

EPN All-Hands Call, Friday, September 20, 2019

This month's all-hands call provided a short explanation of the threat to California's Clean Air Act waiver and [proposed changes to New Source Performance Standards](#).

Presenters

Dave Coursen, former Attorney-Advisor at EPA's Office of General Counsel and co-lead of EPN's Member Engagement Team, hosted the call.

Joe Goffman, former Associate Assistant Administrator for Climate and Senior Counsel, EPA Office of Air and Radiation and current executive director of the Environmental and Energy Law Program at Harvard Law School, presented on the California waiver and New Source Performance Standards (NSPS) for the oil and gas industry.

California Clean Air Act Waiver

Joe Goffman began with a short explanation of the Trump Administration's recent attempts to block California's deal with automakers that maintains strong fuel efficiency standards. The actions taken on September 18 are twofold:

1. EPA announced that it has the authority under Section 209(b) of the Clean Air Act to reconsider and withdraw waivers that were previously granted, in this case to California for its Clean Car program. These waivers allow states to set stricter tailpipe emissions regulations than the national standard, but EPA is now arguing that it made a mistake when it originally granted California's waiver in 2009 and that the state is not facing "extraordinary conditions" to the extent that it requires expanded legal authority.
2. EPA is arguing that a National Highway Traffic Safety Administration (NHTSA) finding means that the Energy Production and Conservation Act (EPCA) preempts state authority to set tailpipe greenhouse gas emission standards where as here compliance with those standards is achieved through fuel economy improvements, which are governed by EPCA via NHTSA fuel economy requirements.

This goes beyond the new California deal with automakers; EPA is arguing that EPCA also preempts California's Zero-Emission Vehicle (ZEV) program, which has existed since 1990. It would also eliminate Section 177 authority under the CAA, which allows states to opt in to California's Clean Car programs. Currently, thirteen states and the District of Columbia have adopted California's standards.

As is the pattern with the Trump environmental record, the administration is pushing the legal envelope as far as conceivably possible. Instead of trying to nullify the California deal alone, EPA is trying to attack the legal foundation of the CAA and make it extremely difficult for future administrations to regulate tailpipe GHG emissions or grant CAA waivers for state action on automotive GHG.

New Source Performance Standards for the Oil and Gas Industry

Joe continued with his presentation and described the details of EPA's recent revisions to 2012 and 2016 NSPS for the oil and gas industry. As background, following a summit with Canada, EPA promulgated a rule in 2016 under Section 111(b) of the CAA to regulate volatile organic compounds and methane during production, processing, transmission, and storage. This was the first time methane was ever included as a regulated pollutant, even though as a greenhouse gas, methane is approximately thirty times as powerful as carbon dioxide.

In 2019, EPA proposed that the NSPS should only apply to production and processing. This would mean that regulation of emissions in the transmission and storage segments under Section 111 would be impossible until EPA made a separate determination that they constituted a source category whose

emissions posed a threat to public health and the environment. EPA also decided to completely withdraw all standards that addressed methane. What would be left are the volatile organic compound standards from 2016, but without any standards denominated in terms of methane. The practical effect is that if a future administration wants to regulate methane, it would have to redefine the source category to once again include transmission and storage, or it would have to create an entirely new source category for transmission and storage. While this proposal does permanently foreclose methane regulation, it would attenuated a significant number of authorities that a future agency would have to reinstate if it wanted to return to the level of regulation in 2016, and, perhaps more importantly, move beyond the 2016 standards to address methane emitted from existing sources. Again, the Trump Administration is taking an extreme legal stance in order to sabotage the legislative foundation for environmental regulation.

Following the presentation, we opened the line for questions and suggestions. Some of the ideas that came up were as follows:

- A legal battle over California's waiver is assured, with multiple organizations already pledging to file lawsuits. However, it is unknown whether automakers are able and willing to intervene on behalf of California, as the language in the agreement is terse.
- An economic valuation has, to Joe's knowledge, never been done for the risk of gas explosions and methane leaks. It would be a complex but very interesting analysis. One of the most dramatic explosion incidents was in Southern California and was far beyond CAA jurisdiction to analyze in the context of NSPS standards.
- The action was a Notice of Proposed Rule-Making, so other groups are likely to file comments and submit their objections to the Federal Register. Interestingly, some large companies such as BP and Shell have made clear that they support comprehensive methane regulation on new and existing sources, but it is unknown whether they will weigh in.