requires "industry provide the maximum amount of protection possible" and would make environmental justice concerns a key focus.

EPA sent the draft proposed rule to OMB for interagency review on Apr. 27, 2022. NMA joined a coalition of industry trade associations and met with OMB, EPA, and SBA staff on June 16, 2022. NMA expressed concerns over EPA potentially adding ammonium nitrate as a regulated chemical under this program.

On Aug. 19, 2022, EPA announced proposed revisions to the RMP. On Aug. 31, 2022, EPA published the proposed rule, "Safer Communities by Chemical Accident Prevention," in the *Federal Register*, starting a 60-day public comment period that ended on Oct. 31, 2022. EPA also released several supporting documents including a: (1) fact sheet for regulated facilities; (2) fact sheet for communities; (3) regulatory impact analysis; and (4) technical background document. EPA held virtual public hearings on September 26, 27, and 28, 2022**.**

Notably for the mining industry, EPA has decided not to propose expanding the list of RMP-regulated substances to include ammonium nitrate at this time. Instead, "EPA acknowledges the need for reviewing the list of RMP-regulated substances," and targets ammonium nitrate as a "priority chemical for EPA's upcoming review." While EPA says this issue is beyond the scope of this proposed rule, the agency still welcomes comment on this issue and points to a separate discussion the Technical Background Document.

EPA is also proposing several programmatic amendments to the RMP to address natural hazards and power loss, facility siting, root cause analysis incident investigations when facilities have had a RMP-reportable accident, third-party compliance audits, employee participation, emergency response exercises, enhanced information availability, and safer technologies and alternative analysis for petroleum and coal products manufacturing processes and chemical manufacturing processes co-located (i.e., within one mile) of another facility using the same processes.

On Oct. 31, 2022, NMA submitted comments on proposed rule. NMA's comments respond to EPA's request for feedback on adding AN to the list of RMP-regulated substances in a future rulemaking. NMA's comments expand on information submitted to EPA in 2014 when the agency asked the same question. NMA's comments again oppose this action and detail the comprehensive regulatory requirements that already apply to the mining sector's handling and use of AN and AN-based explosives for blasting operations.

Separately, the NMA also joined coalition comments that address the legal, practical, and economic concerns of the extensive programmatic changes proposed by EPA. These comments focus on new requirements that impact process hazard analysis, third-party audits, safer technology alternative analysis, employee participation, emergency response, and information disclosure.

EPA's Fall semi-annual regulatory agenda targets August 2023 for a final rule. EPA has received approximately 58,000 public comments.

TSCA: CHEMICAL DATA REPORTING RULE

PRIORITY C - EPA

Background:

The Chemical Data Reporting (CDR) rule, authorized under TSCA Section 8(a), requires manufacturers (including importers) to report certain information on the chemicals they produce domestically or import into the United States. Manufacturers (including reporters) are required to report if they meet certain production volume thresholds, generally 25,000 pounds or more of a chemical substance at a single site. A reduced reporting threshold of 2,500 pounds applies to chemical substances subject to certain TSCA actions. The last CDR submission period started June 1, 2016 and ended Sept. 30, 2016. EPA issued reporting guidance for the metal mining industry in May 2016.

On Mar. 17, 2020, EPA announced a final rule revising the CDR rule, which was published in the *Federal Register* on Apr. 9, 2020. 85 Fed. Reg. 20,122. EPA's final revisions addressed:

- **Processing and Use Codes**: EPA's final rule replaced the CDR industrial function and commercial/consumer product use codes with international codes developed through the Organization for Economic Cooperation and Development (OECD) on function, product, and article use categories. EPA also added the requirement to report the function of the chemical in commercial/consumer products. In response to comments, EPA phased-in the implementation of the OECD-based codes. For the 2020 reporting period, submitters were required to use these codes for those chemical substances designated by EPA as a high priority for risk evaluation. For all other chemical substances, submitters were allowed to use either the OECD-based codes or the current CDR codes. Full implementation of this change will occur during the 2024 CDR submission period. Regarding function codes (industrial and consumer/commercial), EPA's final rule replaced the current 35 function codes with 117 OECD-based function codes. EPA replaced the current 33 consumer/commercial product categories with 96 OECD-based product categories.

- **North American Industrial Classification System (NAICS) Codes for Manufacturers**: EPA's final rule added the requirement to report the 6-digit NAICS code(s) that best describe the manufacturing activities conducted at the reporting site. A reporter may indicate up to three NAICS codes where identifying a single NAICS code would be difficult.

- **Modifying Recycled Information**: EPA finalized a requirement to report whether a chemical substance is recycled or otherwise used for a commercial purpose, instead of being disposed or as a waste or included in a waste stream. This requirement removed the terms "remanufactured, reprocessed, and reused" from the regulation relied on in previous reporting periods. EPA maintains that these terms are not "necessarily synonymous with 'recycle'" in all scenarios. EPA did not finalize a requirement for reporters to identify the percent recycled when reporting to CDR, addressing a concern raised in NAMC's joint comments. However, EPA finalized a voluntary reporting element to allow the reporting of the percent total production volume (by weight) for a chemical substance that is a byproduct by selecting one of four ranges.

- **Parent Company Identity**: EPA finalized the following changes: (1) adding the requirement to report a foreign parent company in addition to reporting the highest-level U.S. parent company, when the ultimate parent company is located outside of the United States; (2) removing the definition of U.S. parent company from the regulations and replacing it with a new definition for highest-level parent company; and (3) adding the requirement for reporters to report legal name(s) and to follow a naming convention for providing the parent company name(s).

- **Byproducts**: EPA finalized two exemptions for: (1) specifically-listed byproducts that are recycled in a site-limited, enclosed system (*e.g.*, Portland cement manufacturers that manufacture flue dust) with a petition process for the public to request additions to the list of exempted manufacturing processes and related byproduct substances; and (2) byproducts manufactured in pollution control and boiler equipment when that equipment is non-integral to the primary manufacturing process. EPA will provide enhanced guidance on how the byproduct petition process will operate. EPA did not finalize an alternative method for reporting by category for inorganic metal byproducts.

- **Confidentiality Claims**: EPA finalized changes to requirements related to claiming CDR data as confidential to align with new statutory requirements in TSCA section 14.

EPA did not finalize several proposed amendments including: (1) requiring the reporting of a public contact for each CDR submission as a voluntary data element; (2) alternative reporting in metal compound categories for inorganic byproducts; or (3) consolidating byproduct exemption regulatory text.

EPA finalized in a separate action an amendment to update the size standards definition for small manufacturers for reporting and recordkeeping requirements under TSCA section 8(a). 85 Fed. Reg. 31,986 (May 28, 2020). The final rule became effective on June 29, 2020.

Status:

The 2020 CDR submission period began June 1, 2020, was supposed to end Nov. 30, 2020 (a one-time extension from Sept. 30, 2020), but was again extended to Jan. 29, 2021. Manufacturers were required to report production volume information for calendar years 2016, 2017, 2018, and 2019. Full manufacturing, processing, and use information was required only for 2019.

Significantly, EPA silently posted (likely in December 2020) a new guidance for the 2020 reporting year for the metal mining industry, which made significant changes and additions to the 2016 guidance. EPA did not conduct any industry outreach after posting the guidance. The guidance addresses, among other things, when a mined chemical substance is no longer considered a naturally occurring chemical substance, when intermediates and byproducts are reportable, how to identify the manufactured chemical substance, and provides numerous new examples of mining activities and manufacturing under the CDR rule. Notably, the guidance included new language on froth flotation that warranted company review. The guidance also walks through the carbon-in-pulp gold recovery process and what is reportable.

The next CDR submission period is 2024.

NATURAL RESOURCE DAMAGES RULEMAKING

PRIORITY C - DOI

Background:

On Aug. 27, 2018, the U.S. Department of the Interior (DOI) published an advance notice of proposed rulemaking (ANPRM) requesting comment on whether revisions to the regulations for conducting natural resource damage assessments and restoration (NRDAR) for hazardous substance releases are needed. 83 Fed. Reg. 43,611 (Aug. 27, 2018). DOI last revised these regulations, found at 43 C.F.R. Part 11, in 2008. 73 Fed. Reg. 57,259 (Oct. 2, 2008). This rulemaking finalized several targeted revisions to regulations governing the "Type B" assessment procedures.

According to DOI, the ANPRM stems from an internal biennial statutory review, which identified issues not addressed in the 2008 rulemaking but were previously identified by an expert committee convened under the Federal Advisory Committee Act (FACA) as warranting action, as well as practice issues that have developed since the last regulatory revision. The ANPRM is also associated with Executive Order 13777 on "Enforcing the Regulatory Reform Agenda," which directed DOI to evaluate existing regulations for repeal, replacement, or modification. NMA submitted comments to DOI last year identifying the NRDAR regulations as a candidate for withdrawal or revision under this Executive Order. NMA's comments highlighted that the existing regulations impose unnecessary compliance costs on the regulated community and cause project delays and the diversion of resources away from more effective projects that restore impacted natural resources.

DOI requested "comments or suggestions that improve the efficiency and cost effectiveness of the NRDAR process." DOI welcomed comments on any aspect of the regulations, but is specifically requesting comment on the following six issues:

1. **Simplification and "Plain Language"**: DOI recognized that the regulations are "arguably complicated, overly prescriptive, repetitive, and dense." DOI requested comment on whether it should consider a comprehensive "plain English" revision to the NRDAR regulations.

2. **Type A Regulations**: DOI recognized the challenges in developing "workable Type A Regulations that are streamlined and utilize minimal actual field observations but are still relevant and reliable enough to be entitled to a rebuttable presumption of correctness." Accordingly, DOI requested comment on revising these regulations.

3. **Early Emphasis on Restoration over Damages**: In 2007, the NRDAR FACA recommended that DOI revise the regulations to encourage early scoping of restoration opportunities at NRDAR sites. DOI requested additional comments on "where specifically in the assessment process restoration scoping may be cost effective and appropriate and how that could best be addressed in the regulations."

4. **Procedures to Further Encourage Negotiated Settlements and Early Restoration**: DOI acknowledged that in recent years partial negotiated settlements have been used early in the assessment process to cost effectively resolve discrete NRDAR claims and reinforce a restoration focus when resolving claims. However, DOI also acknowledged that the existing regulations "offer little guidance on how to align early restoration

settlements with existing statutory and regulatory requirements for assessment and restoration planning." DOI requested comment on this issue.

5. **Advance Restoration and Restoration Banking**: Since the last revision of the NRDAR regulations, advance restoration and restoration banking have been used at several sites. However, DOI recognized that the existing regulations "do not provide any guidance on the use of advance restoration and restoration banking techniques." DOI requested comment on this issue.

6. **National Environmental Policy Act (NEPA) Compliance**: In 2007, the NRDAR FACA encouraged DOI to adopt Department-wide categorical exclusions from NEPA and ensure that compliance with NEPA requirements occurs concurrently with NRDAR restoration planning. DOI requests comment on "whether that would best be addressed in the NRDAR regulations, NEPA regulations, or in Departmental guidance."

On Oct. 26, 2018, NMA filed comments recommending several changes to the existing regulatory provisions that would increase the likelihood that settlements and restoration services occur in an expeditious manner. NMA's comments also addressed the limitations of using the Habitat Equivalency Analysis model, as well as supported a focus on restoration instead of damages.

Status:

NMA will reengage with the Solid Waste Subcommittee on this rulemaking when DOI issues a notice of proposed rulemaking. DOI's Fall regulatory agenda did not provide a timeline for this rulemaking process. It is not listed as a "long-term" action.

On Jan. 19, 2023, DOI published an advance notice of proposed rulemaking that seeks comments on revisiting the simplified Type A procedures. Comments are due on Mar. 20, 2023. NMA is evaluating this

GROUNDWATER PROTECTION AT URANIUM *IN SITU* RECOVERY FACILITIES

PRIORITY A – NRC

Background:

On January 31, 2019, the Nuclear Regulatory Commission (NRC) published a request for comment (RFI) in the *Federal Register* regarding whether the agency should resume its rulemaking to address groundwater protection at uranium *in situ* recovery (ISR) facilities. NRC had deferred that rulemaking in 2010 when the U.S. Environmental Protection Agency (EPA) announced its own rulemaking to promulgate generally applicable standards for ISR facilities under its Atomic Energy Act (AEA) authority.

In March 2019, the National Mining Association (NMA) provided comments in support of a narrowly scoped rulemaking. NMA's comments were more abbreviated than originally planned, dropping references to the NMA white paper and the "milling underground" decision due to the potential to undermine industry's position that the EPA's 40 C.F.R. Part 192 rulemaking was duplicative to NRC's jurisdiction. Simultaneously, NMA continued to advocate that NRC and EPA enter into a memorandum of understanding (MOU) confirming EPA's authority to set generally applicable health and environmental protection standards for uranium recovery activities and NRC's authority to implement those standards.

In early January 2020, NRC released the staffs' recommendations on "Regulatory Options for Uranium In Situ Recovery Facilities" (SECY-19-0123). The paper provided recommended that NRC restart the rulemaking accompanied by guidance revisions. The staff's rationale for resuming a narrow rulemaking echoed much of the reasoning of NMA's RFI comments. In June 2020, NMA submitted detailed language to the commission regarding possible content of the rule. On July 23, 2020, NRC and EPA finally issued the long-awaited Memorandum of Understanding (MOU) to clarify the agencies' respective authority over uranium recovery operations.

In Oct. 2020, the Commission issued the staff recommendation memorandum (SRM) regarding the rulemaking directing the staff to restart the rulemaking as recommended in SECY-19-0123. The SRM indicates the proposal rule should be issued within 9 months. Importantly, and in line with NMA recommendations, the Commission agreed the rulemaking should be narrowly targeted and its costs should be included in fee relief. In conjunction with the groundwater protection rulemaking, NRC will also pursue revisions to the ISR Standard Review Plans (SRP) (NUREG-1569). According to SECY-19-0123, the staff would evaluate the current licensing process to identify and implement any efficiencies that can be gained and implement such efficiencies into the updated guidance. Such efficiencies would most likely include revisions to internal NRC processes, such as the development of acceptable standard review designs or programs, more frequent interactions with licensees, and the development of review templates.

In June 2021, the Natural Resources Defense Council (NRDC) and numerous other environmental groups sent a letter to the Commission requesting the agency to hold the groundwater protection rulemaking in abeyance until EPA finalized a rulemaking under 40 CFR part 192. Additionally, NRDC requested NRC work with EPA to dissolve the July 2020 EPA/NRC MOU. The letter expressed strong support for the previous EPA rulemaking efforts

and claims the arbitrary and capricious reversal of course by the previous administration "opened the door for NRC's current misguided proposal to resume its efforts to codify the existing dysfunctional system." A similar letter was sent to EPA. In July 2021, NRC responded indicating support for both the MOU and moving forward with the proposed rule.

In Aug. 2021, NRC publicly released materials related to its upcoming rulemaking including: (1) the SECY-21-0067 memo to the Commission to obtain approval to publish; (2) the prepublication version of the proposed rule; (3) the draft environmental assessment (EA); (4) the regulatory analysis; and (5) the estimated rulemaking resources. Subsequently, NRC made available the draft supplemental guidance to NUREG-1569.

Status:

While the Fall 2022 Unified Agenda of Regulatory Actions indicates the rule is expected to be proposed in May 2023. We anticipate a 75-day comment period. Initial review of the prepublication version has revealed numerous significant issues with the proposal. To press the importance of NRC moving forward in an appropriate way, NMA is requesting in-person meetings with individual commissioners and other key NRC staff for the end of March 2023.

PROGRAMS AND LEGISLATION TO SECURE THE NUCLEAR FUEL SUPPLY CHAIN

PRIORITY A – CONGRESS, DOE

Background:

Much has occurred since Energy Fuels Inc. and Ur-Energy Inc. submitted a Jan. 2017 joint petition to the Department of Commerce for relief under Section 232 of the Trade Expansion Act of 1962. The petition warns that the "domestic uranium mining industry has reached a turning point," and "absent immediate relief from imports, the industry could soon cease to exist." The petition explained that the situation presents a national security risk as less than 5 percent of uranium consumed last year came from the U.S., while state-owned or -subsidized companies in Russia, Kazakhstan and Uzbekistan supplied nearly 40 percent and imports from Russia and China are expected to increase. NMA engaged with administration officials and other policymakers in support of the petition.

In April 2019, the Secretary of Commerce concluded his investigation and advised President Trump that uranium is being imported in such quantities and under such circumstances as to threaten to impair the national security. Trump responded on July 12, 2019 denying the petition but signaling future action in a *Memorandum on the Effect of Uranium Imports on the National Security and Establishment of the United States Nuclear Fuel Working Group* (NFWG), a group designed to "to reinvigorate the entire nuclear fuel supply chain." NMA submitted comments to the NFWG highlighting actions to revitalize the domestic uranium recovery industry. Similarly, in March 2020, NMA submitted comments in response to DOE's RFI on key challenges in reconstituting domestic uranium mining and conversion capabilities. The comments primarily focused on various regulations and policies that impede domestic uranium production. Importantly, however, the comments emphasized that regulatory reforms alone are insufficient to rectify the challenges faced by the uranium recovery industry and other mechanisms are necessary to level the unfair global market playing field.

In April 2020, DOE released the report setting forth the NFWG recommendations. The report, *Restoring America's Competitive Nuclear Energy Advantage: A Strategy to Assure U.S. National Security* provides recommendations ranging from shoring up uranium mining, the front of the nuclear supply chain to promoting the development of nuclear reactors. Many of the recommendations reflect comments NMA submitted to both the NFWG and DOE.

The final federal budget for FY 2021 included provisions for the establishment of the uranium reserve at $75 million even though the original request was for $150 million to be appropriated annually for 10 years to address our overreliance on imported uranium. In August 2021, DOE issued a separate RFI regarding the establishment of a uranium reserve program and options for acquiring natural uranium and converting it into uranium hexafluoride that would be stored at commercial facilities in the United States. In Oct. 2021, NMA submitted comments in response to the August RFI focusing on the urgent need for DOE to move quickly to implement the reserve and to begin purchasing uranium this year to preserve the industrial base, guard against global supply disruptions, and create a source of U.S.-origin uranium for defense needs.

The most recent step related to the reserve was the DOE's deployment of the appropriated $75 million for the National Nuclear Security Administration's purchase of 1 million pounds of domestically-produced uranium toward the strategic uranium reserve. NMA continues to advocate for further funding for the reserve with the DOE and Congress.

Status:

Most of the recent activity regarding paths forward to securing nuclear supply chains has been legislative. For example, legislation has been introduced in the Senate that would provide $3.5 billion to rejuvenating U.S. production of uranium. S. 452, the Nuclear Fuel Security Act introduced by Senators Manchin (D-W. Va.), Barrasso (R-Wyo.) and Risch (R-Idaho) on Feb. 15, 2023, would require DOE to establish a Nuclear Fuel Supply Program, expand the American Assured Fuel Supply Program and submit a report on a civil nuclear credit program. The bill has provisions that would increase purchases of domestic uranium for the reserve and to increase the quantity of HALEU produced by U.S. companies. Representative Bill Latta (R-Ohio) is expected to introduce a companion bill in the House.

PROPOSED REVISIONS TO 40 CFR PART 192 GROUNDWATER STANDARDS

PRIORITY B – EPA

Background:

In 2015, EPA proposed a new Subpart to 40 CFR 192 to establish groundwater restoration and monitoring requirements at ISR facilities. In the proposal, EPA failed to heed industry concerns regarding the establishment of a lengthy post-closure groundwater monitoring timeframe. The proposed rule would require ISR operators to monitor groundwater for 30 years after demonstrating that the groundwater chemistry has been restored and is stable.

