

# Air Management Study Group Quarterly Meeting

February 4, 2021



# Zoom Guidelines

Hello Everyone,

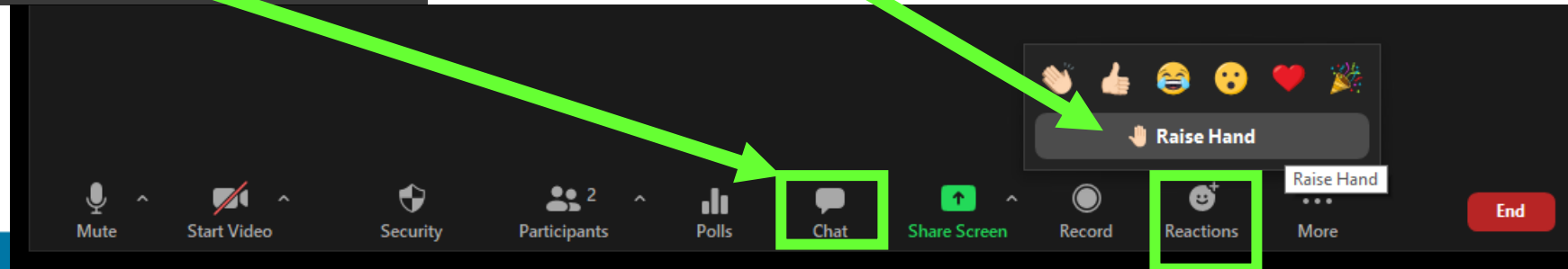
We've developed some guidelines for this meeting, in the hopes of making this a smooth and enjoyable experience for all. Thank you in advance for your understanding.



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# Zoom Guidelines

- Questions will be addressed at the end of the meeting.
- All participants will be muted and will not be able to unmute themselves.
- If you'd like to speak, use the "Raise Hand" button and you will be unmuted when appropriate.
- Questions may also be asked in the chat.



# Zoom Guidelines

- The host will attempt to respond to all messages received, but some messages may be missed.
- Participants will join the meeting with their video disabled. We ask that you keep your video disabled for the duration of the meeting.



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# Zoom Guidelines

- We ask for patience while the Air Program conducts this meeting with this setup.
- Zoom technical support: **[support.zoom.us](https://support.zoom.us)**



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# Air Management Study Group Quarterly Meeting Agenda

- Opening remarks & agenda review
- Hiring update
- Proposed guidance, rules and legislative update
- Proposed state legislation
- Administration Update
- ACE Rule
- Non-Road Emissions and Stationary Sources
- SO<sub>2</sub> Update
- Regional Haze
- Ozone Update
- GHG Inventory Update
- AMMSG Charter
- Member updates
- Enviro-Check
- Federal Litigation Update



# Air Management Study Group Quarterly Meeting

Madison  
February 4, 2021



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# Hiring Update

Gail Good  
Air Program Director



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# Proposed Guidance and Rules Legislative Update

Kristin Hart  
Permits and Stationary Source Modeling Section Chief

Gail Good  
Air Program Director, Acting Air Quality Planning and Standards Section Chief



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# Air Program Guidance



- Access Air Program Guidance:  
<https://dnr.wisconsin.gov/topic/AirPermits/Policy.html>
- Air Program Guidance in Development:  
<https://dnr.wisconsin.gov/topic/AirQuality/Input.html>



# DNR Guidance

DNR Guidance in Development	Description	Target Date
Municipal Solid Waste Landfills	Updates to guidance for MSW Landfills	2021
Regulation of Non-road and Motive Engine Testing Operations	Guidance on the stationary source status of different engine testing operations	2021
FAQs for Construction Permit Revisions	Webpage update with information on when and how to apply for a construction permit revision	Early 2021
FAQs for Construction Permit Exemptions	Webpage update answering frequently asked questions on applicability of construction permit exemptions	Early 2021
DNR Guidance in Public Comment	Description	Date Posted
Next Day Deviations	Guidance on meeting next day deviation requirements	DATE
Published DNR Guidance	Location	Final Date
None		



# Proposed DNR Rules

Proposed DNR rule	Description	Phase
AM-20-18 VOC RACT Revisions	Updates RACT rules in ch. NR 422 to meet current EPA Guidelines for Miscellaneous Metal and Plastic Parts Coatings, and Miscellaneous Industrial Adhesives, and other updates.	Public hearing held on January 25. Comment period concluded on February 1. Next: address comments and prep for NRB approval
AM-10-19 2015 Ozone NAAQS	Incorporates the 2015 ozone NAAQS into state rule and makes related updates. Scope statement approved by NRB in June 2019.	EIA comment period concluded on January 18. Next: public comment/public hearing
AM-31-19 Emissions inventory reporting	Revises NR 438 to align with federal Air Emissions Reporting Rule requirements, resolves inconsistencies between state and federal emissions reporting, and addresses ambiguities in current rule.	Scope statement approved by NRB in October 2020. Next: drafting rule and EIA.



