



Recap from the Trenches: Reactions to EPA's 2023 Big Air Agenda

10.19.2023

The first three quarters of 2023 have seen an unprecedented number of rulemakings under the Clean Air Act. The Biden administration has released a new suite of proposed rulemakings with a particular focus on climate change and air toxics. In our April newsletter, we highlighted air rules to put on your watch list. Since then, air professionals have been hard at work digesting and commenting on the Biden administration's ambitious air agenda. Take a ticket aboard this adventure in the making. A review of the most impactful new air regulations and sleepers follows.

Big Air Watch List

- **Reconsideration of the Particulate Matter (PM) National Ambient Air Quality Standard (NAAQS) (Forthcoming 2023 Final Rule):** At the beginning of the year, EPA released a rule to lower the existing PM 2.5 NAAQS Annual Standard from $12.0 \mu\text{g}/\text{m}^3$ (current) to either $9.0 \mu\text{g}/\text{m}^3$ or $10.0 \mu\text{g}/\text{m}^3$. The comment period for the proposed rule ended on March 28, 2023. The final rule is presently at the Office of Management and Budget (OMB) and is expected to be released this fall.
 - **Impacts and Reaction:** A lower PM 2.5 NAAQS standard will cause ambient modeling for permitting to be more challenging because background (baseline) ambient concentrations are close to the proposed new standards. The rule will impact all industry sectors. Since the proposed rule was released, parties developing new greenfield projects are looking at background PM 2.5 values at potential locations before committing to build. Site shopping may help potential permittees avoid modeling challenges and obtain air permits sooner.
- **Good Neighbor Federal Implementation Plan (FIP) (2023: Final Rule released on March 15, 2023, ongoing implementation):** The Final Rule addresses summer NO_x emissions. The Final Rule applies to twenty-three states to address their Good Neighbor obligations to eliminate significant contribution or interference with maintenance of the 2015 Ozone NAAQS in other states. The power sector and many industrial manufacturing sector categories are implicated. For the power sector, implementation is accomplished using the established Cross-State Air Pollution Rule (CSAPR) trading program. For certain industrial source categories, stationary sources must come into compliance by 2026. This rulemaking imposes dramatic NO_x reductions during the ozone season for all sectors in affected states. EPA has not yet acted on the possibility of adding six more

states (Arizona, Iowa, Kansas, New Mexico, Tennessee, and Wyoming) to the list of 23 upwind contributors to downwind attainment with the NAAQS in other states.

- **Impacts and Reaction:** Strong, consistent opposition to the Good Neighbor FIP persists among many affected upwind states and industry groups. Implementation is in disarray due to litigation challenges, including appellate cases challenging EPA's ozone transport state implementation plan (SIP) disapprovals and direct challenges to the Good Neighbor FIP itself. The cumulative effect of the litigation is that 12 states have stays that prevent EPA from implementing the Good Neighbor FIP with respect to sources within their boundaries. On September 25, 2023, the D.C. Circuit declined to put in place a stay of the Good Neighbor FIP in *State of Utah v. EPA*. Consequently, there is no nationwide stay of the Good Neighbor FIP, but the 12 Disapproval state stays remain in effect. In a recent rulemaking, EPA expressed willingness to provide sources within stayed states additional time for Good Neighbor FIP compliance that sources would have had absent a stay, should the stay be lifted. Affected sources must continue to follow the myriad of judicial challenges as they shape their FIP compliance strategy.
- **Power Sector Greenhouse Gas Rules (2023: Proposed Rule released, 2024 Final Rule)** EPA released five greenhouse gas rulemakings rolled into one momentous action ? applying to new and existing electric generating units. The proposed rule is largely based on the application of carbon capture and sequestration (CCS) and low-greenhouse gas co-firing technologies, even though neither are yet fully developed. These measures would not take effect immediately but would need to be deployed in the 2030s. The portion of the rule aimed at coal-fired units is effectively a coal shutdown rule that uses sunset categories unless CCS is applied, even though CCS is not geologically available in many portions of the country. New baseload gas generation must co-fire with hydrogen or pursue CCS.
 - **Impacts and Reaction:** More than a million public comments were filed. Utilities and regional transmission organizations (RTOs) cited reliability concerns. The proposed rule is set to shut down a substantial number of fossil generation units, yet this dispatchable energy must be replaced. EPA appears to disagree with utilities and RTOs as to the magnitude of the energy crisis this rulemaking would create. The power sector views the proposed rule as legally indefensible ? stepping beyond all reasonable boundaries set by the Clean Air Act. Comments contend that the major questions doctrine and the recent *West Virginia v. EPA* decision limits EPA's statutory authority to promulgate such expansive rules. Utilities currently are devising compliance strategies while maintaining options should the final rule be judicially struck. Concrete implementation plans are a challenge due to the unavailability of low-greenhouse gas hydrogen and infeasibility of CCS. All sectors should be watching this rulemaking due to its overall bearing on energy reliability.