NMA and industry allies worked throughout 2016 to delay or derail the rulemaking, particularly during the OMB interagency review process. Those efforts were successful, and EPA withdrew its final rule from further OMB consideration. Simultaneously, however, EPA announced a new

proposed rule for public comment that was published on Jan. 19, 2017 (82 Fed. Reg. 7400), initiating a 180-day comment period, which was subsequently extended until Oct. 16, 2017. The new proposal contained many of the flaws of the previous version and raised new concerns. NMA's 2017 comments continued to lay the groundwork for the new administration to withdrawal the proposal and to clarify the non-revocable nature of aquifer exemptions. On Oct. 30, 2018, EPA formally withdrew the proposed rule.

Status:

The NRDC continues to identify the rulemaking as a top priority for reconsideration. In a May 2021 letter to EPA, NRDC and other environmental groups urge EPA to recommence and finalize the rule. Additionally, these groups urged the same in their response to the White House Interagency Working Group on mining regulations, laws and permitting. To avoid raising the profile of the issue, NMA has continued to quietly make inquiries with EPA to determine if the rule will be prioritized by the new administration. To date, the response has been EPA has higher priority issues that the agency is pursuing.

SUBPART W RULEMAKING

PRIORITY B – EPA

Background:

In May 2014, EPA proposed updates to 40 CFR Part 61, Subpart W "Revisions to National Emissions Standards for Radon Emissions from Operating Mill Tailings." 79 Fed. Reg. 25,388. The proposal applied to emissions from any type of uranium recovery facility that manages uranium byproduct material or tailings including: conventional uranium mills; in-situ leach recovery facilities; and heap leach facilities. While the proposal retained a work practice standard option that limited the number of conventional tailings impoundments (no more than two 40-acre impoundments), EPA proposed to add a new definition of non-conventional impoundments that would not be subject to the limitation on conventional tailings impoundments. Instead, the non-conventional impoundments would be subject to the requirements of 40 CFR 192.32(a)(1) and also be required during operation, and until final closure begins, to ensure the liquid level in the impoundment not be less than one meter. EPA's rationale for treating non-conventional impoundments differently relied on the agency's survey of existing ponds showing that because they contain liquids, the amount of radon emitted from the ponds is limited, in many cases, to almost zero.

NMA submitted detailed comments highlighting concerns with the proposal including unworkable technical standards and jurisdictional issues. Additionally, NMA raised its concerns to the Office of Management and Budget (OMB) during the interagency review process. EPA published a final rule in Jan. 2017 that addressed many of industry's concerns. There were a few implementation issues that merited additional discussions with EPA. NMA submitted recommendations on these issues to EPA in March 2017. A preliminary response from EPA seemed favorable, but no formal response followed. Energy Fuels, however, has engaged in discussions directly with EPA Region 8 regarding its implementation issues and received a March 2019 regulatory interpretation that addresses many of industry's concerns. The interpretation addressed the formation of the material on the steeply sloped sides of the impoundment, i.e., the freeboard area, where Energy Fuels found it impractical to implement the GACT-based standard as written. The 2019 interpretation concluded that these "evaporite

crystals" was not considered to be "solid material" that must be kept covered with liquid (although it is still considered to be byproduct material).

In 2021, EPA seemed to backtrack on its previous letter of clarification to Energy Fuels, which may signal new issues on Subpart W. In addition, the Ute Tribe filed a complaint about Energy Fuel's compliance with Subpart W and the State of Utah issued a compliance advisory that Energy Fuels responded to and forwarded to EPA.

Status:

In March 2022, EPA sent a new letter to Energy Fuels clarifying its 2019 regulatory interpretation specifying that unlike the evaporate crystals on the steep slopes, "the solid byproduct material that is present on the more extensive bottom of the impoundment is "solid material" subject to §61.252(b) that must be kept covered such that it is not visible above the liquid level." The new clarification is problematic as it limits opportunities to recycle water/drawdown fluids that may contain valuable vanadium or uranium. Ensuring coverage of the bottom evaporates is also difficult due to the ongoing drought. Despite Energy Fuels submission of radon flux data demonstrating the risks related to the bottom evaporates are low (as low as a reclaimed uranium mill that can be released for unrestricted use), EPA has declined to reevaluate its latest interpretation. NMA will stand ready to assist Energy Fuels as needed. NMA will also continue to work with NRC to determine whether the upcoming NRC ISR groundwater rulemaking could provide a basis for EPA to rescind Subpart W.

RADON GUIDANCE

PRIORITY B – STATE OF WYOMING

Background:

NRC has been working on revisions to its Interim Staff Guidance: Evaluations of Uranium Recovery Facility Surveys of Radon and Radon Progeny in Air and Demonstrations of Compliance with 10 CFR 20.1301 since 2014. NMA had serious concerns with the proposed guidance as it: (1) deviated from existing NRC policy; (2) would have imposed technically infeasible standards; and (3) advocated approaches that were not merited by the risks related to the emissions involved. NMA continued engagement with NRC to secure changes resulting in: an April 2014 guidance; an exchange of letters in 2015 that left many NMA concerns unaddressed; unfulfilled promises of a final guidance in 2016; a follow-up webinar in Sept. 2017, again leaving many NMA concerns remain unaddressed. At the Fall 2018 UES meeting, we evaluated whether these issues would be better resolved through guidance prepared by Wyoming as an agreement state. NMA provided all historic materials, correspondence, presentations to Wyoming for its consideration. On June 20, 2019, NRC released its final guidance and related materials.

Wyoming is in the process of developing its own guidance document. Wyoming issued its draft guidance in August 2021. At the 2022 Uranium Recovery Workshop, Wyoming indicated that it was continuing to evaluate industry feedback on draft guidance and aimed to finalize the guidance by the end of 2022.

Status:

The final Wyoming guidance has been delayed due to the departure of the staff person in charge of its finalization. A new staffer will start in March to complete the project.

IMPLEMENTATION OF NHPA SECTION 106

PRIORITY B – MULTIAGENCY (EPA, DOE, BLM, NRC)

Background:

Beginning with the Jan. 2021 presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, the Biden-Harris Administration has signaled renewed interest in the importance of tribal engagement. Deb Haaland's position as the first indigenous Secretary of Interior has also elevated tribal views, making it a priority on its own merits rather than just a subset of the broader environmental justice topic. The White House hosted another Tribal summit in Dec. 2022, which spurred a flurry of actions related to how federal agencies engage with Tribal Nations and Alaska Native Corporations.

As part of the summit the president release a "Memorandum on Uniform Standards for Tribal Consultation" that imposes baseline standards for all federal agencies that conduct such consultations. Pursuant to the memo, steps in process must include designating an agency point of contact, determining whether consultation is appropriate, providing adequate notice and compiling a record of the consultation that explains how tribal input influenced or was incorporated into the agency action. The wording of the memo will likely predetermine the answer of whether consultation is appropriate since it encourages agencies to "still engage in Tribal consultation even if they determine that a policy will not have Tribal implications, and should consider doing so if they determine that a policy is of interest to a Tribe or Tribes."

Status:

In accordance with the presidential memo, DOI issued new policies and procedures to strengthen its Tribal consultation process. These policies are designed to encourage early and transparent consultation and establish a model for seeking consensus. DOI's actions apply across the board to activities conducted on federal lands that implicate Tribes. Another announcement specifically addressed DOI and Forest Service consultation in the context of hardrock mining on federal lands and reflects recommendations that will be part of the forthcoming report from the White House Interagency Working Group on Mining Laws, Regulations and Permitting.

DEFINITION OF 11E.(2) BYPROODUCT MATERIAL

PRIORITY C – MULTIAGENCY (NRC, EPA)

Background:

The definition of 11.e(2) byproduct material is foundational to today 's uranium industry, and it has been the subject of considerable controversy among the NRC, EPA, Agreement States, non-profit organizations, and other stakeholders. While the definition is not perfect, the industry can operate within its current scope. Even minor changes to this longstanding definition could have unforeseen consequences for existing producers.

Status:

NMA will monitor two situations with implications for the definition of 11e.(2): (1) the treatment of the Exxon Pit lake in Wyoming and (2) Disa Technology's attempts to facilitate deployment of its technology via a change in the definition. NMA's goal is to preserve NRC preemption over 11e.(2) byproduct material and prevent dual regulation by EPA.

POTENTIAL LEGISLATION TO WATCH IN 2023

PRIORITY C - CONGRESS

- Withdrawals or restrictions on mining
- Mining Law reform
- Bans on Russian uranium
- HALEU legislation

Status:

Withdrawals: NMA is actively opposing Rep. Raul Grijalva's (D-Ariz.). H.R. 803, Protecting America's Wilderness and Public Lands Act, which includes provisions to permanently withdraw uranium rich lands in the Arizona Strip. NMA will continue to oppose legislation that puts public lands off limits to mining.

Mining Law: The risk of punitive Mining Law amendments has somewhat abated for 2023 with the republicans in control of the House of Representatives. NMA's Minerals Policy Task Force will continue to actively oppose punitive measures.

ARMY CORPS MODERNIZATION EFFORTS

A PRIORITY – ARMY CORPS

Background:

On June 3, 2022, the U.S. Department of the Army (Army) and U.S. Army Corps of Engineers (Corps) published a notice seeking comment on its effort to "modernize" the Corps' Civil works program through a number of policy initiatives. 87 Fed. Reg. 33758 (June 3, 2022). A primary focus of this effort is to identify ways to better serve the needs of Tribal Nations and other disadvantaged and underserved communities.

Updating the Corps' Tribal Consultation Policy, Including Tribal Consultation and Consideration of ITEK on WOTUS AJDs

NMA believes the most significant potential policy change involves the Army and Corps' intent to address how Tribal consultation should be "specifically incorporated into the processes associated with the Corps' Regulatory Program." In particular, the Army intends to address tribal consultation requirements for approved jurisdictional determinations (AJDs) for determining whether a parcel of land is a "waters of the United States" (WOTUS) under the Clean Water Act (CWA). As explained in more detail below, NMA believes that tribal consultation on AJDs and the consideration of Indigenous Traditional Ecological Knowledge (ITEK) in AJDs could be used as another tool to delay or block mining projects.

Recall that under the Trump administration, Assistant Secretary of the Army for Civil Works R.D. James issued a memo stating that as a "matter of programmatic policy, [the Corps] shall not initiate tribal consultation on any future AJDs." The Corps later reversed course in April 2021 when then-Acting Assistant Secretary of the Army for Civil Works Jaime Pinkham formally rescinded the R.D. James memo and affirmed the Corps' commitment to robust tribal consultation.

In the *Federal Register* notice, the Corps explained that some tribes have "questioned previous issuances of approved jurisdictional determinations…without pre-decisional government-to-government consultation." The Corps also noted that Tribes "may be impacted by an [AJD] in terms of which waters may or may not be jurisdictional under the Clean Water Act and as a result any permit requirements that may be required." The Corps also specifically acknowledged the need to consider ITEK in deciding AJDs as tribes "may have information, including [ITEK], ...that is unknown to the Corps and may only be provided in consultation with Tribes." NMA is concerned that tribal consultation on AJDs could cause delays in the permitting process and additional regulatory and legal uncertainty. Further, NMA is concerned that considering ITEK into AJDs could raise significant transparency and notice issues for project proponents and the public.

Additionally, the Corps released a memo rescinding AJDs for the Rosemont and Twin Pines mining projects. The memo stated that the project proponents' AJDs (completed under the 2020 Navigable Waters Protection Rule, which was the rule in effect at the time) are no longer valid because they did not consult as the tribes requested, and that "given the specific circumstances associated with these AJDs, it is my policy decision that the Corps should have honored these…consultation requests." The Corps planned to let the tribes that originally wanted consultation "as well as any other Tribal Nations who may be implicated" consult on the AJDs, noting that "no new AJD will be issued until the conclusion of such consultation." The memo stated that this direction was limited to the Rosemont and Twin Pines AJDs at issue, but NMA was concerned that the Corps could take similar action on other AJDs for development projects.

Twin Pines sued the Corps, and the Corps ultimately settled and reinstated their AJD. In Nov. 2022, the Southern Environmental Law Center sued the Corps in the U.S. District Court for the District of Columbia on behalf of several environmental groups. The lawsuit challenged the Corps' decision to return control of the project to the state Environmental Protection Division (EPD). Secretary of the Interior Deb Haaland and Georgia Senator John Ossoff have also expressed their disapproval with the project in the last several months. Meanwhile, the project is moving ahead with seeking its state permits. There were two public hearings on Feb. 21 and 23 and there is an open comment period on Twin Pines' land use plan, which ends on March 20, 2023.

Potential Rulemaking Action on NHPA Sec. 106

The Corps also sought input on revising its regulations governing Sec. 106 of the National Historic Preservation Act (NHPA). Recall that Sec. 106 requires "the head of any Federal department…having authority to license any undertaking prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property." The Advisory Council on Historic Preservation (AHCP) oversees agencies' compliance and issues regulations governing Sec. 106. There have been several updates to the NHPA since the Corps' regulations governing Sec. 106 were promulgated. For example, the 1992 amendments to the NHPA recognized and expanded the role of Indian Tribes and Native Hawaiian organizations in the national preservation program. The Corps previously issued an advanced notice of proposed rulemaking to gather input on an update to its implementing regulations in 2004, but never finalized an update. 69 Fed. Reg. 57662 (Sept. 24, 2004). The Army acknowledges that there has been "longstanding disagreement" between the Corps and ACHP regarding differences between the Corps' regulatory program's Appendix C and the regulations promulgated by ACHP governing the Sec. 106 process. For example, the scope of the undertaking subject to review and the Corps' use of "permit area" versus ACHP's use of "area of potential effect."

Environmental Justice Guidance for Corps Regulatory Program

The Corps also sought comment on how to incorporate environmental justice in its regulatory program. The Corps also seeks comment on its proposed definition of "economically disadvantaged community," which is defined as meeting one or more of the following: (1) low per capita income; (2) unemployment rate above national average; (3) Indian country as defined in 18 U.S.C. 1151; (4) U.S. territories.

Status:

On Aug. 2, NMA formed a coalition to file joint comments on the *Federal Register* notice. Overall, the comments laid out several overarching themes and principles important to the broader business community. In response to the specific topics raised in the *Federal Register* notice, the comments (1) explained how requiring Tribal consultation on approved jurisdictional determinations does not fit within the CWA, Corps' regulations, or the regulatory process; (2) encouraged the Corps to retain its own NHPA Appendix C regulations rather than adopting wholesale those of the Advisory Council on Historic Preservation; and (3) urged the Army and Corps to involve industry and the broader business community in any guidance it plans to develop for its regulatory program related to environmental justice.

On Aug. 30, 2022, NMA held an in-person meeting with our coalition and Corps Regulatory Chief, Tom Walker, Deputy Chief Tunis McElwain, and IIJA Implementation Manager David Hobbie. The meeting reiterated the concerns raised in our comments. NMA is working with our coalition to determine next steps. Mr. Walker and Jacob Siegrist, regulatory program manager

focusing on mining issues, also met with NMA members in Dec. 2022 to discuss the Corps' progress on these modernization efforts and other priorities. NMA and several industry allies held another meeting with Mr. Walker on Feb. 21, 2023 to discuss WOTUS implementation and other issues, and asked about the status of the Corps' initiative to require tribal consultation on WOTUS AJDs. Mr. Walker explained the Corps' view that tribal consultation is not part of the AJD process, but did not provide further detail on the status of the agency's plans moving forward. NMA will continue to engage with the Corps to gather information and advocate our views on this issue.

APPENDIX C PROCEDURES FOR THE PROTECTION OF HISTORIC PROPERTIES

A – ARMY CORPS

Background:

The Fall 2022 Unified Regulatory Agenda included a new rulemaking that would revise the Corps' regulations implementing section 106 of the National Historic Preservation Act (NHPA), known as Appendix C regulations, to conform with the regulations of the Advisory Council on Historic Preservation (ACHP), known as the Part 800 regulations. The Corps believes its Appendix C regulations are not compliant with the NHPA and Administration policies regarding Tribal Nations.

Status:

A proposed rule is expected in May 2023. NMA will discuss with members and evaluate comment opportunities and strategies.

REVISING WATER QUALITY STANDARDS REGULATIONS TO PROTECT TRIBAL RESERVED RIGHTS

PRIORITY A – EPA

Background:

Many tribes hold rights reserved through treaties, statutes, or Executive Orders ("reserved rights") to aquatic or aquatic-dependent resources in waters where states have CWA jurisdiction to establish water quality standards (WQS). EPA is considering revising the federal WQS regulations at 40 CFR Part 131 to explain how tribal reserved rights must be protected when states or EPA are establishing and revising WQS.

Prior to 2016, states and EPA had not regularly considered tribal reserved rights when establishing and revising WQS. However, in 2016, EPA made protecting those rights an element of its WQS analysis. After several years of consultation and coordination with tribes about reserved rights to fish for subsistence in Maine and in the Pacific Northwest, EPA disapproved standards developed by Maine and Washington because the states failed to adequately consider tribal reserved rights. Specifically, EPA required that human health criteria

established for waters under state jurisdiction where tribes reserved the rights to fish for subsistence/sustenance be set at more stringent levels to protect tribal fish consumers in those waters. EPA took a different position on this issue in 2019, concluding that tribal reserved rights do not require any special consideration in the WQS context. EPA has concluded that its 2016 position was consistent with the intent of the CWA.

Tribes hold many reserved rights to resources on lands and waters under state and federal jurisdiction, through treaties and equivalent agreements with the U.S. government. The U.S. Constitution defines treaties as the supreme law of the land. EPA's Office of Water is pursuing a change to its water quality standards regulations to codify the path to compliance with existing legal obligations to ensure that water quality standards do not impair tribal reserved rights and give clear and sustainable direction as to the scope of states' obligations.
This rulemaking is intended to help EPA ensure protection of resources reserved to tribes in treaties and equivalent agreements when establishing, revising, and reviewing water quality standards.

Status:

EPA recently published for public comment a proposed rule to revise the WQS regulation to specifically protect tribal reserved rights. 87 Fed. Reg. 74361 (Dec. 5, 2022). **Comments are due March 6, 2023.**

NMA continues to analyze the proposal and its potential impact on the mining industry, but several key provisions of the proposal are highlighted below and in EPA's fact sheet:

- Where tribal reserved rights exist, states must account for those rights in revising their designated uses, criteria, and/or antidegradation provisions.
- WQS must protect unsuppressed use of any reserved resources, which considers past, present, and future use of the resource.
- WQS must protect the health of tribal members exercising reserved rights to at least the same risk level at which the general population of the state would be protected, especially in determining the appropriate cancer risk level when deriving criteria to protect human health.
- State WQS submissions must include documentation of the state's efforts to obtain information about the existence of any applicable tribal rights, their current and past use, scope, and nature, as well as the level of water quality to protect those rights. States would also be required to reevaluate whether WQS need to be revised to protect any applicable tribal reserved rights at each triennial WQS review.
- EPA must initiate tribal consultation with the right holders when reviewing WQS submissions to determine whether the state WQS protect applicable reserved rights.

Of note, the proposed definition of "tribal reserved rights" is "any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law."

NMA formed a coalition of industry groups to file an extension request and coalition comments on the proposal. On Feb. 27, EPA denied our request for an extension. We plan to file comments on the original deadline of March 6. According to the Fall 2022 Unified Regulatory Agenda, a final rule is expected in Sept. 2023. We will keep you informed of developments.