# Proposed EPA Rules/Guidance

Proposed EPA rule/guidance	Docket	Comments due
Standards of Performance for Volatile Organic Liquid Storage Vessels for which construction, reconstruction, or modification commenced after July 23, 1984	<a href="#">EPA-HQ-OAR-2020-0372</a>	11/30/20
Revised Cross-State Air Pollution Rule Update for the 2008 Ozone National Ambient Air Quality Standards	<a href="#">EPA-HQ-OAR-2020-0272</a>	12/14/20
National Emission Standards for Hazardous Air Pollutants: Cyanide Chemicals Manufacturing	<a href="#">EPA-HQ-OAR-2020-0532</a>	02/16/21
National Emission Standards for Hazardous Air Pollutants: Carbon Black Production Residual Risk and Technology Review and Carbon Black Production Area Sources	<a href="#">EPA-HQ-OAR-2020-0505</a>	03/01/21



# Proposed EPA Rules/Guidance

Proposed EPA rule/guidance	Docket	Comments due
National Emission Standards for Hazardous Air Pollutants: Mercury Cell Chlor-Alkali Plants	<a href="#">EPA-HQ-OAR-2020-0560</a>	02/08/21
National Emission Standards for Hazardous Air Pollutants: Primary Magnesium Refining	<a href="#">EPA-HQ-OAR-2020-0535</a>	02/08/21
National Emission Standards for Hazardous Air Pollutants: Flexible Polyurethane Foam Fabrication Operations Residual Risk and Technology Review and Flexible Polyurethane Foam Production and Fabrication Area Source	<a href="#">EPA-HQ-OAR-2020-0572</a>	02/25/21
National Emission Standards for Hazardous Air Pollutants: Refractory Products Manufacturing	<a href="#">EPA-HQ-OAR-2020-0148</a>	03/01/21
Interpretation of “Begin Actual Construction” under New Source Review	<a href="#">Draft Guidance</a>	Not expected to proceed



# Finalized EPA Rules/Guidance

Finalized EPA rule/guidance	Link	Date finalized
Project Emissions Accounting – affects netting analysis methodology in New Source Review permitting	<a href="#">EPA-HQ-OAR-2018-0048</a>	Signed 10/23/20, not yet published
Reclassification of Major Sources as Area Sources Under S. 112 Reverses once-in-always-in applicability or NESHAP	<a href="#">EPA-HQ-OAR-2019-0282</a>	11/19/2020
Fuels Regulatory Streamlining	<a href="#">EPA-HQ-OAR-2018-0227</a>	12/04/2020
Test Methods and Performance Specifications for Air Emissions Sources	<a href="#">EPA-HQ-OAR-2018-0815</a>	12/07/2020
Error Corrections to New Source Review Regulations	<a href="#">EPA-HQ-OAR-2019-0435</a>	01/05/2021



# Finalized EPA Rules/Guidance

Finalized EPA rule/guidance	Link	Date finalized
Review of National Ambient Air Quality Standards for Particulate Matter	<a href="#">EPA-HQ-OAR-2015-0072</a>	12/18/2020
Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process	<a href="#">EPA-HQ-OAR-2020-0044</a>	12/23/2020
Review of the Ozone National Ambient Air Quality Standards	<a href="#">EPA-HQ-OAR-2018-0279</a>	12/31/2020
Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information	<a href="#">EPA-HQ-OA-2018-0259</a>	01/06/2021 Vacated/remanded 2/1/2021
Official Release of the MOVES3 Motor Vehicle Emissions Model for State Implementation Plans and Transportation Conformity	<a href="#">No docket</a>	01/07/2021





# Finalized EPA Rules/Guidance

Finalized EPA rule/guidance	Link	Date finalized
International Transport of Air Pollution - Guidance on the Preparation of Clean Air Act Section 179B Demonstrations for Nonattainment Areas Affected by International Transport of Emissions	<a href="#">EPA-HQ-OAR-2019-0668</a>	01/07/2021
Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures	<a href="#">EPA-HQ-OAR-2018-0276</a>	01/11/2021
Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance	<a href="#">EPA-HQ-OAR-2013-0495</a>	01/13/2021
Air Quality Designations for the 2010 Primary Sulfur Dioxide (SO <sub>2</sub> ) National Ambient Air Quality Standard - Round 4	<a href="#">EPA-HQ-OAR-2020-0037</a>	Signed 12/21/20, not yet published