The 2023 Sleepers

In April, we identified one ?sleeper:? The **Section 111(d) Implementation Rule (2023: Proposed / Final Rule expected)** will impact all industry sectors. It outlines the requirements for development of future Section 111(d) rules. The proposed rule lays out a scheme that narrows the states' roles in Section 111(d) implementation, adds expansive public engagement requirements, and imposes tight timeframes for states to work through state plans with sources. States would also have a higher bar to use ?remaining useful life? and ?other factors? to demonstrate that a less stringent emissions guideline is appropriate for an individual source. The final rule is scheduled to be released this fall. EPA is behind

its original schedule to issue the rule.

EPA's **Air Emissions Reporting Rule (AERR) (2023: Proposed / 2024: Final Rule expected)** is a proposed rule and a surprise newcomer to our watch list. On August 9, 2023, EPA published revisions that substantially modify the individual source and state requirements for emissions data reported to EPA. New annual hazardous air pollutants (HAPs) emissions reporting requirements for individual sources are the most visible change. The volume of data to be reported is extraordinary, especially for some small sources that may not have dedicated environmental staff or electronic emissions inventory systems. New mobile source reporting requirements may be difficult to implement. These new data are intended to be used to help EPA target new enforcement opportunities and protect vulnerable communities. This rule impacts all sectors.

High Level Take-Aways

EPA has released an uncompromising regulatory wish list of proposals meant to ratchet down the use of fossil fuels, improve ambient air quality for criteria pollutants, identify air toxics for use in enforcement, and add public engagement opportunities all around. To-date, many states and affected sources have pushed back in public comments and in litigation for the FIP. EPA will consider whether to roll back the proposals or merely whittle away at the edges in the forthcoming final rules. Additional litigation is certain, regardless of EPA's approach. These rulemakings are relevant to all industries, but particularly the power sector and any energy-intensive manufacturing category reliant on consistent and affordable power. If the proposed rules are finalized as-is, energy reliability and cost concerns are likely to arise.

Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, **88 Fed. Reg. 5558 (Jan. 27, 2023)**

The New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units, **88 Fed. Reg. 33240 (May 23, 2023)**

West Virginia v. EPA, **142 S.Ct. 2587, 2616 (2022)**

Federal Good Neighbor Plan for the 2015 Ozone National Ambient Air Quality Standards, **88 Fed. Reg. 36654 (June 5, 2023)**

Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, **88 Fed. Reg. 9336 (Feb. 13, 2023)**

Order issued Sept. 25, 2023, *State of Utah v. EPA*, No. 23-1157 (D.C. Cir.).

Federal Good Neighbor Plan for the 2015 Ozone National Ambient Air Quality Standards; Response to Additional Judicial Stays of SIP Disapproval Action for Certain States, **88 Fed. Reg. 67102 (Sept. 29, 2023)**

Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d), **87 Fed. Reg. 79176 (Dec. 23, 2022)**

Revisions to the Air Emissions Reporting Requirements, **88 Fed. Reg. 54118 (Aug. 9, 2023)**

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