FEDERAL BASELINE WATER QUALITY STANDARDS FOR INDIAN RESERVATIONS

PRIORITY A – EPA

Background:

According to EPA, only 46 tribes out of over 300 with reservations currently have EPA-approved WQS effective under the CWA. Between 1999 and 2003, EPA developed but did not complete a rulemaking to establish federal "core standards" for Indian country waters. In Sept. 2016, EPA published an advance notice of proposed rulemaking requesting public comment on whether to establish federal baseline water quality standards for waters on Indian reservations that do not yet have standards under the CWA and, if so, what those standards should be and how they should be implemented. During a 90-day public comment period (Docket #:EPA-HQ-OW-2016-0405), EPA received comments from tribal governments and associations; state officials, agencies, and associations; private citizens; and private entities. EPA's goal in initiating that effort was to identify ways to address the existing gaps in CWA protection in reservation waters.

This administration's EPA has decided to revisit this effort and move forward with establishing federal baseline water quality standards for Indian reservations that do not have water quality standards in effect for CWA purposes. In a notice on its website, EPA stated that this rulemaking recognizes the importance of tribal waters and the need to better protect the water resources on which tribes rely, as over 80% of Indian reservations currently do not have WQS in effect for CWA purposes. According to information presented in a listening session for tribes in July 2021, EPA sees the potential benefits of this rulemaking as: establishing water quality goals for reservation waters, facilitating tribal participation in managing water quality, providing basis for enforceable NPDES and other discharge permits, protecting reservation waters from upstream discharges, and providing a basis for determining watershed impairments.

EPA held a 90-day tribal consultation and coordination period with federally recognized Indian tribes on this action from June 15 to September 13, 2021.

Status:

The proposed rule is currently at OMB for interagency review. NMA will discuss with members if and how to engage in this rulemaking.

ALUMINUM WATER QUALITY CRITERIA IMPLEMENTATION

PRIORITY A – EPA

Background:

In 2018, the U.S. Environmental Protection Agency (EPA) issued final updates to its aluminum criteria to reflect consideration of the latest scientific information on aluminum toxicity, including new data on mussels' sensitivity and pH and hardness effects on aluminum toxicity. The updated Clean Water Act (CWA) Section 304 aquatic life ambient water quality criteria for

aluminum utilized Multiple Linear Regression (MLR) models to take into account three water chemistry parameters that impact bioavailability – pH, total hardness, and dissolved organic carbon (DOC) – and provided a range of acceptable values on a site-specific basis. The criteria included both an acute criterion, which provided a one-hour average total recoverable aluminum concentration not to be exceeded more than once every three years on average, as well as a chronic criterion, which provided a four-day average total recoverable aluminum concentration not to be exceeded more than once every three years on average.

Administrative:

To help implement the criteria, EPA released for public comment its Draft Technical Support Document (TSD): Implementing the 2018 Recommended Aquatic Life Water Quality Criteria for Aluminum in Aug. 2019. NMA filed comments based on member feedback and a paper prepared by GEI Consultants and also reiterated the key implementation concerns identified by NMA members during the public comment period on the draft criteria itself. Specific implementation concerns included: the criteria's use of total rather than bioavailable aluminum, and EPA's failure to consider alternative analytic methods that potentially could more accurately measure bioavailable aluminum. NMA's comments also identified specific concerns with portions of the draft TSD, including concerns with state flexibility, the collection of input parameter data, methods for determining criteria values, and the agency's failure to address aluminum used for EPA-approved beneficial uses. In Jan. 2020, EPA issued a Response to Comments on the 2017 draft aluminum ambient water quality criteria. To further elevate our concerns, in Feb. 2020, NMA and several member companies participated in a technical meeting with EPA Office of Water staff Owen McDonough, Senior Science Advisor, and Sara Hisel-McCoy, Director of the Standards and Health Protection Division. NMA members highlighted the significant implementation issues with the final criteria and discussed potential solutions that could be addressed in the final implementation guidance. Following this meeting, NMA members provided additional comments on the draft TSD to the Office of Water.

Concurrently, EPA was working to finalize the final aluminum criteria for Oregon. Under a consent decree with Northwest Environmental Advocates, EPA initially had until March 27, 2020, to either take an action under CWA Sec. 303(c) to approve aquatic life criteria for aluminum submitted by the state of Oregon, or, if aluminum criteria have not yet been submitted by Oregon and approved by the EPA, to finalize statewide federal aquatic life criteria for aluminum in Oregon. The deadline in consent decree was later amended to November 19 and then December 31, 2020. NMA met Sara Hisel-McCoy and several members of her team to learn more about the progress of the Oregon criteria and help build relationships with career staff working on this issue. The final Oregon criteria was finalized on Dec. 31, 2020, was published in the *Federal Register* on March 19, 2021, and became effective April 19, 2021.

In 2022, EPA released a second draft TSD for public comment. On March 9, 2022, NMA filed comments, which included a comment letter and a technical memorandum prepared by GEI Consultants. NMA's comments noted that the draft TSD was a good starting point and provided additional recommendations. NMA supported the TSD's recognition of the bioavailable analytical method for listings, assessments, and total maximum daily loads, but disagreed with EPA's decision not to develop a translator between bioavailable and total recoverable aluminum. NMA also disagreed with EPA's characterization of the water effects ratio (WER) procedure as unnecessary and urged the agency to instead allow the use of WERs in certain circumstances. NMA's comments also requested additional flexibility for states to exclude aluminum used for beneficial uses (such as in wastewater treatment); flexibility for wet weather

situations; and clarity on how the new criteria will work within the bounds of EPA's 2021 multi-sector general permit.

On June 15, 2022, NMA held a member meeting with Sara Hisel-McCoy and more than a dozen EPA Office of Water staff to reiterate concerns expressed in our comments on the aluminum and selenium implementation documents. The agency was receptive to some comments, including our request to recognize the use of translators between total recoverable aluminum and bioavailable aluminum for permitting purposes. EPA was less receptive to NMA's comments requesting changes to the language around WERs. GEI Consultants also joined the meeting to provide technical expertise during the meeting.

Status:

Administrative:
NMA will continue to engage with EPA on this issue. The final aluminum TSD is expected for release in spring/summer 2023.

SELENIUM WATER QUALITY CRITERION IMPLEMENTATION

PRIORITY A – EPA

Background:

Administrative:

In 2004, EPA published a draft criterion designed to update its 1987 5 µg/L chronic selenium freshwater criterion for selenium. That draft was intended to reflect that selenium toxicity to aquatic life is primarily driven by the consumption of selenium-contaminated food rather than direct exposure to selenium dissolved in water. That criterion, which included a chronic whole-body fish tissue criterion (7.91 [mu]g/g dry weight), was never finalized. In May 2014, EPA proposed a new draft criterion, which included four parts: two fish tissue-based concentrations (egg-ovary: 15.2 mg/kg dry weight; and either whole-body: 8.1 mg/kg dry weight, or muscle tissue: 11.8 mg/kg dry weight) as well as two water column-based concentrations (30-day average concentration not to exceed 4.8 µg/L lotic waters, 1.3 µg/L lentic more than once in three years on average; and an intermittent concentration equation).

NMA filed extensive comments on the draft criterion, which was subjected to external peer review and subsequently updated and re-proposed in July 2015. The updated draft also contained two fish tissue-based elements and two water column-based elements: (1) a concentration limit of 15.8 mg/kg, dry weight in the eggs or ovaries of fish; (2) a concentration limit of 8.0 mg/kg dry weight in whole-body of fish, or a limit of 11.3 mg/kg dry weight in muscle tissue of fish (skinless, boneless fillet); (3) a 30-day average concentration not to exceed 3.1 µg/L in lotic (flowing) waters and 1.2 µg/L in lentic (standing) waters more than once in three years on average; and (4) an intermittent concentration equation. The updated draft additionally outlined two scenarios when water column values would have primacy over fish tissue values: (1) in the case of "fishless waters" (waters where fish have been extirpated, or where physical habitat and/or flow regime cannot sustain fish); and (2) new or increased inputs of selenium until equilibrium is reached in the food web of lotic and lentic systems.

NMA again filed extensive technical comments on the revised draft in Oct. 2015. In Jan. 2016, NMA, as well as representatives from UWAG and NAMC, met with to reiterate concerns with the draft and provide additional data regarding the proposed water column concentrations. NMA also engaged with other federal agencies to try to obtain OMB review of the draft. Though several agencies ultimately requested such review, EPA nevertheless finalized the criterion in July 2016.

The final criterion contains: (1) a concentration limit of 15.1 mg/kg, dry weight in the eggs or ovaries of fish; (2) a concentration limit of 8.5 mg/kg dry weight in whole-body of fish, or a limit of 11.3 mg/kg dry weight in muscle tissue of fish; (3) a 30-day average concentration not to exceed 3.1 µg/L in lotic (flowing) waters and 1.5 µg/L in lentic (standing) waters more than once in three years on average; and (4) an intermittent exposure equation. With two notable exceptions, the fish tissue elements are to be given precedence when both types of data are available, with fish egg/ovary concentrations superseding whole-body or muscle concentrations where they are measured. However, "water column values are the applicable criterion element in the absence of fish tissue measurements, such as waters where fish have been extirpated or where physical habitat and/or flow regime cannot sustain fish populations, or in waters with new discharges of selenium where steady state has not been achieved between water and fish tissue at the site."

In Oct. 2016, EPA released for public comment four draft guidance documents designed to assist states in adopting and implementing the final 2016 criterion. The draft documents addressed several issues concerning state adoption and application of the new criterion, including NPDES implementation, CWA Sec. 303(d) listings, total maximum daily load development, site-specific derivations, state adoption mechanisms and certain technical aspects of fish tissue sampling. NMA filed comments on the draft guidance in Feb. 2017 which outlined several concerns with the proposed approaches to reasonable potential analyses, water quality-based effluent limitations, and application of the criterion to fishless streams, and provided recommendations on technical implementation of the selenium criterion.

During the Trump administration, NMA highlighted both the final criterion and the draft guidance documents as appropriate for repeal, replacement, or modification under E.O. 13777 and 13771. Additionally, NMA highlighted the criteria and guidance documents to staff at OMB good candidates for regulatory reform in light of their potentially significant impacts. NMA advocated for the establishment of an interagency review process for all criteria-related documents.

EPA actions in the state of California provided NMA with a new opportunity to highlight our concerns with the national 2016 criterion and implementation documents. Pursuant to a consent decree obligating EPA to propose selenium criteria to protect aquatic life and aquatic-dependent wildlife for certain California fresh waters, EPA published for public comment a proposed federal selenium freshwater criterion for parts of California that in part incorporates elements of the 2016 national criterion. The proposed chronic criterion is comprised of the 2016 fish tissue components, as well as a bird tissue component to protect aquatic-dependent wildlife, and a performance-based approach for translating the bird and fish tissue elements into site-specific water column elements.

Importantly, while the fish tissue components included in the California proposal are the same as those of the 2016 national criterion, the California criterion's aquatic life aspects would differ from the national criterion and implementation documents in two key respects that could partially address NMA's concerns: (1) rather than utilizing the overly restrictive national water

column concentrations, the proposal would require the development of protective water column elements on a site-specific basis; and (2) the proposal makes clear that "if the tissue elements are being met, the criterion is being attained even if the water column element is exceeded." On March 29, 2019, NMA submitted comments on EPA's proposed federal selenium criterion for parts of California. NMA's comments relied primarily on a critique prepared by GEI consultants. As the proposed California criterion incorporates elements of the 2016 national criterion, NMA used this opportunity to leverage our concerns with the national 2016 criterion and implementation documents. As noted in the comments, the California proposal improves upon the national criterion by allowing the development of protective water column elements on a site-specific basis; and clarifies that if the tissue elements are being met, the criterion is attained even if the water column element is exceeded. NMA's comments also provided an alternative to water column site-specific criteria for NPDES permitting situations where site-specific criteria development is unnecessary or unfeasible. In such cases, NMA urged EPA to consider implementing tissue limits directly into permits.

During the Trump administration, EPA also rescinded the four draft technical support documents that NMA identified as problematic for the mining industry under its new policy concerning draft guidance documents discussed in the previous section.

On Oct. 4, 2021, EPA re-released for public comment a suite of four draft technical support materials (TSMs) for implementing the 2016 criterion. On Jan. 3, 2022, NMA filed comments on the TSMs. NMA's comments included a detailed technical review prepared by GEI Consultants. Overall, while NMA's comments recognized the TSMs as a good starting point, we urged the agency to incorporate GEI's many recommendations in the final TSMs to ensure that the mining industry and other stakeholders have the clarity needed to implement the criterion. To reiterate the concerns raised in NMA's comments, NMA held a member meeting with EPA's Office of Water to discuss the aluminum TSD and the selenium TSMs on June 15, 2022.

Status:

Administrative**:**

California Criteria:

According to the Spring 2022 Unified Regulatory Agenda, the federal selenium criteria for California was expected to be finalized in Dec. 2022, but in the most recent agenda, that deadline has slipped to Oct. 2023.

Draft Technical Support Materials:

NMA will continue to engage with EPA on this issue. The final TSMs are expected for release in spring/summer 2023.

DEFINITION OF WATERS OF THE U.S.

PRIORITY A – EPA, ARMY CORPS, & COURTS

Background:

The legal and regulatory history surrounding the definition of "waters of the United States" (WOTUS) under the CWA is decades-long and complex. This summary will focus primarily on recent legal and regulatory activity and NMA's plan moving forward.

Administrative:

Recall that conflicting judicial decisions on the legality of the Obama administration's overly broad 2015 Rule resulted in a patchwork of differing regulations across the country. During the Trump administration, EPA and the Corps began a two-step rulemaking process to repeal the 2015 rule and replace the 2015 rule with a new, more tailored definition of WOTUS that better aligned with congressional intent and the CWA. NMA, our industry coalition, and the Waters Advocacy Coalition (WAC) were involved in every step of the rulemaking process, including filing comments and holding numerous meetings with the agencies and OMB.

The final rule repealing the 2015 rule was published on Oct. 22, 2019 and became effective on Dec. 23, 2019. The final replacement rule, the Navigable Waters Protection Rule (NWPR) was announced on Jan. 23, 2020, published in the *Federal Register* on April 21, 2020, and became effective on June 22, 2020. The final rule recognized four simple categories of jurisdictional waters, provided clear exclusions for many water features that traditionally have not been regulated under the CWA, and defined terms in the regulatory text that had not previously been defined. Specifically, EPA and the Corps considered the following four categories of waters as WOTUS: the territorial seas and traditional navigable waters; tributaries; lakes, pond, and impoundments of jurisdictional waters; and adjacent wetlands. EPA and the Corps also finalized 12 exclusions from the definition of WOTUS, including eight that were critical to the mining industry and addressed in our comments.

On August 30, 2021, the U.S. District Court for the District of Arizona remanded and vacated the NWPR without adjudicating the merits of the rule. The ruling was especially confusing because it did not specify the geographic scope of the vacatur. Nevertheless, on Sept. 3, 2021, the agencies announced they would halt implementation of the NWPR and return to the pre-2015 regulatory regime "until further notice," effectively applying the Arizona court's vacatur nationwide. The agencies are currently implementing the pre-2015 regulatory framework.

On July 30, 2021, the agencies announced additional details on stakeholder engagement in their plan to repeal and replace the 2020 NWPR. The agencies scheduled five "stakeholder sessions" in August and opened a 30-day public comment period. NMA and the Waters Advocacy Coalition (WAC) filed comments in response to the agencies' request for pre-proposal recommendations on their efforts to repeal the NWPR and replace it with a new WOTUS definition. Numerous trade associations, companies, and even Members of Congress, asked the agencies to extend the 30-day comment period given the importance of this rule. The agencies declined to extend the comment period, even after the confusion caused by the Arizona judge's vacatur order. NMA's and WAC's comments both supported the continued implementation of the NWPR and recommended several principles that must be part of any durable WOTUS rule.

"Step One" Rulemaking

On Feb. 7, 2022 NMA filed comments on the step one proposed rule. NMA's comments highlighted numerous concerns with the proposed rule's approach that expanded the scope of federal jurisdiction under the CWA and urged the agencies to withdraw the proposal or at least pause the rulemaking given the U.S. Supreme Court's decision to hear the *Sackett v. EPA* case this fall. NMA's comments also provided several recommendations that would make the rule clearer for the regulated community and agency field staff to implement. NMA's comments specifically advocated retaining the longstanding waste treatment system exclusion with several necessary clarifications, and encouraged the agencies to codify several additional exclusions that have been part of longstanding agency practice. WAC also filed extensive comments detailing the numerous legal and technical flaws in the rule. WAC's comments were bolstered by a detailed technical analysis of the proposal by GEI Consultants and an economic critique from Dr. David Sunding. This comment package will be critical in any future litigation on the Step One rule.

During this process, there has been significant uncertainty about how the Corps has addressed and will address permit decisions and approved jurisdictional determinations (AJDs) issued under the now-vacated NWPR. The Corps quietly released a new policy on its website stating that the Corps "will not rely on an AJD issued under the NWPR in making a new permit decision." AJDs are final agency actions and generally are valid for five years unless new information warrants their reopening. NMA and our allies raised concerns about this uncertainty in congressional hearings and with the Small Business Administration's (SBA) Office of Advocacy. In April 2022, SBA sent a letter to the Corps requesting clarity for the regulated community and providing some recommendations.

Status:

Administrative:

Step One Rulemaking

On Dec. 30, 2022, EPA and Army released a pre-publication version of the final rule, which was followed by publication in the Federal Register on Jan. 18, 2023. The rule is expected to go into effect on March 20, 2023. The agencies' press release on the rule is available here. The agencies also released a fact sheet, guidance for landowners, and a joint coordination memo regarding the process for jurisdictional determinations under this rule. Other supplemental materials are available here.

As we expected, the final rule expands the scope of federal jurisdiction over land and water features and relies on the problematic significant nexus test, making it more difficult to determine whether a project needs a federal CWA permit. The rule's expanded scope and lack of clarity around determining jurisdiction could cause delays at your operation and increase your permitting and mitigation costs. Below are several key takeaways from our initial review.

General Themes/Initial Takeaways of the Final Rule

- While the agencies state the final rule is a return to the familiar and predictable pre-2015 regulatory regime, the final rule expands jurisdiction compared to the status quo in several important ways. One expansion is the creation of a new catchall (a)(5) "other waters" category, which allows federal jurisdiction over features not identified as (a)(1) through (4) waters that meet either the relatively permanent or significant nexus test.

Another expansion is a change in the way the agencies plan to implement the significant nexus test that will generally be broader than has been done previously.

- Despite these and other expansions, the agencies assert that there are only de minimis costs and benefits associated with this rulemaking.
- The final rule continues to rely on the confusing and subjective significant nexus test.
- The final rule retains the waste treatment system (WTS) exclusion, but the agencies did not include the clarifications from the 2020 Rule that NMA and other stakeholders supported.
- Several important key terms and concepts remain unclear or undefined.

Jurisdictional Waters

The final rule includes five categories of jurisdictional waters identified by the following paragraph numbers:

(a)(1) – Traditional navigable waters, the territorial seas, and interstate waters;

(a)(2) – Impoundments of WOTUS;

(a)(3) – Tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries either meet the relatively permanent standard or the significant nexus standard;

(a)(4) – Wetlands adjacent to (a)(1) waters; wetlands adjacent to and with a continuous surface connection to relatively permanent (a)(2) impoundments or jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries;

(a)(5) – Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent or the significant nexus standard.