# State Draft and Final Legislation

Draft legislation	Link

Final legislation	Link



# Administration Update

Kristin Hart  
Permits and Stationary Source Modeling Section Chief

Gail Good  
Air Program Director, Acting Air Quality Planning and Standards Section Chief



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# Biden administration federal action review

- [Memo: Regulatory Freeze Pending Review](#) (1/20/2021)
  - Pulls back most rules not yet published, pending agency review.
  - Asks agencies to consider 60d delay in effective dates for rules published, but not yet in effect.
- [“Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”](#) (1/20/2021)
  - Established a policy to be guided by the best science, improve public health, protect the environment, advance environmental justice, and reduce GHG emissions, among other factors.
  - Required agency heads to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021 to ensure consistency with above.
  - Specifically identified rules to be reviewed and suspended, revised, or rescinded by certain dates.



# Biden administration federal action review

Rule	Review complete by
Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process	“As soon as possible”
Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information	“As soon as possible” Vacated/remanded 2/1/2021
SAFE Vehicles Rule Part One: One National Program ( <i>CA waiver</i> )	April 2021
SAFE Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks	July 2021
National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review	August 2021
Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration	September 2021



# Changes at EPA

- Acting EPA Region 5 Administrator – Cheryl Newton
- Confirmation hearing for Michael Regan February 3, 2021



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# Affordable Clean Energy Rule

Gail Good

Air Program Director, Acting Air Quality Planning and Standards Section Chief



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# ACE Rule Update

- Vacated and remanded to EPA on January 19, 2021
- Department work with affected units paused



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# Non-Road Emissions and Stationary Sources

Kristin Hart

Permits and Stationary Source Modeling Section Chief



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# Manufacturing Non-Road Equipment

- The Question: are the emissions from testing of non-road equipment during the manufacturing process stationary source emissions?
  - Engine performance testing
  - Testing during research and development
  - Product testing
  - Reliability testing
- Department is developing guidance to clarify the unit operations and activities involved in manufacturing of non-road equipment that must be included in stationary source permits



# Stakeholder Input

- Stakeholder meeting was held on November 17, 2020
- Notes are posted on AMMSG Webpage under the “Past meetings” tab
- Stakeholders provided information on:
  - Unique costs and challenges of regulating emissions from non-road equipment manufacturing in Stationary Source Permits
  - Regulatory authority for stationary sources and for non-road engines in the Clean Air Act and Wisconsin Statute
  - Experiences in other states



# Next Steps

- DNR is developing a technical support document and guidance
- Another stakeholder meeting will be held to present draft findings and guidance
- Targeting late February/early March to post documents for 21 days to collect public input
- DNR will make final documents available and start implementing
- DNR decisions on pending requests for removal of engine testing lines will be finalized and permits moved forward – Targeting April 2021



# SO<sub>2</sub> Update

Gail Good

Air Program Director, Acting Air Quality Planning and Standards Section Chief



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# 2010 SO2 NAAQS Implementation

All of Wisconsin has been designated as “attainment/unclassifiable” with the following exceptions:

Round 1: Partial Oneida County Nonattainment area

- EPA/facility/DNR talks are ongoing to resolve remaining issues with the attainment plan
- EPA proposed partial approval/disapproval of (2016) attainment plan on November 25, 2020
- DNR committed to resolving by March 31, 2021

Round 4: Outagamie County

- Finalized as nonattainment in December 2020, based on 2017-2019 monitored air quality data. Effective date of designation is April 30, 2021.
- DNR early certified 2020 data showing attainment. Based on EPA’s final rule, this should result in an attainment designation for this area.



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# Regional Haze

Gail Good

Air Program Director, Acting Air Quality Planning and Standards Section Chief



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# Regional haze

- SIP for second planning period (through 2028) is due July 31, 2021.
- The Class I federal areas in this region appear to be on track to meet their 2064 visibility goals.
- DNR has been working with Region 5 states, LADCO and federal land managers (FLMs) to ensure the latest information about source emissions, controls, and impacts in the region are documented.
- DNR's draft SIP is expected to be ready for formal review by the FLMs in February 2021, followed by the public comment period.