Exclusions

The final rule provides eight exclusions, including the two longstanding exclusions (WTS and prior converted cropland) and several exclusions that have been part of agency practice but had not been codified:

1. Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the CWA;
2. Prior converted cropland;
3. Ditches (including roadside ditches) excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water;
4. Artificially irrigated areas that would revert to dry land if the irrigation ceased;
5. Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basis, or rice growing;
6. Artificial reflecting pools or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;

7. Waterfilled depressions in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation is abandoned and the resulting body of water meets the definition of WOTUS; and

8. Swales and erosional features that are characterized by low volume, infrequent, or short duration flow.

While NMA and many other stakeholders urged EPA to explicitly exclude groundwater, as the agencies did in 2015 and 2020, the agencies determined an exclusion was not necessary because groundwater is not surface water and therefore does not fall within the possible scope of "navigable waters." P. 367-368.

"Step 2" Rule

Based on conversations with EPA's Office of Water, we understand the agencies do not anticipate a Step 2 rulemaking as they previously indicated. Instead, the agencies are focused on implementing the Step 1 rule, which they believe is legally durable and simple to implement.

Implementation

NMA and our industry partners continue to evaluate how to engage with the agencies on implementation. For example, the EPA and Corps recently released their joint Interim Draft of the National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams (National OHWM Manual). The OHWM defines the lateral extent of non-tidal aquatic features in the absence of adjacent wetlands in the United States and is used to delineate the jurisdictional limits of certain aquatic features. The Corps notes that this is the first manual to describe a consistent approach for identifying physical features in different climatic regions nationwide to support OHWM delineation. The agencies are accepting public comment on the interim draft OHWM Manual for one year, with comments due Dec. 1, 2023. A final version of the National OHWM Manual is anticipated for publication in 2024.

The Corps specifically seeks comment from stakeholders on the following topics:

- Indicators that were particularly useful or not useful in identifying the OHWM.
- Regional differences in the applicability of specific field indicators.
- Implementation of the Weight of Evidence approach to assemble, evaluate, and integrate lines of evidence to support OHWM identification and delineation.
- Problem situations encountered and possible approaches for addressing them.
- Additional remote sensing data or techniques which may be utilized to support OHWM identification and delineation.
- Usefulness of the supporting examples to clarify and inform identification of indicators and lines of evidence in the field.
- Usefulness, usability, and clarity of the OHWM datasheet and its accompanying instructions and field procedures.

Other opportunities to engage with the agencies on implementation include the Corps' anticipated efforts to revise the JD form and JD guidebook.

Litigation:

The day the new WOTUS rule was published in the *Federal Register*, NMA and 17 agriculture and industry groups filed a lawsuit in the U.S. District Court for the Southern District of Texas, Galveston District, asking the court to declare unlawful and set aside agencies' final rule. The

final rule was published in the Federal Register yesterday and is scheduled to go into effect March 20, 2023. 88 Fed. Reg. 3004 (Jan. 18, 2023). The state of Texas also filed. NMA's complaint explains how the agencies' final rule is unlawful and violates the Constitution, the CWA, and the Administrative Procedure Act (APA). In particular:

- The final rule expands CWA jurisdiction far beyond the bounds of the Commerce Clause and federalism limits;
- The final rule violates the "major questions" doctrine;
- The final rule impermissibly asserts CWA jurisdiction over all interstate waters for which there is no constitutional or statutory basis;
- The final rule establishes jurisdiction over a broad category of intrastate waters that satisfy the new version of the significant nexus test, no matter how far remote from navigable waters;
- The final rule is unconstitutionally vague;
- The final rule's definition of "tributary" is impossible to implement without a case-specific and subjective determination by the agencies;
- The final rule's concept of "adjacent" wetlands is inconsistent with previous Supreme Court decisions and is vague;
- The final rule disregards the CWA's cooperative federalism framework;
- The final rule's case-specific significant nexus test violates the Due Process Clause, the APA, and the plain language of the CWA;
- The final rule fails to establish the precision and guidance necessary to ensure those enforcing this law do not act in an arbitrary or discriminatory way; and
- The final rule is too vague and expansive to comport with the rule of lenity, which would require a narrow definition of WOTUS given the CWA's significant criminal and civil penalties.

On Feb. 16, 2023, a coalition of 24 states, led by West Virginia Attorney General Morrisey filed suit in the North Dakota district court. NMA's industry coalition also moved to intervene in the case in support of the state coalition. A coalition of industry groups led by the Kentucky Chamber of Commerce also filed a lawsuit in the Eastern District of Kentucky. NMA's industry coalition will continue to evaluate opportunities for potential intervention.

The agencies also face some roadblocks in implementing their final rule given the Supreme Court's forthcoming decision in *Sackett v. EPA*. In this case, the Court will consider whether the U.S. Court of Appeals for the Ninth Circuit set forth the proper test for determining whether wetlands are WOTUS under the CWA. This case is critically important for the mining industry and broader regulated community, as confusion over Justice Kennedy's "significant nexus" test that is at issue in the case has led to project delays, litigation, and uncertainty for many years. Any clarity from the Court on whether this is the proper test for jurisdiction could help end some of that confusion. The Court heard oral argument in the case on Oct. 3, 2022 and a decision is expected by June 2023.

Legislative

There has been significant congressional pressure for EPA and the Corps to halt the rulemaking process until the Supreme Court decides the *Sackett* case. With a new Republican majority in the House this year, this pressure and scrutiny over the agencies has only intensified. Most recently, on Feb. 8, 2023, the House Committee on Transportation and Infrastructure (T&I) Subcommittee on Water Resources and Environment held a hearing on "Stakeholder Perspectives on the Impacts of the Biden Administration's Waters of the United States

(WOTUS) Rule." For reference, NMA and the Waters Advocacy Coalition developed a summary of the final rule found here, and a detailed analysis found here.

At the start of the hearing, subcommittee Chairman David Rouzer (N.C.) submitted NMA's testimony for the record describing the impacts of the rule on the domestic mining industry. His opening remarks acknowledged the importance of the CWA in protecting the nations water resources, however, he criticized the new rule as lacking clarity and transparency, while providing greater flexibility for "bureaucrats to substitute their own biases" in implementing and enforcing the rule. He highlighted the NMA supported joint resolution of disapproval supported by more than 150 House Republicans as a necessary tool to revoke the final WOTUS rule until the Supreme Court's forthcoming decision *Sackett v EPA.* NMA continues to build upon recent congressional oversight actions, including a congressional letter to EPA signed by 194 Republican members of Congress urging EPA postpone further agency action, and the introductions in the House and the Senate of identical joint resolutions of disapproval to revoke the final WOTUS rule.

Forward looking actions include engaging several moderate Democratic Members of Congress to brief them on the rules' impact on domestic mining, including sharing a one-page overview developed in coordination with the Waters Advocacy Coalition. Additionally, through the appropriations process, NMA is working with congressional allies to support the inclusion of provisions that prohibit federal funds from being used by the EPA to implement the final rule.

We anticipate additional hearings and activity on WOTUS this Congress. NMA is pursuing several strategies, including the following:

- Oversight: Supporting our allies in Congress, like House T&I Committee leadership, key appropriators, and the Congressional Western Caucus, to conduct oversight activities, inquiry letters to the EPA, and hearings regarding the final rule.
- Appropriations: Advocating for the inclusion of provisions in fiscal year 2024 appropriations legislation that prevents the implementation of the new WOTUS regulations and ongoing outreach and education activities with members of Congress and third-party allies throughout the year.

GROUNDWATER/NPDES PERMITTING

PRIORITY A – EPA AND MULTIPLE COURTS

Background:

The CWA regulates discharges of pollutants to WOTUS from "discernable, confined, and discrete conveyances," known as "point sources." Under the CWA, "the addition of any pollutant to a [WOTUS] from any point source" is unlawful unless done pursuant to a duly issued CWA permit, such as an NPDES permit, or some other exclusion. Thus, for CWA liability to attach, there must be (1) an addition, (2) of a pollutant, (3) to a WOTUS, (4) from a point source. Examples of point sources subject to CWA NPDES permitting include pipes and ditches discharging channeled or collected wastewater or stormwater to WOTUS. By contrast, pollutants that reach regulated waters via diffuse methods, such as by wind dispersion or overland runoff, are regulated by states under nonpoint source management programs.

Environmental groups have filed an increasing number of CWA citizen suit complaints alleging, based on various legal theories, that discharges originating from a point source that subsequently migrate via groundwater or other diffuse methods to a WOTUS require NPDES permits. While NMA has long contended that discharges of pollutants that reach WOTUS by diffuse means such as groundwater seepage constitute "nonpoint source" pollution that does not require a CWA permit, courts have split on the issue, and the Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund* in April 2020 has not provided much certainty or clarity for the regulated community.

Litigation:

In April 2020, the U.S. Supreme Court issued a 6-3 decision *in the long-awaited County of Maui v. Hawaii Wildlife Fund case. Justice Breyer wrote the opinion of the Court and was joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, and Kavanagh. The Court vacated and remanded the Ninth Circuit's judgment and held that the CWA requires a permit "when there is a direct discharge of a pollutant from a point source into navigable waters or when there is the functional equivalent of a direct discharge" (emphasis added). Opinion at 15. The Court rejected the Ninth Circuit's "fairly traceable" standard as too broad and rejected both Maui's "means of delivery" test and the Government's position as too narrow. Instead, the Court created a new "functional equivalent" test, leaving it up to lower courts and EPA to provide more clarity on a case-by-case basis or thorough guidance. The functional equivalent test includes seven nonexclusive factors, giving weight to the first two:* (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, [and] (7) the degree to which the pollution (at that point) has maintained its specific identity."

Administrative:

In response to the *Maui* decision, in Dec. 2020 EPA released for public comment a draft guidance memo, "Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the CWA Sec. 402 NPDES Permit Program" for public comment. 85 Fed. Reg. 79,489 (Dec. 10, 2020). The draft guidance was intended to help the regulated community and permit writers with incorporating the *Maui* holding into existing CWA NPDES permit programs and authorized state programs. NMA filed comments supporting EPA's draft guidance and encouraging the agency to finalize it expeditiously. The final guidance memo, nearly identical to the proposal, was published in the Federal Register on Jan. 21, 2021 (86 Fed. Reg. 6,321).

Then in Sept. 2021, EPA released a memorandum rescinding the groundwater guidance issued under the previous administration. EPA rescinded the guidance for several reasons. First, the agency stated that the eighth factor in the guidance (the design and performance of the system or facility from which the pollutant is released) is "not consistent with the CWA" or the Supreme Court's decision in Maui because, "among other things, the additional factor introduces an element of intent that is not reflected in or consistent with the [Maui] decision." Second, the agency stated that the guidance was rescinded because it "was issued without proper deliberation within EPA or with our federal partners."

Status:

Administrative:

In a meeting with EPA Office of Water leadership in January 2023, we learned the agency plans to release draft groundwater guidance for public comment in Spring 2023. The substance and precise timing of that guidance is uncertain at this point. NMA will continue to engage with the agency to learn more about this guidance and plans to collaborate with likeminded stakeholders to discuss potential next steps.

Litigation:

NMA continues to monitor litigation in lower courts that consider or apply the *County of Maui* functional equivalent test, including the following: Hawaii Wildlife Fund v. County of Maui (D. Hawaii July 15, 2021); Cottonwood Env'l Law Center v. Edwards, (D. Mont. March 23, 2021); Black Warrior Riverkeeper Inc. v. Drummond, (N.D. Ala. Jan. 12, 2022); Conservation Law Foundation, Inc. v. Town of Barnstable (D. Mass. Feb. 16, 2021).

404(C) VETOES

PRIORITY A – EPA & CONGRESS

Background:

There is a long history of lawsuits because EPA has preemptively and retroactively vetoed mining projects, including with the Pebble Project, Twin Metals, and Mingo Logan. During the previous administration, NMA highlighted this issue as part of its regulatory reform package to EPA, and continues to support legislative efforts to address EPA's 404(c) authority. The 404(c) veto has garnered interest during this Congress. In March 2021, Reps. Jared Huffman (D-CA), Chair of the Natural Resources Water, Oceans, and Wildlife Subcommittee and Peter DeFazio (D-OR), Chair of the House Committee on Transportation and Infrastructure, sent a letter to EPA Administrator Regan urging him to use his 404(c) veto authority on the Pebble project. Shortly thereafter, Rep. Bob Gibbs (R-Ohio), a member of the House Transportation and Infrastructure Committee, reintroduced H.R. 1820, which would prevent EPA from retroactively vetoing a Corps CWA Sec. 404 permit.

During the Trump administration, then-EPA Administrator Scott Pruitt issued a memorandum directing EPA's Office of Water to promulgate draft regulations eliminating the use of EPA's CWA Sec. 404(c) authority before a Sec. 404 permit application has been filed, or after a permit has been issued. Echoing concerns NMA has raised for years in response to EPA's actions concerning the Spruce Mingo Logan and Pebble mining projects, Administrator Pruitt noted that he was "concerned that the mere potential of the EPA's use of its Sec. 404(c) authority before or after the permitting process could influence investment decisions and chill economic growth by short-circuiting the permitting process." Therefore, to "ensure that EPA exercises its extraordinary authority under Sec. 404(c) in a careful, predictable and prudent manner," the memorandum instructs the Office of Water within six months to propose regulations eliminating "preemptive" and "retroactive" 404(c) vetoes, requiring that EPA headquarters approve the initiation of any 404(c) process, and mandating the consideration of final Environmental Assessments or Environmental Impact Statements prior to the proposal of a 404(c) action. NMA engaged with EPA's Office of Water as they were moving forward with rulemaking, but it was never completed.

The Biden administration renewed efforts to explore the Sec. 404(c) veto process with regard to Pebble. Recall that in July 2019, EPA issued a notice withdrawing its 2014 Proposed Determination issued under CWA Sec. 404(c). This action terminated the review process for Bristol Bay. A recent Ninth Circuit court decision found that EPA can withdraw a Proposed Determination "only if the discharge of materials would be unlikely to have an unacceptable adverse effect." The agency now believes the 2019 withdrawal notice did not meet the Ninth Circuit's standard. On remand from the Ninth Circuit, the Alaska federal district court recently directed EPA to file a proposal for additional court proceedings by Sept. 10. The U.S. Department of Justice, in a filing in the district court, announced EPA's intent to request that the 2019 withdrawal notice be remanded and vacated. Now that the court has granted EPA's motion for remand and vacatur, EPA's 404(c) review process is automatically reinitiated and the agency will announce a schedule for resuming a process, including opportunities for public input.

On October 29, 2021, the Alaska federal district court granted EPA's request to remand and vacate the agency's 2019 withdrawal of a Proposed Determination to protect fishery areas in the Bristol Bay watershed under CWA Sec. 404(c). The court's decision reinitiated EPA's 2014 CWA Sec. 404(c) process to protect certain waters in Bristol Bay, Alaska. In Jan. 2022, EPA Region 10 informed the state, Corps, and project proponents of their intention to issue a revised proposed determination to ensure "ample opportunity for full consideration of available information to determine next steps before May 31, 2022."

On May 26, 2022, EPA Region 10 released for public comment its Sec. 404(c) proposed determination to prohibit and restrict the use of certain waters in the Bristol Bay watershed as disposal sites for the discharge of dredged or fill material associated with mining the Pebble Deposit. 87 Fed. Reg. 32021 (May 26, 2022). An executive summary of the proposed determination is available here.

On Sept. 6, 2022, NMA filed comments on EPA Region 10's proposed determination to prohibit and restrict mining in the Pebble deposit area. NMA's comments reiterated concerns we have consistently advocated over the last decade regarding EPA's preemptive CWA Sec. 404(c) veto and highlight additional concerns with the agency's proposed action, including: the harmful precedent it would set for other mining projects and development projects; the effect it will have on an already stressed mineral supply chains; and the increased regulatory uncertainty that will result.

NMA also led a coalition letter with 16 national and Alaska-based trade associations opposing EPA's proposed determination and emphasizing the negative consequences this action will have on a broad swath of the U.S. economy. NMA will continue to work with our allies to elevate our concerns with the proposed determination and the damaging precedent this action could have on future mining and development. EPA also published a notice in the *Federal Register* extending the period of time the agency has to review the administrative record and either withdraw the proposed determination or prepare a recommended determination. The new deadline for EPA to complete that action is Dec. 2, 2022.

Status:

Administrative:

In Feb. 2023, EPA headquarters issued its final determination under CWA Section 404(c) to preemptively veto the Pebble Mine Project. The National Mining Association (NMA), Pebble Limited Partnership, Alaska Miners Association, State of Alaska, and others released strong statements in opposition to EPA's preemptive action that is clearly at odds with this administration's mineral development priorities. It is also worth noting that the project's administrative appeal of its CWA Section 404 permit is still pending before the Corps. Notably, EPA's decision, along with the White House's recent statement touting its actions to ban mining in the Boundary Waters area and the Pebble deposit area, demonstrate a conflict with the administration's purported support of domestic mining projects.

During this final stage of the CWA section 404(c) process, EPA determined that certain discharges associated with developing the Pebble deposit will have unacceptable effects on certain salmon fishery areas in the Bristol Bay watershed. As a result, the agency's final determination:

1. Prohibits the specification of certain waters of the United States (WOTUS) in the South Fork Koktuli River (SFK) and North Fork Koktuli River (NFK) watersheds as disposal sites for the discharge of dredged or fill material for the construction and routine operation of the 2020 Mine Plan. This includes future proposals to construct and operate a mine to develop the Pebble deposit anywhere at the mine site that would result in the same or greater levels of aquatic resource loss or streamflow changes as the 2020 Mine Plan; and

2. Restricts certain WOTUS in a broader area (SFK, NFK, and Upper Talarik Creek watersheds) from also being used as disposal sites for any future proposals to construct and operate a mine to develop the Pebble deposit that would result in similar adverse effects to those of the 2020 Mine Plan.

The NMA continues to analyze the agency's 900+ page response to comments document. However in our initial review of this document, it appears clear that EPA dismissed the concerns raised by the NMA, the regulated community, the state of Alaska, and other groups opposing the veto. For example, EPA dismissed the mining industry's concerns that the final determination would set harmful precedent for resource development projects because, among other reasons, the agency has not "consistently used Section 404(c) to stop mining and development projects." EPA Response to Comments, p. 1-111 and p. 1-124.

In response to NMA's concerns about the nation's need for the minerals that would be developed from the project, EPA stated "[c]omments regarding critical minerals are outside the scope" of this action and the final determination "has no effect on the nation's critical minerals supply chain because no critical minerals would be produced by the proposed Pebble Mine." EPA Response to Comments, p. 1-111. While EPA acknowledged that its action would prevent billions of dollars of economic activity in the state and that foreclosing minerals development would detrimentally impact U.S. processors and manufacturers, the agency ultimately decided that the environmental and cultural benefits of vetoing the project outweighed its immense economic value. EPA Response to Comments, p. 6-90 through 6-105.

NMA will continue to work with our industry partners and Congressional allies to advocate for fair and consistent regulatory processes and against EPA overreach. We will continue to evaluate opportunities and discuss strategy development with members.

NMA also continues to monitor petitions filed by environmental and other groups asking EPA to exercise its veto authority on other projects. For instance, in Jan. 2023, the National Parks Conservation Association filed a petition with EPA requesting the agency veto all future oil and gas exploration and extraction in the Big Cypress National Preserve near the Everglades in Florida. If you are aware of petitions that environmental or other groups in your area have filed or plan to file, please let us know as we continue to track this issue.

Litigation:

Litigation is expected. NMA will keep you informed of any developments.

POWER PLANT ELGs

PRIORITY A – EPA

Background:

In June 2013, EPA proposed revisions to its 1982 ELGs for power plants, which it finalized in Nov. 2015. The final ELGs, which include new stringent limits on both new and existing facilities, apply to coal, nuclear, oil and natural gas steam electric power plants. The final ELGs set numeric limits on pollutants such as arsenic, mercury, selenium, nitrates and total dissolved solids (TDS) for various waste streams from power plants. The ELGs also establish "no discharge" requirements for flue gas mercury control wastewater, as well as for fly ash transport water and bottom ash transport water at existing facilities (with an exception for water used as makeup water in a flue gas desulfurization scrubber). As such, the rule requires dry handling or closed-loop systems for bottom ash and dry handling for fly ash. The rule also adopts evaporation as the model technology for gasification wastewater and dry handling as the best available technology economically achievable for flue gas mercury control wastewater.

However, the rule also establishes more lenient limits for "legacy wastewaters," which are those waters generated prior to the date of compliance with new limits, and does not set best management practices concerning the structural integrity of surface impoundments in light of EPA's recently finalized rule regulating the disposal of coal combustion residuals. Additionally, the final ELGs include an extended compliance period. Specifically, the new limits did not apply until a date determined by the permitting authority that is as soon as possible beginning Nov. 1, 2018, but that is no later than Dec. 31, 2023.

In 2017, EPA published in the *Federal Register* an administrative stay of certain compliance deadlines contained in the 2015 rule. Litigation on the administrative stay of compliance deadlines ensued in 2017 and 2018. Prior to a decision in the case, however, the administrative stay was withdrawn by EPA's Sept. 2017 rulemaking postponing the compliance deadlines (see below). As a result, the court ruled in April 2018 that the NGO's claim was moot. The court further held that the NGO's subsequent challenge to the delay rule needed to be brought in the 5th Circuit. The NGOs brought their claims against the delay rule in a July 2018 brief to the 5th Circuit.

Rulemaking on Compliance Deadlines: In June 2017, EPA proposed to postpone the Nov. 2018 compliance deadlines for certain new, more stringent limitations and standards contained in the rule. NMA filed comments in support of the postponement. In Sept. 2017 EPA finalized a rule, effective immediately, postponing for two years the Nov. 2018 compliance deadlines for the new, more stringent limitations and pretreatment standards related to flue gas desulfurization (FGD) wastewater and bottom ash transport water contained in the ELG Rule. According to EPA, the postponement is intended to "preserve the status quo" and "prevent the potentially needless expenditure of resources" while the agency "conducts a rulemaking to potentially revise" the more stringent requirements in response to concerns raised by industry and the Small Business Administration. The rule's two-year postponement is based on EPA's estimate that it will complete its new rulemaking by the fall of 2020, but if the agency "does not complete a new rulemaking by Nov. 2020, it plans to further postpone the compliance dates such that the earliest compliance date is not prior to completion of a new rulemaking." EPA also asserts that "it would be reasonable for permitting authorities to consider the need for a facility to make integrated planning decisions" when determining when to require power plants to comply with the requirements not being postponed, which under the 2015 Rule must be met by Dec. 2023.

On Jan. 30, 2018, the Center for Biological Diversity filed suit in the US District Court for the District of Arizona Tucson Division alleging that EPA violated the Endangered Species Act by failing to consult with the US Fish and Wildlife Service and National Marine Fisheries Service over the delay rule, and further seeking to compel EPA to conduct a NEPA analysis of the delay rule. The government and industry have sought to have the case dismissed for lack of jurisdiction (see D.C. decision above), but CBD has argued that the delay rule does not fall under CWA Sec. 509(b) and should be heard in district courts. Briefing is ongoing.

5th Circuit Litigation: In Apr. 2017, the Trump Administration was granted a 120 day stay of the litigation in front of the 5th Circuit to allow the agency time to reconsider the Rule. In Aug. 2017, the agency then asked for and was granted a motion to remand parts of the rule over the objections of the NGOs. Specifically, the court remanded for reconsideration several portions of the rule highlighted by industry as being flawed, including the rule's new, more stringent limits and standards for bottom ash transport water, flue gas desulfurization (FGD) wastewater, and gasification wastewater. The order also granted EPA's motion to move forward with briefing on the parts of the rule not remanded, which include those aspects of the rule that environmental organizations have claimed are too lenient, but which are supported by the utility industry. Pursuant to the order, EPA moved forward defending those parts of the rule against the environmental groups' challenges. NGO's have also included claims against the delay rule in the 5th Circuit litigation (see above). Oral argument was held before the 5th Circuit on Oct. 3, 2018. On April 12, 2019, the 5th Circuit vacated the portions of the final rule regulating legacy wastewater and residual combustion leachate and remanded to the agency.

In another case before the 5th Circuit, a unanimous three-judge upheld EPA's decision to delay the earliest compliance dates for two key waste streams addressed in the 2015 ELGs for the Steam Electric Power Generating Point Source Category. Specifically, the Court held the compliance extension for FGD wastewater and BATW "best available technology economically available" limits was within the agency's statutory authority under the CWA and was not arbitrary or capricious. In addition to noting that EPA has the statutory authority under the CWA to revise its regulations, the Court explicitly found the agency has the inherent authority to revise previously-promulgated rules so long as they follow the proper administrative requirements and provide a reasoned basis for the decision. In this instance, the court determined EPA had

complied with the necessary notice-and-comment procedures and appropriately explained its rationale. Please note, the Court's decision addresses only the issue of compliance deadlines and not the ELGs themselves. However, it is an important legal victory for the mining industry that lays firm groundwork for the agency's ongoing rulemaking effort to revise the FDG and BATW limits.

In Jan. 2020, NMA filed comments *that supported EPA's proposed rule revising the new stringent limitations and standards concerning FGD wastewater and BATW.* Below is an overview of several key provisions.

- Changed the technology-basis for treatment of FGD wastewater and BATW.
    - For FGD wastewater, the final rule establishes numeric BAT effluent limitations on mercury, arsenic, selenium, and nitrate/nitrite as nitrogen. As supported in NMA's comments, it also identifies treatment using chemical precipitation followed by a low hydraulic residence time biological treatment as the BAT technology basis.
    - For BATW, the final rule establishes as BAT a high recycle rate system with a site-specific volumetric purge which cannot exceed 10 percent of the BATW system's volume where the purge volume and associated effluent limitations are established by the permitting authority.
- Established new compliance dates.
    - When BAT limitations in the rule are more stringent than previously established Best Practicable Technology Currently Available (BPT) limitations applicable to the relevant wastestreams, those limitations do not apply until the permitting authority determines a date that is as soon as possible on or after one year after publication of the rule in the *Federal Register* but no later than December 31, 2025.
- Revised the Voluntary Incentives Program for FGD wastewater.
- Added subcategories for high-flow units, low-utilization units, and those that will cease the combustion of coal by 2028 – finalizing requirements that are tailored to facilities in these categories.

NMA coordinated with our utility industry allies on these comments and in advocating the mining industry's perspective in numerous meetings with EPA and OMB. In Aug. 2020, we met with OMB to reiterate the importance of coal to the nation's economy and our position that the rule will allow coal to continue to remain part of the energy generation fleet. We also emphasized the critical need for the agencies to finalize the rule quickly. The timing of the final rule's issuance was especially significant. A previous EPA rule had postponed compliance deadlines until Nov. 2020, which provided the mining and utility industries short-term certainty. However, some states instituted permit conditions that would have required implementation of the 2015 standards if EPA had not promulgated a final replacement rule by November 2020. If the final rule's issuance had been delayed past the beginning of September, some facilities may have had to institute irreversible and costly capital expenditures that could have forced plants to retire early. The rule was published in the *Federal Register* on Oct. 13, 2020 and went into effect Dec. 14, 2020.

On July 26, 2021, the EPA announced its decision to implement the 2020 Steam Electric ELG Reconsideration Rule (October 13, 2020; 85 FR 64650) and simultaneously conduct a rulemaking that would potentially further strengthen the Steam Electric ELGs (40 CFR Part 423) as contemplated under the CWA. This rulemaking process could result in more stringent ELGs for waste streams addressed in the 2020 final rule as well as waste streams not addressed in

the 2020 rule. A proposed rule is anticipated in November 2022, and the agency is implementing the 2015 and 2020 rules in the meantime. NMA is also coordinating with new industry allies on this effort.

Status:

Administrative:

The proposed rule, which we expect will impose more stringent limitations and potentially limit needed flexibilities, is currently at OMB for interagency review and is expected for release in the coming months. NMA has been working with new industry allies on areas of alignment. NMA is meeting with OMB on March 13, 2023 to discuss this proposal. We will continue to advocate for the retention of needed flexibilities and reiterate the reliability concerns that forced premature plant retirements due to this rule will cause.

CWA HAZARDOUS SUBSTANCE FACILITY RESPONSE PLANS

PRIORITY B – EPA

Background:

In 2015, environmental groups sued EPA to issue hazardous substances spill prevention regulations under CWA Sec. 311(j)(1), which resulted in a consent decree requiring EPA to undergo a rulemaking. Under the previous administration, EPA published a final rule declining to establish new regulatory requirements for hazardous substances under CWA Sec. 311(j)(1)(c). In finalizing this rule, EPA determined that the existing regulatory framework adequately served to prevent and contain CWA hazardous substance discharges. NMA filed coalition and mining-specific comments, which explained the robust spill prevention and containment regulations and best management practices already in place at mine sites.
Environmental groups then sued again, this time to compel the agency to issue regulations under CWA Sec. 311(j)(5)(A), which provides that the President (via EPA) "shall issue regulations which require an owner or operator of a tank vessel or facility described in subparagraph (C) to prepare and submit…a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance."

In 2020, the agency entered into a consent decree to publish a proposed rule no later than March 12, 2022, and adopt a final rule by Sept. 30, 2024. While the consent decree provides few clues as to what direction the agency will take, a Dec. 2021 report from environmental advocates could be a preview. The report ties promulgation of broader regulations to the Biden administration's environmental justice, racial equity, climate, and regulatory reform priorities, and encourages EPA to take action to develop both comprehensive spill prevention and worst-case discharge planning rules.

On July 26, NMA filed comments and also helped form a coalition representing a broad group of sectors with members that could be affected by this rulemaking. The coalition's joint comments are available here. NMA's comments urged EPA to withdraw the proposal or finalize an action that no new regulatory requirements are necessary given the existing comprehensive regulatory

framework governing hazardous substances on mine sites. NMA's comments further encouraged the agency, if it moves forward with the proposed rule, to narrowly tailor the rule to fit within the existing regulatory framework, provide additional clarification on key definitions and concepts, and consider additional recommendations. Coalition comments explained other flaws in the proposed rule, such as the concerns with the substantial harm criterion, lack of clarity regarding hazard evaluation requirements, and the significant costs imposed on facilities.

Status:

The Fall 2022 Unified Regulatory Agenda lists the date for this final rule as Sept. 2024.

CWA SEC. 401 STATE WATER QUALITY CERTIFICATIONS

PRIORITY B – EPA AND ARMY CORPS

Background:

Under CWA Sec. 401, any applicant for a federal permit that may result in a discharge into navigable waters must obtain a certification from the state in which the discharge originates that the discharge will comply with listed sections of the CWA, particularly applicable effluent standards. Federal permits – including CWA Sec. 404 permits issued by the Corps – cannot be issued without the certification, and under the certification process states can place mandatory conditions on issuance of the federal permit. The U.S. Supreme Court has read the provision broadly to allow states to impose limits based on water quality standards, including designated uses, and to allow states to look at the entire activity in question, not just the discharge to the navigable water. Most states utilize Sec. 401 appropriately. However, some states recently have tried to use the Sec. 401 process to block federal permits from moving forward for non-water quality-related issues. For example, the State of Washington utilized Sec. 401 to block a coal export facility based on the state's position on coal usage and climate change. The previous administration first issued guidance and then a proposed and final rule subsequently published in the *Federal Register* that went into effect on September 11, 2020. The final rule addressed several key areas of the CWA Sec. 401 certification process that the NMA specifically supported, including clarifying the timelines for review and action and clarifying the scope of certification review.

Litigation:

There has been extensive litigation on this issue – including regarding the Millennium Bulk Terminal project, *Oakland Bulk & Oversized Terminal v. City of Oakland;* and *Wyoming and Montana v. Washington.* NMA and industry allies have been involved wherever possible by filing amicus briefs in these cases. Most recently, NMA and the National Association of Manufacturers, filed an amicus brief supporting Montana and Wyoming's Supreme Court petition challenging Washington State's denial. Please see NMA's memorandum of March 23, 2020 for additional details about our amicus brief. A coalition of 18 states (Kentucky, Alaska, Arkansas, Indiana, Kansas, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia) also filed an amicus brief supporting Montana and Wyoming. Rather than reject or accept Montana and Wyoming's challenge to Washington state's coal export ban, the Supreme Court invited the federal government to weigh in with its views before deciding whether to hear the case. The Trump DOJ did not provide a brief with its views and the Supreme Court did not take up the case.

Administrative:

On June 2, 2021, EPA published in the *Federal Register* a notice of intent to revise its 2020 CWA Sec. 401 certification rule. 86 Fed. Reg. 29,541 (June 2, 2021) under Executive Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. NMA's comments on the notice of intent, available here, reiterated the mining industry's support for the current 401 rule, especially the clarifications on the timelines and scope of review, and encouraged EPA to engage in meaningful dialogue with the mining industry to ensure that any revisions are reasonable and practical in protecting water quality and allowing projects to be permitted efficiently. NMA's comments also highlighted the comprehensive regulatory framework that governs mining operations and how the regulatory certainty and clarity the rule provides also supports the Biden administration's infrastructure and supply chain priorities. Our comments also respond to certain questions EPA raised on specific provisions of the rule. In Dec. 2021**,** EPA published a document entitled "Clean Water Act Section 401 Water Quality Certification Questions and Answers on the 2020 Rule Vacatur."

On June 1, 2022, EPA proposed new regulations under Section 401. On Aug. 8, 2022, NMA filed association and coalition comments on EPA's proposed CWA Sec. 401 certification rule. Recall NMA filed pre-proposal comments last year encouraging the agency to retain as much of the 2020 rule as possible, as it provided important clarifications on the scope of review and timelines for review that were helpful to the mining industry. Unfortunately, EPA moved forward with a proposed rule that removes those important clarifications and expands the role of states and Tribes in the Sec. 401 certification process, which could cause uncertainty or delays for project proponents.

NMA's comments built on our pre-proposal comments and member input. Specifically, NMA's comments (1) reiterated that the Sec. 401 certification process is just one part of the comprehensive legal and regulatory framework governing the mining industry; (2) generally opposed EPA's new requirement for project proponents to provide a copy of the draft permit or license with a request for certification and request additional clarity and flexibility; (3) generally supported the proposed approach to determining the reasonable period of time and (4) generally opposed EPA's proposed expanded scope that allows states and Tribes' review to include the "activity as a whole." NMA's coalition comments focused on the numerous legal flaws in the proposed rule and laid the groundwork for potential litigation. NMA has also engaged with EPA's Office of Water to reiterate these concerns and specifically explain the problems with the draft permit requirement.

Legislation:

The Senate Environment and Public Works Committee held a legislative hearing on Nov. 19, 2019 on S. 1087, the Water Quality Certification Improvement Act of 2019. The hearing focused on state perspectives on implementation issues and reforms to the CWA Sec. 401 process. The majority's witnesses were Governor Gordon of Wyoming and Governor Stitt of Oklahoma. NMA engaged with majority staff in the weeks leading up to the hearing to ensure they had a good understanding of coal export issues and the mining industry's perspective on Sec. 401, including related Commerce Clause issues. NMA also wrote a letter to the Committee reiterating the mining industry's support of the legislation and our view on Sec. 401 reform. Chairman Barrasso cited NMA's letter in his first question of the hearing to Governor Gordon, and entered into the record NMA's amicus brief supporting Lighthouse Resources in their challenge that is currently before the 9th Circuit.

Status:

Administrative:

According to the Fall 2022 Unified Regulatory Agenda, a final rule is expected in June 2023, three months delayed from the date identified in the Spring 2022 Unified Regulatory Agenda.

Legislative:

Potential changes to Sec. 401 were initially included in Senator Manchin's draft permitting bill, but these were ultimately removed in the final continuing resolution text. NMA will continue to engage with congressional allies on this issue.

Litigation:

The agency asked courts to remand the rule back to it without vacating the 2020 rule, and two courts reviewing the rule did so. *Del. Riverkeeper Network v. EPA*, No. 2:20-CV-3412 (E.D. Pa.); *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-03062 (D.S.C.). However, the N.D. Cal. vacated the 2020 rule and remanded it to the agency, reinstating the 1971 rule. *In re Clean Waters Act Rulemaking*, 3:20-cv-04636 (N.D. Cal.). Eight states and industry groups appealed the decision, and on Apr. 6, 2022, the Supreme Court stayed it. This ruling put the Trump administration's 2020 rule back into place while EPA works on its new rulemaking. Shortly thereafter, states, Tribes, and environmental organizations filed a Motion for Indicative Ruling in N.D. Cal. asking the court to issue a ruling telling the Ninth Circuit that it will revisit its earlier vacatur order, a move that would allow the case to move forward on the merits. The court denied this motion because the plaintiffs had not demonstrated extraordinary circumstances and because EPA's new rule was "just around the corner, so close that there is little point in backing up and adjudicating a rule, the 2020 rule, that has little viability left."

2008 MITIGATION RULE

PRIORITY B – ARMY CORPS OF ENGINEERS

Background:

In 2008 the Corps and EPA finalized a rule (2008 Mitigation Rule) governing compensatory mitigation for activities authorized by permits issued by the Department of the Army. In early 2017, President Trump issued Executive Order 13777, "Enforcing the Regulatory Reform Agenda." The order instructed agencies to identify regulations that eliminate or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; or create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies. NMA members identified the 2008 Mitigation Rule as one such regulation and began to advocate with the Corps and EPA on potential reforms. NMA members identified several issues with the text and application of the 2008 Compensatory Mitigation Rule, including: the failure of Corps districts to recognize the temporary nature of certain mining-related impacts; widespread inconsistency in interpretation and application of the rule; unreasonable requirements from certain districts related to financial assurance, advanced mitigation, preference hierarchy, and use of assessment methodologies and protocols; the rule's infeasible long-term protection requirements and the increasingly overly-stringent application of those requirements (including unnecessarily requiring the retirement of subsurface mineral rights); overly stringent monitoring

requirements; and lack of consideration of alternative mitigation options. Over the last several years, NMA worked with the Corps and EPA on two initiatives related to compensatory mitigation reform.

Administrative:

Mining RGL:

At the beginning of the Trump Administration in Jan. 2017, NMA began working with the Corps to develop a mining-specific regulatory guidance letter (RGL) that would address many of the mining industry's concerns with the 2008 Rule. NMA held in-person meetings and calls with NMA members and Corps leadership and regulatory staff to describe the temporary nature of mining impacts, the extensive reclamation work undertaken by mining companies, and the issues associated with requirements for compensatory mitigation projects (including conservation easements and financial assurances). Through the end of the Trump term, NMA forcefully advocated for the Corps to issue the mining RGL expeditiously in dozens of meetings and conversations with Corps regulatory staff and leadership, including with NMA's President and CEO Rich Nolan and Assistant Secretary James. Assistant Secretary James continuously affirmed the Corps' commitment to completing the RGL by the end of the year, but we understand it was held up in Dept. of Defense regulatory approval and therefore not finalized by the end of the Trump term.

Proposed Rule to Reform the Review and Approval Process of Mitigation Banks and ILF Programs:

In June 2019, the Corps and EPA began an effort to revise certain parts of the 2008 Rule related to the review and approval process of mitigation banks and in-lieu fee (ILF) programs. The current review and approval process includes two separate reviews: an initial opportunity for public and agency review and comment, and a second review by an interagency review team (IRT). The revisions in the proposed rule were intended to remove duplication in the review process, increase efficiency, and lower costs by providing one review process for proposed mitigation banks and ILF programs, instead of two processes. NMA was an active participant in the agencies' pre-proposal process, beginning with an industry roundtable with senior agency staff. During this pre-proposal period, NMA also worked closely with several other trade associations to brainstorm potential areas of alignment and drafted comments based on these discussions and member feedback. On August 9, 2019, NMA submitted pre-proposal comments to EPA and the Corps that generally supported the agencies' proposal to remove the IRT process and offered more specific mining-related recommendations.

Ohio Stream and Wetland Valuation Metric (SWVM)

Over the last several years, there has been some activity at the Corps District on compensatory mitigation. In May 2020, NMA filed comments on the Huntington Corps District's Ohio Stream and Wetland Valuation Metric (SWVM). NMA also signed onto a broader industry coalition letter that identified significant flaws in the Ohio SWVM and requested that the District formally withdraw the Ohio SWVM because it would substantially increase the cost of mitigation without providing any meaningful environmental benefits. In July 2020, the Huntington District sent a letter to stakeholders involved in this proceeding indicating that it decided to pause the development of this stream assessment tool pending two actions by Corps Headquarters: (1) the development of a "Technical Guide for the Development, Evaluation, and Modification of

Stream Assessment Methodologies," and (2) the final mitigation rule amendment. Please keep us informed if the Corps Districts in which your companies operate similarly try to implement a new valuation methodology or tool without providing stakeholders the opportunity to provide input.

Proposed Rule to Reform the Review and Approval Process of Mitigation Banks and ILF Programs

The proposed rule was delayed several times throughout 2020 and was moved to a "long term action" in the Fall 2021 Unified Agenda with an expected proposed rule slated for Jan. 2023 but was formally withdrawn in the Spring 2022 Unified Agenda. NMA continues to inform EPA and the Corps about compensatory mitigation challenges and the need for a solution.

Status:

NMA continues to evaluate how to best engage the Corps on how to address our compensatory mitigation priorities. NMA has consistently reiterated concerns with compensatory mitigation and access to credits in recent engagements with EPA, the Corps, and congressional allies, particularly in the context of the WOTUS rulemaking. NMA will continue to explore other opportunities to elevate our compensatory mitigation concerns.

MULTI-SECTOR GENERAL PERMIT FROM STORMWATER DISCHARGES (MSGP)

PRIORITY B – EPA

Background:

EPA's NPDES General Permit for Stormwater Discharges from Industrial Activities, commonly referred to as the Multi-Sector General Permit (MSGP), is reauthorized every five years and covers stormwater discharges from industrial activities including metal mining (Sector G), coal mines and coal mining-related facilities (Sector H), and mineral mining and dressing (Sector J). NMA has filed comments and been engaged on this issue for nearly a decade. In Dec. 2014, NMA filed extensive comments on EPA's proposed MSGP, focusing on EPA's improper application of the requirements from the 2012 CGP to mining operations and pointing out practical problems associated with EPA's changes to corrective action requirements, deadlines for ensuring uninterrupted coverage under the new permit, and various specific provisions in the proposal. NMA held a meeting in Feb. 2014 with EPA to discuss NMA's concerns with the proposal and filed follow-up comments in Dec. 2014.

Environmentalists sued over general provisions of the MSGP in the U.S. Court of Appeals for the Second Circuit, seeking more stringent discharge and monitoring requirements, as well as a potential national ELG. In Aug. 2016 the parties entered into a settlement agreement requiring EPA to have National Academies of Science (NAS) Natural Research Council (NRC) conduct a study that it must consider prior to proposing the next iteration of the MSGP. The study was required to examine issues such as benchmark monitoring requirements and the feasibility of numeric retention standards. EPA also was required to propose, but not necessarily adopt, certain strict requirements concerning benchmark monitoring, changes to permit eligibility criteria, expansion of limitations to discharges to CERCLA sites, and the exclusion of operators using coal tar sealant from MSGP coverage. The Federal Stormwater Association and Federal

Water Quality Coalition both intervened in the litigation and were therefore part of the settlement negotiations.

In June 2020, NMA filed extensive comments explaining why the proposed MSGP was not workable for the mining industry and offered recommendations. We also held a conference call with members and EPA leadership and explained potential options for the agency to consider in finalizing the MSGP that would make the permit more workable for the mining industry. NMA also met held two meetings with OMB during the interagency review process.

Administrative:

On Jan. 15, 2021, EPA issued its 2021 MSGP along with a fact sheet that details the agency's rationale for its changes. The 2021 MSGP is effective March 1, 2021 and expected to expire at 11:59 p.m. (Eastern) on Feb. 28, 2026. The agency did not adopt all NMA's recommendations, but importantly, it modified or removed some of the most problematic provisions that would be burdensome for the mining industry.

Litigation:

In Aug. 2021, NMA joined an industry coalition led by the Federal Water Quality Coalition and Federal Stormwater Association to intervene in a lawsuit. Recall that while this permit only applies in the few states where EPA is the permitting authority, many states use EPA's MSGP as a model for their own stormwater permits. The Center for Biological Diversity's (CBD) petition for review, filed in the U.S. Court of Appeals for the Ninth Circuit, claimed EPA's issuance of the MSGP violated the CWA and the APA. CBD further requested that the Court review two biological opinions on the MSGP issued by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service.

Administrative:

Earlier this year, EPA sought public input on updating its fact sheets for sectors covered under the 2021 Multi-Sector General Permit for stormwater discharges from industrial activity, including Sector G (Metal Mining), and Sector H (Coal Mines and Coal Mining-Related Facilities) and Sector J (Mineral Mining and Dressing). 87 Fed. Reg. 38083 (Jan. 25, 2022). EPA was especially interested in updating the sector specific fact sheets to address: common activities, pollutant sources, and associated pollutants at facilities in each sector; and stormwater control measures or best management practices, including source control and good housekeeping/pollution prevention measures for potential pollutant sources at facilities in each sector. NMA filed comments with recommendations to clarify that the fact sheets are voluntary, and that the best management practices (BMPs) listed in the fact sheets are also voluntary and site-dependent. NMA's draft comments also encourage EPA to consider how the potential new "waters of the United States" (WOTUS) definition could affect the BMPs listed in the fact sheets, as it appears that several BMPs listed (e.g. discharge diversions, artificial wetlands, and others) potentially could be improperly interpreted as WOTUS under the new proposed definition.

In Sept. 2022, EPA began scheduling stakeholder meetings for Oct. and Nov. 2022 to discuss sector specific fact sheet meetings for following: air transportation sector (Sector S), timber products (Sector A), water transportation and ship and boat building ad repair yards (Sectors Q & R), and rubber, miscellaneous plastics, and miscellaneous manufacturing (Sector Y). NMA will keep you apprised if and when the agency schedules similar stakeholder meetings for the mining sectors.

Litigation:

In Dec. 2021 the litigation challenging the EPA's 2021 MSGP was voluntarily dismissed. The agencies rejected CBD's settlement proposal and wanted to move forward defending the MSGP in court. Briefing was expected to begin in late Jan. 2022, but CBD asked the court to dismiss the case instead. The MSGP is up for renewal again in 2025/2026, but this dismissal means the 2021 MSGP is in effect and not burdened by legal challenges.

Status:

The MSGP is not up for renewal again until 2025/2026. NMA continues to monitor new trends regarding stormwater that could be addressed in a future MSGP.

STATE ASSUMPTION OF 404 PERMITTING

PRIORITY B – EPA & ARMY CORPS

Background:

Pursuant to CWA Sec. 404(g)-(l), states and tribes can assume the administration of the federal Sec. 404 dredge and fill permitting program. Such assumption could eliminate duplication between state and 404 permitting activities. However, states and tribes can only assume the federal 404 program with respect to certain waters – under CWA Sec. 404(g)(1), the Corps retains jurisdiction over all tidal waters and their adjacent wetlands, and waters used as a means to transport interstate or foreign commerce and their adjacent wetlands. Once a state or tribe's program is approved by EPA, EPA reviews the program annually to ensure compliance with the CWA, and for discharges with larger impacts EPA and other federal agencies review the permit application, and states and tribes cannot issue a permit over EPA's objection.

Currently four states implement the 404 program. The Corps implements the program in all other states. In May 2017, NACEPT's Assumable Waters Subcommittee issued a final report summarizing the deliberations and recommendations regarding how EPA might clarify which waters a state or tribe assumes CWA 404 permitting for and which the USACE retains CWA permitting for. EPA formed the Assumable Waters Subcommittee under the auspices of the National Advisory Council for Environmental Policy and Technology (NACEPT) to, over the course of Oct 2015 through May 2017, provide advice and develop these recommendations in the hope that a clearer understanding of Sec. 404(g) would allow more states to assume the 404 program. Notably, David Ross, the Trump Administration's Assistant Administrator for the Office of Water, was on the Subcommittee.

In June 2020, EPA published a Request for Comment on whether the agency should reconsider its current position that consultation under the Endangered Species Act (ESA) Sec. 7 is not required when EPA approves a state's request to assume the CWA Sec. 404 program. EPA's docket is available here. Recall that ESA Sec. 7 consultation applies to "all actions in which there is discretionary Federal involvement or control." 50 CFR 402.03. Based on the text of CWA Sec. 404 and the Supreme Court's decision in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), EPA has historically held the position that its approval of a state's Sec. 404 program is non-discretionary and therefore does not trigger Sec. 7 consultation. EPA affirmed this position in 2010 in response to a request for clarity from the

Environmental Council of the States (ECOS) and the Association of State Wetland Managers, Inc. (ASWM). Specifically, EPA explained that when considering a state CWA Sec. 404 program request, the agency is only permitted to evaluate the specified criteria in CWA Sec. 404(h) and does not have discretion to add requirements to the list, including considerations of endangered and threatened species through ESA Sec. 7 consultation.

In Dec. 2020, Florida assumed responsibility of the 404 program for certain wetlands and other surface waters in the state. In Aug. 2022, the Miccosukee Tribe of Indians of Florida filed a complaint in the U.S. District Court for the Southern District of Florida against EPA, challenging the agency's delegation of the 404 program to Florida. The Miccosukee Tribe's complaint argues that EPA's delegation to Florida restricts the ability of the Tribe and its members to exercise their rights and have been prevented from obtaining permits necessary to build homes on Indian lands. The Complaint also states that EPA's actions diminished Tribal sovereignty by subjecting more than 200,000 acres of Indian lands to the state's regulatory jurisdiction. On Sept. 7, 2022, Florida moved to intervene in support of EPA. A judge subsequently granted the state's request. In Nov. 2022, the case was referred to mediation to be completed no later than 80 days before the scheduled Oct. 23, 2023 trial date. On Jan. 18, 2023, the parties filed a joint motion to set deadlines, spanning from March 8, 2023 through June 9, 20223. NMA will continue to monitor developments.

Status:

In addition to Florida, a number of other states, including Alaska, have expressed interest in or a commitment to assuming the section 404 program. The Fall 2022 Unified Regulatory Agenda also lists a proposed rule that would clarify requiring for assumption of the CWA 404(g) program, reduce barriers to assumption, and place more states and tribes in the decision-making position on dredge and fill permits. A proposal is expected in Sept. 2023.

HUMAN HEALTH CRITERIA IN WASHINGTON

PRIORITY B – EPA

Background:

In 2016, EPA disapproved 143 surface water quality criteria adopted by the State of Washington because those criteria were not based on the latest sound science and were therefore not protective of human health and promulgated protective federal criteria in their place. EPA later decided to reverse the 2016 disapproval and approve the same State-adopted criteria in 2019 and then withdraw the rule setting federal criteria in 2020. The State, several tribes, and environmental groups voiced strong opposition to the reversals. EPA has decided to proceed with a federal rulemaking to restore protective and science-based human health criteria for Washington to meet CWA requirements.

On May 31, 2022, NMA filed comments on EPA's proposed rule establishing human health criteria (HHC) for Washington State. Recall that while this proposed rule would only apply in Washington State, NMA was concerned that the proposed rule could have precedential impact in other states.

NMA's comments highlighted several concerns, including: the premature nature of this rulemaking given EPA's anticipated rulemaking to address tribal treaty rights in water quality standards; the overly conservative inputs used to establish the criteria; the limited economic analysis that appears to underestimate anticipated compliance costs for point source dischargers; and disagreement with EPA's approach to apply HHC necessary to protect tribal treaty rights to all of Washington state

Status:

EPA recently finalized this rule establishing HHC for Washington state. 87 Fed. Reg. 69183 (Nov. 18, 2022). A fact sheet is available here. Recall that while this action only applied to waters in Washington state, NMA was concerned that this action could serve as a model for other states and filed comments highlighting numerous concerns, including the premature nature of this rulemaking given the agency's proposal regarding tribal reserved rights, and the overly conservative inputs used in setting HHC.

NMA continues to engage with other industry groups in Washington state to learn more about implementation challenges and future developments.

CONDUCTIVITY METHODOLOGY DEVELOPMENT

PRIORITY B – EPA

Background:

Administrative:

In 2010, EPA began work to derive an aquatic life advisory value for conductivity that may be applied to waters in the Appalachian region. 75 Fed. Reg. 5589 (Feb. 3, 2010). NMA worked with Norwest and GEI Consultants to develop comments and to conduct field sampling, producing several technical documents revealing flaws in EPA's studies, including "A Field-based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams." EPA ultimately developed a conductivity "benchmark" of 300-500us/cm, which was part of the guidance document at issue in *NMA v. Jackson*. The conductivity benchmark and methodology used to derive it were made part of "peer-reviewed" scientific literature via the Cormier papers in the SETAC journal. On Dec. 20, 2016, EPA released a draft methodology document outlining a process – similar to the benchmark development – for states to use to develop their own numeric conductivity criteria. According to EPA, the document went through external peer review – in which it received positive remarks – and was written in response to six states asking for help in developing conductivity criteria. EPA has also stated that the methodology is intended to help "bridge the gap between field and lab effects" that they have seen.

In Apr. 2017, NMA filed comments, prepared by GEI Consultants, on the draft methodology explaining how the proposed methodology does not produce criteria protective of 95% of aquatic species, fundamentally misinterprets EPA's 1985 *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses*, and fails to account for data that provides substantial evidence for the fact that conductivity is not

likely the causative factor for the presence or absence of genera. As such, NMA's comments asked EPA to withdraw the draft methodology in its entirety.

NMA also highlighted the draft methodology as appropriate for repeal, replacement, or modification under E.O. 13777 and 13771. In meetings with EPA and OMB, NMA summarized the significant scientific flaws in the methodology; outlined the importance of the issue to the mining industry – including in the context of citizen lawsuits, application of the permit shield, and TMDLs (i.e., documents that outline the scientific, legal, and policy rationales for elevating the issue and rescinding the draft methodology); and presented. To further elevate this issue, on Sept. 20, 2018, NMA organized a broad industry meeting with Anna Wildeman, Deputy Assistant Administrator for the Office of Water, and Owen McDonough, Senior Science Advisor for the Office of Water, to discuss our concerns with the draft methodology and underlying "benchmark" study, and ask that EPA publicly rescind the methodology.

Litigation:

In June 2018, the U.S. Court of Appeals for the Fourth Circuit issued a decision overturning a novel ruling by Judge Robert Chambers of the U.S. District Court for the Southern District of West Virginia in the case of *Ohio Valley Envt'l Coalition v. Pruitt*. The case involved a challenge brought by environmental groups alleging that EPA had a duty to act where the state of West Virginia had not yet submitted for approval certain CWA Total Maximum Daily Loads (TMDLs) related to conductivity. NMA and other allied groups filed an amicus brief in the case.

Despite this court victory, however, environmental organizations continue to point to the methodology and underlying "benchmark" in litigation seeking to impose CWA liability, including in the context of trying to force NPDES coverage for underdrains at reclaimed mine sites that are allegedly causing exceedances of the "benchmark" in Appalachian streams.

The Fond Du Lac Band of Lake Superior Chippewa in Wisconsin also proposed a revised water quality standard for conductivity based on the Appalachian benchmark. NMA submitted coalition comments objecting to the proposal. The Band's response to comments disagreed with the coalition's perspective. EPA approved the Band's water quality standards revisions in Oct. 2020. EPA's decision document is available here.

Status:

The draft-field based methods for developing aquatic life criteria for specific conductivity was rescinded during the previous administration under EPA Office of Water's Aug. 2019 policy memo that rescinded all draft documents that were issued more than two years ago and that had not been finalized. As of Oct. 1, 2019, the Office of Water has rescinded more than 60 draft guidance documents dated from 1977-2016 which were never finalized or withdrawn. NMA's list of draft guidance documents that were rescinded is available here.

NMA also continues to monitor litigation that may reference the Appalachian benchmark or the rescinded guidance document. On Oct. 27, 2021, Black Warrior Riverkeeper, Inc. filed a notice of intent to sue Drummond Company for alleged CWA violations for a property in Alabama. According to the letter, test results of pumped wastewater contained conductivity levels above the recommended benchmark of 300-500 us/cm for conductivity in the Central Appalachian region. The letter also references a 2011 memorandum from EPA to the regional administrators of regions 3, 4, and 5 on "Improving EPA Review of Appalachian Surface Coal Mining

Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order."

WET TESTING

PRIORITY B – EPA

Background:

Whole Effluent Toxicity (WET) Testing regulations designate one invertebrate species, Ceriodaphnia dubia for chronic WET tests (with fathead minnows, Pimephales promelas, the only vertebrate test species allowed). Based on experience from both dischargers and their labs, Ceriodaphnia dubia appears to be sensitive to TSS, TDS and salinity, so test "failures" occur even when other "toxics" are shown not to be present in the effluent. EPA staff have developed a chronic WET test using Daphnia magna. This species is already approved as an acute WET test species and appears to be less susceptible to these interferences. As such, use of this organism would likely produce fewer erroneous test failures while still protecting receiving waters from toxicity. A request for Daphnia magna chronic testing was approved for one mine in Arizona by ADEQ and EPA region IX.

Status:

EPA has not issued guidance or 40 CFR Part 136 regulations to authorize widespread use of Daphnia magna for chronic WET tests, despite frequent use as an acute WET test organism. NMA conducted discussions with other industries concerning the possibility of petitioning EPA to authorize the EPA-developed Daphnia magna chronic WET tests. However, the costs of compiling the lab information needed for EPA to approve a new organism were deemed prohibitively expensive at that time.

WATER QUALITY CRITERIA GUIDELINES UPDATE

PRIORITY B – EPA

Background:

In Sept. 2015, EPA hosted an invited expert meeting to gather information regarding the state of the science for ecological risk assessment as it pertains to revising the 1985 *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses*. Those guidelines provide the basis for deriving EPA's national ambient water quality criteria for the protection of aquatic life. Notably, presentations at that meeting addressed topics such as endangered species protection, and EPA's field-based methodology used to derive its Appalachian benchmark for conductivity.

On Aug. 29, 2016, EPA announced that it was seeking advice from the Science Advisory Board on documents that propose methods for revising and updating national water quality criteria for aquatic life. Specifically, EPA sought additional scientists for the "augmented" SAB Ecological Process and Effects Committee that is charged with an overarching document that spells out the agency's plans to revise guidelines for deriving national water quality criteria. The panel of experts also is expected to review two other related documents, "Draft Expedited Methodologies

for Deriving Water Quality Criteria for the Protection of Aquatic Life" and "Draft Revised USEPA Guidelines for Deriving Numeric Water Quality Criteria for the Protection of Aquatic Life."

NMA nominated the following experts for the panel: Steve Canton, Bob Gensemer, Bob Mosher, and Toby Frevert. EPA has stated that it intends to consult with the panel to get early guidance on the path forward for updating the guidelines. These updates will be a multi-year project, and EPA is hoping to take a two-pronged approach to the updates: developing a method available for criteria development with a more limited data set (expedited criteria development); and also a "Cadillac" criteria development process where have lots of data. Protection of endangered species and field-based criteria derivation will likely also be focal points.

NMA highlighted this issue in the context of the conductivity methodology as part of its regulatory reform package to EPA.

In Jan. 2018, EPA also signed a Cooperative Research and Development Agreement (CRADA) with eight metals associations in order to leverage the knowledge and resources of scientists inside and outside of the agency to better protect aquatic life. According to EPA, current science demonstrates that water chemistry parameters (e.g., pH, dissolved organic carbon, and hardness) can affect the toxicity of metals by affecting the bioavailability of metals in the water to aquatic species. Through the CRADA, EPA will work collaboratively with the metals associations to develop a common modeling approach that can predict the bioavailability and toxicity of metals. Using the resulting peer-reviewed modeling approach, EPA plans to develop updated Aquatic Life Ambient Water Quality Criteria for metals to better support states, territories and tribes with criteria that reflect the most current science and are easier to implement than current approaches. All approaches and products developed through the CRADA will be open for external peer review and public comment. The associations are: the Aluminum Association, Aluminum REACH Consortium (ARC), Cobalt Institute, International Copper Association, Copper Development Association, International Lead Zinc Research Organization, International Zinc Association, and NiPERA Inc. In Oct. 2018, EPA released a workplan for developing a new, simplified modeling approach to update aquatic life criteria for metals as part of the CRADA with the metals association. The workplan includes an overview of the objectives, approach, and expected deliverables, including an overarching modeling approach to predict the bioavailability metals and models to predict the bioavailability and toxicity of specific metals.

Status:

A progress update is available here. A workplan is available here. NMA will continue to monitor developments.

PERMIT SHIELD LITIGATION

PRIORITY B – EPA & VARIOUS COURTS

Background:

Under CWA Sec. 402(k), known as the "permit shield" provision, if a permittee discharges in compliance with its NPDES permit, it is shielded from CWA liability. Environmental groups have been bringing lawsuits in multiple states against mining companies attempting to limit the scope

of the permit shield defense. NMA has been following a number of these permit shield cases, and has helped form industry coalitions in several and filed amicus briefs supporting mining companies.

Aurora (9th Cir) – Non-Governmental Organizations (NGOs) appealed favorable lower court ruling in which NMA had filed an amicus brief. NMA filed amicus brief at 9th Cir. as well. Sept, 2014 9th Cir held on limited grounds defense not available to Aurora. Aurora sought Sup Ct review, NMA led amicus effort and was joined by states and industry. However, cert was denied. A&G (4th Cir) – NMA filed coalition amicus brief. 4th Cir again on narrow grounds held shield not available in this case. ICG Hazard (6th Cir) – NMA filed coalition amicus. 6th Cir. held that shield applies equally to general permits and individual permits, found in favor of coal company. Fola (J. Chambers) – lower court took very narrow view of permit shield defense and conflated water quality standards with permit limitations. Fola appealed to 4th Circuit, NMA filed coalition amicus brief supporting Fola. In Jan. 2017 4th Circuit upheld lower court decision, finding that general language in an NPDES permit about "meeting applicable water quality standards" was a separate and enforceable "effluent limitation."

Status:

Administrative:

NMA highlighted EPA's current permit shield guidance as a candidate for revision under Executive Orders 13771 and 13777. NMA will continue to monitor any developments and opportunities during the Biden administration.

Litigation:

On March 30, 2021, a unanimous Fourth Circuit panel held that a mine was not liable under SMCRA when the CWA permit shield applies. *Southern Appalachian Mountain Stewards et al. v. Red River Coal Co., Inc.,* 2021 WL 1182464 (4th Cir. Mar. 30, 2021). The court's ruling affirmed a district court holding that an operator cannot be held liable under SMCRA for a discharge that is otherwise shielded from liability by the CWA. The court's opinion expressly relied on the Sixth Circuit's decision in *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281 (6th Cir. 2015), which reached the same conclusion.

NPDES APPLICATIONS AND PROGRAM UPDATES RULE

PRIORITY B – EPA & CONGRESS

Background:

Administrative:

EPA began updating its NPDES regulations and application forms in 2009 and proposed a rule in May 2016. Several of the proposed revisions in that rule would have negatively impacted the mining industry. Specifically, the proposed rule including a provision that would have allowed EPA to designate certain administratively continued permits as "proposed permits."

This provision would have applied to existing permits that were past their statutory five-year limitation but had been continued in effect by operation of law because the state had not yet

acted on the permittee's renewal application. Under the proposed revision, "environmentally significant" permits that have had administratively continued for either two or five years (EPA sought comment on which timeframe was appropriate) would have been designated by EPA regional offices as "proposed permits" subject to EPA review and objection. Among "environmentally significant" permits were those to which new or revised water quality standards or effluent limitations would apply; that implicated threatened or endangered species, public concerns or environmental justice issues; that were subject to national program priorities (which include "keeping industrial, including mining, pollutants out of the nation's waters"); and that posed potentially significant impacts to impaired or threatened waterbodies or drinking water resources.

NMA filed comments on the proposal in Aug. 2016 that strongly objected to the administratively continued permit provision in the proposed rule. NMA also highlighted the rule as part of EPA's regulatory reform process, noting that it should be revised/repealed based on the fact that it is unnecessary, intrudes upon the rights of states, and inhibits job creation. Once the rule was again placed on EPA's unified agenda, NMA raised the issue to EPA's Office of Water. EPA published the final rule on Feb. 12, 2019. However, the agency only moved forward with certain less controversial aspects of the original proposal and deferred other aspects for re-proposed for additional notice and comment.

Legislative:

House Transportation and Infrastructure Committee held a markup on Oct. 29, 2019 of an amended H.R. 1497, the Water Quality Protection and Job Creation Act of 2019. It passed out of committee with bipartisan support. Provisions in the bill would allow municipal discharge permits to have 10-year (as opposed to the industrial 5-year) terms. While the 10-year term limit would benefit municipalities, the additional modification provisions that would be problematic for many industries. Additionally, an amendment introduced by Rep. Garamendi (D-CA) that was incorporated into the bill would be problematic for the mining industry and other regulated industries. This provision would require state NPDES permitting authorities to notify EPA and Congress if an NPDES permit has not been renewed within 30 days of its expiration date, and if the state does not make a final decision within 180 days of its expiration date, it requires EPA to take over and make a final decision within 180 days after that. NPDES permits are frequently "administratively continued" after their expiration date.

Status:

Administrative:

There is no indication that EPA plans to re-propose for additional notice and comment the problematic provisions concerning the administratively continued permit provisions.

Legislative:

NMA and other allied industries have advocated against these provisions in H.R. 1497. We met with House T&I Republican staff and Senate EPW Republican staff to share the practical importance of administratively continued permits to our members and reiterated the numerous problems with those provisions of the bill. In June, NMA and 29 other associations sent a letter to Chairman Barrasso, Ranking Member Carper, Chairman DeFazio and Ranking Member Graves expressing concerns related to the possible legislative changes proposed in HR 1497 related to NPDES permits. This letter and our advocacy were especially timely, as Rep.

Garamendi offered an amendment on HR 2 on the NPDES issue but it was not accepted in order and was not incorporated into the bill.

TECHNICAL REPORT ON PROTECTING AQUATIC LIFE FROM EFFECTS OF HYDROLOGIC ALTERATION

PRIORITY B – EPA & USGS

Background:

In March 2016, EPA and the US Geological Survey released a draft technical report, *Protecting Aquatic Life from Effects of Hydrologic Alteration*. The report outlines the impacts hydrologic alteration, particularly stream flow modification, can have on aquatic life, and provides a framework states can use to develop numeric flow regime targets necessary to support the biological integrity of streams and protect aquatic ecosystems. According to the draft, those targets, and flow information generally, can be incorporated into state water quality standards, CWA Sec. 402 National Pollutant Discharge Elimination System (NPDES) permits, Sec. 404 dredge and fill permitting, Sec. 401 state water quality certifications, and Total Maximum Daily Load (TMDL) development.

NMA submitted comments on the report on June 17, 2016. NMA's comments pointed out a number of significant concerns with the draft report, including the incorrect underlying assumption in the report that any modification in natural stream flow results in a degradation of downstream aquatic life, the report's incomplete legal analysis, and the potential for states and outside parties to misapply the information contained in the report. NMA's comments also noted instances where strict numeric stream flow targets are inappropriate, such as when they could conflict with CWA programs, state water rights, or requirements of SMCRA. In light of such issues, NMA asked that EPA withdraw the draft report or, at a minimum, remove the legal analysis sections in the report, better clarify EPA's intended use for the report, and consult with other relevant state and federal agencies before finalizing the report. NMA also stressed that, should EPA finalize the draft report, it should amend the report so that, rather than focusing on establishing numeric flow targets, the report instead aims to provide states which have adopted narrative flow criteria with information critical to implementing that criteria in a manner that best protects water quality goals.

EPA finalized the report Dec. 21, 2016. In response to comments, EPA and USGS removed the highly problematic legal and policy analysis sections that had been included in the draft version of the report. The final report also, as requested by NMA, acknowledges that any effects mining may have on streamflow are impacted by the type and timing of reclamation activities. Unfortunately, however, the final report maintained the draft report's focus on the degradation of aquatic life caused by hydrologic alteration without discussing the potential benefits of flow alteration or acknowledging that numeric flow targets can conflict with CWA programs and other applicable federal and state laws. Additionally, while stressing the nonprescriptive nature of the framework provided, the report still may be inappropriately utilized by organizations in the context of CWA citizen suits.

Status:

During the Trump term, NMA highlighted the report in its regulatory reform submission to EPA, noting that it should have been revised/repealed under that administration's executive orders.

NMA will continue to monitor this issue.

FISH CONSUMPTION RATE CALCULATIONS

PRIORITY B – EPA

Background:

EPA has been changing how fish consumption rates, which are used in the derivation of water quality criteria, are calculated. In 2011, Oregon changed its fish consumption rate from 17.5 to 175 grams/day to calculate its water quality standards. Environmentalists also brought suit in Washington to force a revision to Washington's rate. EPA has subsequently been trying to require other states to similarly use higher rates in revising water quality criteria for toxic pollutants.

In Apr. 2014 EPA issued a final report on estimated consumption rates in certain populations, and in May, 2014 EPA released draft ambient human health criteria for 94 chemical pollutants using updated default fish consumption rate (from 17.5 grams per day to 22 grams per day based on NHANES data from 2003-2013). EPA also recommended a four preference hierarchy with respect to determining fish consumption rates: 1) use of local data; 2) use of data reflecting similar geography/population groups; (3) use of data from national surveys; and (4) use of EPA's default intake rates.

EPA Guidance on Fish Consumption Surveys - EPA issued a draft revision of its guidance for conducting fish consumption surveys which includes a separate section on how to account for "suppression" of fish consumption due to concerns regarding contamination. EPA's policy preference for an "unsuppressed" Fish Consumption Rate (FCR) in Maine is what led to the 286 grams/day EPA proposed in its Maine federal rule. EPA finalized the guidance in Dec. 2016. The final guidance includes accounting for "suppression" of fish consumption.

Idaho - EPA disapproved Idaho's revised human health criteria for 88 pollutants in May 2012, which were based on the national default fish consumption rate of 17.5 grams per day. EPA stated that the state needed to better account for tribal subsistence fishers, as well as recreational anglers, who consume fish at rates higher than the national default rate. Idaho initiated a year-long statewide survey to estimate fish consumption rates in April 2014 and then proposed a rule in Oct. 2015 for legislative review with a proposed fish consumption rate of 66.5 grams per day. Idaho submitted their final rule, which became effective Mar. 25, 2016 and includes the 66.5 grams per day fish consumption rate, to EPA for approval on Dec. 13, 2016.

Washington State Revised Draft Criteria - The Affiliated Tribes of Northwest Indians asked EPA to take a "regional approach" that would require Washington and Idaho to use Oregon's approach, which at the time was the highest fish consumption rate in the U.S. Washington issued a proposal in Sept 2014 drastically raising its current rate of 6.5 g/day to 175 g/day and utilizing a 10^{-5} risk level, but withdrew the package in light of concerns by certain stakeholders and EPA. In Sept. 2015 EPA proposed to revise Washington's human health criteria based on a

fish consumption rate of 175 g/day. NMA filed comments objecting to the use of tribes as the target population for all waters in the state.

Washington State then issued revised criteria using a 10^{-6} risk level. Washington issued final criteria in Aug. 2016, along with a document explaining the differences between its final rule and EPA's proposed rule. For example, EPA's proposed rule did not include implementation measures, while Washington's did, and Washington is taking a more reasonable approach to Relative Source Contributions and Bioaccumulation Factors, two issues industry is also challenging in Florida.

EPA approved in part and disapproved in part Washington's final rule in Nov. 2016. Specifically, EPA approved 45 human health criteria, as well as certain revisions regarding narrative criteria, variances and compliance schedules. However, EPA disapproved 143 human health criteria, and marts of the narrative and variance revisions. Both EPA and Washington state ultimately utilized a fish consumption rate of 175 g/day.

Maine Criteria – In Apr. 2016 EPA proposed federal standards for Maine after finding that Maine's standards were not adequately protective of sustenance fishers. EPA finalized its federal standards in Dec. 2016. EPA used a fish consumption rate of 286 grams per day to calculate the standards for certain waters "to protect tribal sustenance fishers in Maine."

Supreme Court Case – In March 2018, NMA joined with the American Forest & Paper Association (AF&PA) in filing an amicus brief to the U.S. Supreme Court in the case of *Washington v. United States*. The case involved the appeal of a decision by the U.S. Court of Appeals for the Ninth Circuit ordering the state of Washington to remove hundreds of highway culverts alleged to prevent salmon migration based on tribal treaty rights to "take fish." NMA's brief highlights several of the far-ranging implications of the Ninth Circuit's treaty interpretation, including the federal imposition of inappropriate CWA human health water quality criteria and usurpation of state authority over land and water use decisions.

In June 2018, the U.S. Supreme Court issued a one-line decision affirming the Ninth Circuit decision by default given Justice Kennedy's recusal, which resulted in a 4-4 split on the Court. The decision therefore limits the Ninth Circuit's ruling to the culverts at issue. The issue of whether the treaty rights can be used to impose an environmental servitude on a broad range of activities, in particular to impose more stringent HHWQC, is left to be decided in a future case. However, importantly, the U.S brief in the case contained favorable language on the interplay between tribal treaties and state activities, making it clear that the Ninth Circuit Court of Appeals decision that was the subject of the Supreme Court review did not establish a broad "environmental servitude" that could be applied to a broad range of human activities that can affect salmon, but rather was a narrow ruling limited to specific facts – i.e., whether Washington State may obstruct fish passage by building culverts in a manner that degrades fisheries such that tribes are unable to harvest a sufficient quantity of salmon to meet their sustenance needs.

Status:

This issue has played out in other EPA rulemaking contexts, as described previously in the entries on EPA's efforts involving water quality standards and tribes, and Washington's HHC. NMA will continue to monitor this issue and engage with members on next steps.

AQUATIC RESOURCES OF NATIONAL IMPORTANCE (ARNIS)

PRIORITY B – EPA & ARMY CORPS

Background:

Via a 1992 404(q) MOU between EPA and the Corps, EPA can request elevated review of pending 404 permits where the resource involved constitutes an aquatic resource of national importance (ARNI). An ARNI is a resource-based threshold used to determine whether a dispute between EPA and the Corps regarding individual permit cases are eligible for elevation under the 1992 MOA. Factors used in identifying ARNIs include: economic importance of the aquatic resource, rarity or uniqueness, and/or importance of the aquatic resource to the protection, maintenance, or enhancement of the quality of the nation's waters. Past 404(q) elevations have identified the Chesapeake Bay, vernal pools, bottomland hardwoods, sub-alpine fens, bogs, and coastal marshes as ARNIs.

ARNI is not a designation found in the CWA or implementing regulations - rather, it is solely a product of the 1992 MOU. EPA has taken the view that the Corps, states and applicants cannot challenge their ARNI designation (which EPA makes on a case-by-case basis with no official criteria), and is expanding its application to include headwaters streams, etc. EPA appears to be using this as a delay and information-gathering tactic, as well as to at times extract higher mitigation ratios. ARNIs have been used in Regions 4 and 5 with some frequency. NMA has in the past worked to highlight this issue to Congress.

Status:

Trump Administration:
NMA highlighted the various ARNI MOUs in its EPA regulatory reform comments as candidates for revision under Executive Orders 13771 and 13777. NMA further highlighted the issue to the ASA(CW) and other top Corps staff in a Jan. 2018 meeting.

NMA will continue to monitor developments.

EPA ENCHANCED COORDINATION PROCESS AND GUIDANCE ON REVIEWING COAL MINING PERMITS

PRIORITY B – EPA

Background:

EPA issued guidance effective immediately on April 1, 2010, changing the regulatory requirements for review of coal mining permits in six Appalachian states. EPA issued final guidance in July 2011, which NMA challenged in court along with EPA's enhanced coordination process.

Litigation: *NMA v. McCarthy*. After bifurcating the case into two challenges – one to EPA's enhanced coordination process applied to the Corps' 404 permit program, one to the guidance document – the DC Circuit Court issued opinions striking down both actions as violative of the

APA and CWA. EPA appealed the decisions to the D.C. Court of Appeals. A group of industry groups, as well as a group of state Ags, both filed briefs in support of NMA's position. However, the D.C. Circuit reversed the lower court, holding that the guidance document amounted to merely a general statement of policy and as a legal matter "imposed no obligations" and was therefore not final agency action subject to judicial review under the APA. The court also held that the "enhanced coordination process" did not violate the CWA or APA, as it amounted to mere consultation and coordination between federal agencies.

Guidance Document: The Appellate Court held that EPA could not rely on the document itself as the basis for an enforcement action, and that industry could challenge the application of the guidance in the context of any future permit denial. NMA has pushed for legislation addressing the issue. NMA also highlighted the guidance documents in its regulatory reform comments to EPA as candidates for rescission/revision under Executive Orders 13771 and 13777. *See also* conductivity methodology development.

Status:

NMA will continue to monitor.

MEMORANDUM ON SMCRA/CWA INTERPLAY

PRIORITY C – OSM

Background:

OSM in July 2016 released a memo to OSM's regional and field office directors and division chiefs titled "A More Complete Enforcement of SMCRA and its Implementing Regulations." The memorandum, which included many of the concepts included in the final Stream Protection Rule, provided OSM with several enforcement directives concerning SMCRA permitting and implementation. Importantly, the memorandum stated that OSM has a duty to investigate any Notices of Intent to Sue (NOIs) alleging CWA violations at SMCRA-permitted operations, and to issue a Ten Day Notice (TDN) in primacy states if there is reason to believe that a SMCRA violation (i.e., a CWA violation) exists.

The memorandum's enforcement directives also included a statement that discharges in violation of state and Federal water quality laws, regulations and standards are violations of SMCRA; the requirement that SMCRA authorities coordinate with CWA authorities to "determine the appropriate response to potential numeric and narrative WQS violations;" and the requirement that enforcement action – i.e., federal inspections or TDNs – occur if OSM is presented with reason to believe that a coal permittee is failing to comply with National Pollutant Discharge Elimination System (NPDES) effluent limitations or meet applicable WQSs, or if evidence exists of a release of toxic mine drainage or material damage to the hydrologic balance outside the SMCRA permit. For long-term discharges, the memorandum noted that enforcement action may include modification of the hydrologic reclamation plan and adjusted performance bonds.

The June 2016 memorandum was rescinded on Oct. 12, 2017 via a memo from Department of Interior Acting Assistant Secretary for Land and Minerals Management Kate MacGregor.

Status:

NMA will continue to monitor.

NATIONWIDE PERMITS (NWPs)

PRIORITY C – ARMY CORPS

Background:

The Corps issues NWPs to authorize activities under Sec. 404 of the CWA and Sec. 10 of the Rivers and Harbors Act where those activities will result in no more than minimal individual and cumulative adverse environmental impacts. The goal of the NWP program is to authorize such activities with little delay or paperwork. The NWPs generally are reauthorized every five years but can be reviewed by the Corps at any time.

Administrative:

During the Trump administration, NMA highlighted the Corps' nationwide permit program as a candidate for revision under E.O. 13777. In Sept. 2017, the Corps released a "Review of 12 Nationwide Permits Pursuant to Executive Order 13783, Promoting Energy Independence and Economic Growth." In that document, the Corps provided draft recommendations on the NWP program, including the recommendation to remove the current 300 linear foot limit on NWPs 21 and 50, and to remove the requirement that a permittee obtain written authorization from the Corps prior to commencing the NWP activity and instead have a default NWP authorization if the Corps district does not respond to a pre-construction notification within 45 days of receipt for NWPs 21, 49, and 50.

NMA and an industry coalition met with OMB to encourage the expeditious issuance of the proposed suite of NWPS. On September 15, the Corps published in the *Federal Register* its proposal to reissue and modify the NWPs. In November 2020, NMA filed comments and joined coalition comments submitted by the Waters Advocacy Coalition on the proposed reissuance and modification of the suite of NWPs. NMA's comments generally supported the Corps' proposal and recommended several modifications that would further remove administrative burdens and make the NWPs more usable for the mining industry.

In Jan. 2021, the Corps published its final rule reissuing and modifying a portion of its Nationwide Permits (NWPs). 86 Fed. Reg. 2,744 (Jan. 13, 2021). A summary chart is available here. Overall, the Corps reissued a modified 12 existing NWPs (12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52) and issued four new NWPs (55, 56, 57, 58). The 12 reissued NWPs replaced the 2017 versions of those permits, which now expire March 14, 2021. These expiration date for these new NWPs is five years after the date those NWPs go into effect. The Corps declined to reissue or modify the remaining 40 existing NWPs or finalize proposed new NWP E at that time. Of importance to the mining industry, the Corps finalized the proposed removal of the 300 linear foot limit for losses of stream bed from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, 52. On Dec. 27, 2021 the U.S. Corps published its final rule reissuing and modifying the 40 NWPs that it had delayed finalizing earlier in 2021. 86 Fed. Reg. 73522 (Dec. 27, 2021). Recall that during the previous administration, the Corps proposed to reissue 52 existing NWPs and issue five new NWPs, plus the NWP general conditions and definitions.

The Corps decided to split the package of NWPs into two groups. The first group of NWPs (12 of the 52 existing NWPs, four of the five new NWPs, general conditions, and definitions) were finalized and reissued in Jan. 2021. The next batch of NWPs, including the remaining 40 NWPs and one new NWP, were reissued in a final rule published on Dec. 27, 2021. The NWP general conditions and definitions published with the earlier group of NWPs in Jan. 2021 apply to the 41 NWPs reissued or issued in this final rule. Of importance to the mining industry, NWP 49 for coal remining activities was modified between the proposed and final rules stages. The Corps proposed to remove the provision that requires the permittee to obtain written verification from the district engineer before proceeding with the authorized activity to make this NWP consistent with the other NWPs that have a default authorizations when a district engineer does not respond to a complete preconstruction notification (PCN) within 45 days of receiving that PCN from the project proponent. NMA supported this change, but many other commenters expressed opposition to this change. Unfortunately, in the final rule, the Corps decided to retain the provision that requires the permittee to obtain written authorization from the district engineer prior to commencing the authorized activity because "coal remining activities can vary substantially in size and can cover large areas" and "[a]dditional time may be needed for the project proponent to demonstrate to the district engineer that the authorized activity will result in a net increase in aquatic resource functions." 86 Fed. Reg. 73554 (Dec. 27, 2021). The 41 NWPs in this final rule will go into effect on Feb. 25, 2022 and will expire on March 14, 2026.

On March 28, 2022, the Corps published a *Federal Register* notice announcing a formal review of NWP 12 for oil or natural gas pipeline activities. 87 Fed. Reg. 17281 (March 28, 2022). While NPW 12 applies only to oil and natural gas pipeline activities, NMA decided to file comments because we were concerned the Corps' review of NWP12 could have a broader ripple effect on the program. The notice focused on the lack of opportunity for environmental justice communities to comment on NWPs and pointed to a recent example in Memphis, Tenn., where the NWP 12 process "did not afford any opportunity for notice to the community, a written comment period or a public hearing prior to the Corps providing authorization of the pipeline" that was at issue there. Id. at 17282. Several of the questions posed for public comment also could limit the viability of NWP12 and could be applied to other NWPs. Id. at 17283.

Status:

Administrative:

The Fall 2022 Unified Agenda states the Corps "may seek to modify NWP 12" based on input received. A proposed rule is slated for Aug. 2023. However, we understand the Corps may not move forward with this proposal. NMA will keep you informed of important developments.

Litigation:

NWP 12 has been the subject of ongoing litigation for several years. Most recently, environmental groups sued the Corps in the U.S. District Court for the District of Montana. On Aug. 18, 2022, Judge Morris transferred the case to the U.S. District Court for the District of Columbia. Briefing in that court is ongoing.

REVISED AQUATIC LIFE CRITERIA – COPPER

PRIORITY C – EPA

Background:

EPA has been updating its approaches to copper criteria development.

Saltwater: In July 2016, EPA released its Draft Aquatic Life Ambient Estuarine/Marine Water Quality Criteria for Copper – 2016. The draft criteria incorporate the recently-developed saltwater biotic ligand model (BLM), which allows users to develop both chronic and acute values based on site-specific water quality variables that influence the bioavailability and toxicity of copper in estuarine/marine environments, including temperature, dissolved organic carbon, salinity and pH. According to EPA, the draft criteria also include new acute toxicity data for estuarine/marine species. Comments on the draft criteria were due Sept. 27, 2016.

Freshwater: In Feb. 2016, EPA released a draft technical support document intended to provide information to states, tribes and regulated entities concerning the application of EPA's 2007 BLM freshwater aquatic life criteria for copper, "Recommended Estimates for Missing Water Quality Parameters for Application in EPA's Biotic Ligand Model." The BLM predicts metal toxicity using ten site-specific water quality parameters, but data for those parameters is not always available in receiving waters. As such, the draft document summarizes EPA's recommendations for default values for the parameters necessary to calculate the BLM freshwater copper criteria, as well as the approaches EPA used to develop them. According to EPA, this method of estimating missing water quality parameters is necessary to facilitate the use of the BLM by states. EPA is currently reviewing the public comments received on the draft document, but there have been no further developments.

Status:

NMA will continue to monitor this issue.

NEPA AND HEALTH EFFECTS STUDIES

PRIORITY C – ARMY CORPS

Background:

Environmental groups have initiated lawsuits against non-NMA members alleging the Corps must take the Hendryx health effects study and other similar studies into account during the NEPA process for mining operations.

Litigation: In July, 2015, the U.S. Court of Appeals for the Fourth Circuit rejected environmentalists' claims that the Corps violated NEPA and the CWA by failing to consider studies linking surface coal mining activities with adverse public health effects when determining whether to issue a CWA Sec. 404 permit associated with mining through streams. In a unanimous decision, the court in *Ohio Valley Environmental Coalition (OVEC) v. Corps* held that the Corps appropriately limited the scope of its analysis to the effects of the discharge of fill material authorized by the Sec. 404 permit, not the effects of mining generally. Rather, because SMCRA provides an approved state with the "exclusive authority to authorize surface coal

mining," the Corps was correct in determining that "the relationship between surface coal mining and public health are not within the purview of the Corps' regulatory authority. Importantly, the ruling reaffirms the 4th Circuit's 2009 decision in *OVEC v. Aracoma Coal Company*.

Pursuant to the Corps' NEPA regulations, the Corps must address only "the impacts of the specific activity requiring a Sec. 404 permit and those portions of the entire project over which the [Corps] has sufficient control and responsibility to warrant Federal review." Therefore, stressing that "the great bulk of environmental effects associated with surface coal mining operations are authorized by WVDEP's granting of a SMCRA permit, not by the Corps' granting of a Sec. 404 permit," the 4th Circuit in both *Aracoma* and *OVEC* held that the Corps' authority and corresponding NEPA analysis extended "only to those environmental impacts associated with the specific discharge of fill material authorized" by the Sec. 404 permit. The court also held that the CWA's language prohibiting the Corps from issuing a Sec. 404 permit that involves "significantly adverse effects on human health and welfare" and requiring the Corps to conduct a public interest review prior to issuing a Sec. 404 permit likewise did not require the Corps to consider the health effects studies in question. Specifically, the decision states that, while such "provisions certainly require the Corps to take into account the public-health effects of a proposed discharge of fill material before granting a Sec. 404 permit…they do not create an obligation for the Corps to study the effects of activities beyond the proposed discharge itself."

Studies: The National Academy of Sciences announced in Sept. 2016 that it had started work on its new 24-month study, "Potential Human Health Effects of Surface Coal Mining Operations in Central Appalachia" via the Committee on Earth Resources. According to NAS, the study was requested by OSM and DOI, and was designed to examine the potential relationship between increased health risks and living in proximity to sites that have been or are being mined or reclaimed for surface coal deposits. The study was focused on four states in Central Appalachia. NMA nominated Dr. Borak to be on the ad hoc committee conducting the study, but he was not selected for participation. On Aug. 18, 2017 the Office of Surface Mining instructed NAS to "cease all work on a study of the potential health risks for people living near surface coal mine sites in Central Appalachia."

Separately, in Jan. 2015, the National Toxicology Program at the US Department of Health and Human Services received a nomination to review the potential health effects of MTM. OHAT conducted a systematic review of published studies of MTR mining and community health, occupational studies of MTR mining, and any available animal in vitro experimental studies to investigate the effects of exposures to MTR mining-related mixtures. The review was made available in July, 2017 and may be accessed here. According to the report, "the systematic review could not reach conclusions on community health effects of MTR mining because of the strong potential for bias in the current body of human literature. Improved characterization of exposures by future community health studies and further study of the effects of MTR mining…will be critical to determining health risks of MTR mining to communities." The report notes the concern for risk of bias "especially with respect to exposure characterization, accounting for confounding variables (such as socioeconomic status), and methods used to assess health outcomes."

Status:

Several environmental groups have identified the halting of this study as a potential issue for the Biden administration to address. NMA will continue to monitor developments.

COOLING WATER INTAKE STRUCTURE RULE FOR ELECTRIC-GENERATING FACILITIES UNDER CWA 316(B)

PRIORITY C – EPA

Background:

In May 2014 EPA finalized standards addressing fish impingement and entrainment at cooling water intake structures for existing electric-generating facilities. Once the rule was finalized, NGOs filed lawsuits claiming that the rule was too lenient and that FWS needed a bigger role, and industry filed lawsuits challenging parts of the rule. Lawsuits were consolidated in the 2nd Cir. In July 2018, the 2nd Cir. denied all challenges to the rule. Environmental organizations petitioned for a rehearing *en banc*, which the 2nd Circuit rejected. However, in response to the petition, the 2nd Circuit did issue an amended decision, which now suggests that EPA must federalize state-issued permits that it determines do not comply with the ESA or CWA and initiate Sec. 7 consultation with the Services. The original opinion implied that EPA could, but did not have, to do so. The rule is currently in effect and EPA has sent implementation guidance to its regional offices.

Last year, a draft manual titled "Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment – Sec. 316(b) P.L. 92-500" dated May 1, 1977 was rescinded by EPA's Office of Water because it had not been finalized within two years of its drafting.

Status:

NMA will continue to monitor this issue.

REGIONAL MONITORING NETWORKS TO DETECT CLIMATE CHANGE EFFECTS IN STREAM ECOSYSTEMS

PRIORITY C – EPA

Background:

In Dec. 2014 EPA released a report outlining its development of regional monitoring networks (RMNs) designed to collect data from freshwater streams to quantify and monitor impacts related to climate change. The document, "Regional Monitoring Networks to Detect Climate Change Effects in Stream Ecosystems," describes EPA's development of pilot RPNs in the Northeast, Mid-Atlantic and Southeast regions, including EPA's selection of candidate sites, expectations and rationale for data collection and examples of how the data will be used and analyzed. The report includes recommendations on best practices for data collection, and states that EPA will use the information gathered in the pilot regions in initial evaluations and data analyses. The report also encourages other regions interested in establishing RMNs to collaborate with outside organizations such as academia and volunteer monitoring groups to make future networks more robust, and states that the RMN framework can further be used to evaluate estuaries, lakes, wetlands and low gradient streams.

Status:

According to EPA's science inventory database, there have been two presentations in the last two years regarding regional monitoring networks. One titled "Overview of Regional Monitoring Networks" was held on March 4, 2020 and the second titled "Challenges from the Regional Monitoring Networks: Continuous Data Tools and Management" was held June 10, 2021. NMA will continue to monitor this issue.

OCEAN ACIDIFICATION INITIATIVES

PRIORITY C – EPA/NOAA/NOC

Background:

On Nov. 15, 2010 EPA issued "Integrated Reporting and Listing Decisions Related to Ocean Acidification" for considering ocean acidification (OA) impacts under the CWA. NOC also included ocean acidification considerations in its draft ocean plan strategy. The 2012 TMDL Listing Cycle and Ocean Acidification reaffirmed EPA's Nov., 2010 memorandum to the Region's Water Division Directors regarding the preparation of Integrated Reports (IRs) related to OA impacts under Secs. 303(d), 305(b) and 314 of the CWA. States must now list waters not meeting marine pH water quality criteria on their 303(d) lists and must solicit existing and readily available information on OA using the listing program framework. In May, 2014 EPA agreed to convene an expert work group to identify water quality criteria on OA.

NMA submitted comments on the National Ocean Council's draft ocean plan with respect to, among other things, its treatment of OA. CBD also submitted a petition for establishment of standards for pH for 15 coastal state. California and Washington are working on their own initiatives on marine acidification and EPA is tracking those efforts. In April, 2016 the West Coast OA And Hypoxia Science Panel – a collaboration between California, Oregon, Washington, and British Columbia – finalized its papers.

CBD also sued EPA on their approval of Washington and Oregon's decisions not to identify waters experiencing OA on their 303(d) impaired waters lists. In Feb., 2015 a district court judge upheld EPA's approval of state decisions. In April 2015, a system was deployed to observe Casco Bay Maine and help coastal managers evaluate the threat of coastal acidification from excess CO2 in the atmosphere. EPA provided $85,000 towards the effort.

On Sept. 8, 2016, CBD filed a complaint against EPA for failure to respond to their petition seeking the development of new water quality standards to protect marine life from OA. Specifically, CBD's petition asks EPA to update its criteria for ocean acidity – originally developed in 1976 – to reflect new science on OA. CBD voluntarily dismissed the case on Jan. 4, 2017.

A study published in *Nature Communications* in Sept. 2017 shows increased acidification in the Chesapeake Bay, and argues that the government must act to prevent destabilization of the estuary's ecosystem. Oregon state also formed the Coordinating Council on Ocean Acidification and Hypoxia in 2017 to review science and research and recommend ways for Oregon to respond to the issue.

On Sept. 14, 2018, the Oregon Ocean Acidification and Hypoxia Council released its first bi-annual report, which includes 38 recommendations to the state legislature. The recommendations include: strengthening monitoring and research initiatives, reducing causes of ocean acidification and hypoxia through the development of a coordinated approach for management and mitigation, promotion of ecosystem resilience, raising of awareness, and commitment of resources to support a sustained, long-term approach to addressing ocean acidification and hypoxia.

Scientists at the University of Virginia also created a new model that predicted Atlantic sea scallop fisheries could be reduced by more than 50% in the next 100 years due to ocean acidification.

Legislative

On March 13, 2019, Sen. Murkowski (R-AK) introduced S. 778, the Coastal Communities Ocean Acidification Act of 2019. This bill requires the National Oceanic and Atmospheric Administration (NOAA) to conduct and update at least once every seven years an ocean acidification coastal community vulnerability assessment with a corresponding public report. The assessment must identify (1) U.S. coastal communities that are most dependent on coastal and ocean resources that may be impacted by ocean acidification; (2) the nature of those communities' vulnerabilities; and (3) key knowledge gaps where research could be devoted to better understand the possible ocean acidification impacts and possible adaptation strategies for the communities. In carrying out the assessment, NOAA must collaborate with state, local, and tribal government entities that are conducting or have completed vulnerability assessments, strategic research planning, or other similar activities related to ocean acidification to determine whether those activities may serve as a model for others and to identify opportunities for federal agencies to support those activities. At the same time, a companion bill (H.R. 1716) was introduced in the House by Rep. Chellie Pingree (D-ME). This bill passed the House on June 5, 2019 and was then referred to the Senate Committee on Commerce, Science, and Transportation.

Status:

Litigation:

On March 31, 2021, CBD renewed its push for EPA to list waters off the coast of Oregon as impaired by OA caused by climate change and filed its notice of intent to sue EPA under Sec. 303(d) of the CWA. NMA will continue to monitor developments.

REVISING CWA SECTION 404(B)(1) GUIDELINES

PRIORITY C – EPA

Background:

Obama Administration:
The Obama EPA and Corps June 2009 MOU on MTM Mining states the agencies will revise Sec. 404(b)(1) guidelines. However, no further action was taken by the Obama Administration.

Trump Administration

NMA highlighted the MOU in its EPA regulatory reform comments, arguing that it is a candidate for revision/rescission due to the fact that it eliminates jobs and inhibits job creation, imposes costs that exceed its benefits, place undue burden on the development and use of domestic energy resources, and infringes upon state primacy under the CWA.

Status:

NMA will continue to monitor.

REVISING MITIGATION GUIDELINES

PRIORITY C – EPA & ARMY CORPS

Background:

The Obama EPA and Corps announced revising mitigation guidelines as one task for completion under the June 2009 MOU on MTM in the six Appalachian states. In 2011, EPA held an Appalachian Stream Mitigation workshop, but took no further action. During the Trump administration, NMA highlighted the MOU in its EPA regulatory reform comments, arguing that it is a candidate for revision/rescission due to the fact that it eliminates jobs and inhibits job creation, imposes costs that exceed its benefits, place undue burden on the development and use of domestic energy resources, and infringes upon state primacy under the CWA.

Status:

NMA will continue to monitor.