# Ozone Update

Gail Good

Air Program Director, Acting Air Quality Planning and Standards Section Chief



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# Ozone

- Manitowoc redesignation request (2015 ozone NAAQS)
  - Public comment period closed on January 25
  - Legislative review period closes February 9
- Data certification by May 1, 2021
- Planning for ozone season enhanced ozone monitoring



# Greenhouse Gas Inventory Report

Gail Good

Air Program Director, Acting Air Quality Planning and Standards Section Chief



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# GHG Inventory Report

- <https://dnr.wisconsin.gov/sites/default/files/topic/ClimateChange/WisconsinGreenhouseGasEmissionsInventoryReport.pdf>
- Step 1 Report using EPA State Inventory (SIT) Tool, 2005-2017
- Step 2 Report underway and will use more state specific data
- Highlights from Step 1 Report:
  - GHG emissions in the state decreased by approximately 9% from 2005-2017
  - Electricity generation sector accounted for 33.1% of total in 2017 and also experienced the largest decrease in emissions from 2005-2017 (16.1%)
  - Agriculture emissions experienced the highest increase among sectors



# AMSG Charter

Gail Good  
Air Program Director



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# Charter/Membership

- Strong interest in review of charter
- Development of survey to generate ideas
- Will meet with subgroup of membership to work on next steps



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# Member Updates



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# Enviro-Check

Lisa Ashenbrenner - Hunt  
Small Business Assistance Specialist

Laurel Sukup  
Chief, Sustainability and Business Support



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# Overview

- ✓ DNR's Business Support services
- ✓ Purpose and benefits
- ✓ How to participate
- ✓ Eligibility and exclusions
- ✓ Notification and reporting
- ✓ Correcting violations
- ✓ Program trends
- ✓ Collaboration and stakeholder input
- ✓ EPA and other state audit programs
- ✓ Questions and feedback



# Sustainability & Business Support

Support for your business  
wherever you are on your path to sustainability

**SMALL BUSINESS**  
ENVIRONMENTAL ASSISTANCE PROGRAM



*Serving Small Businesses and the Environment*

enviro  
check



**GREEN TIER**



# enviro✓check

- Encourages voluntary self-audit and proactive compliance
- Improves facilities' knowledge and environmental performance
- Reduces risks and liability





**299.85 Environmental Compliance Audit Program.**

- Requirements for participation
- Disclosure and violation correction
- Liability protections
- Transparency

# Why Enviro-Check?

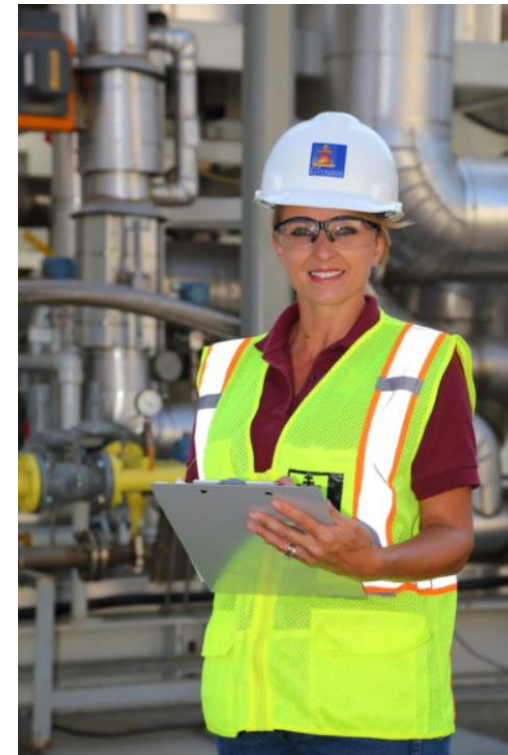
- Limited liability with low or no fines
- Reduced risks, costs and environmental impacts
- Increased efficiencies and better environmental performance
- Increased confidence among:
  - Shareholders
  - Customers
  - Lenders
  - Certification bodies
  - Buyers
  - Neighbors
  - Supply chains
  - Regulators

Losing sleep over  
your environmental  
compliance?



# Why Enviro-Check?

- Learn about the requirements
- Better understanding of environmental footprint
- Reduce uncertainty and increase confidence
- Educate new managers/clean slate for new owner
- Document good faith effort
- Only cost to participate is hiring the auditor



# When Enviro-Check?

- Staff/management turnover
- Buy, sell or expand facility
- Replacing equipment or starting new process
- Risk management requirements
- Due diligence
- New regulations
- Complaints\*\*



# Four Steps to Participation

1. Notify DNR at least 30 days before audit
2. Upon approval, conduct audit within one year
3. Submit compliance audit report within 45 days of completion
4. Correct any violations within 90 days of submitting audit report or request an extension







# Program Eligibility



- No enforcement suit by DOJ within two years
- Internal compliance status check
- DNR can consider the nature of violation in determining eligibility

# Ineligible Violations



- Imminent threat to public health or environment
- Identified through required monitoring or sampling
- Repeat offender
- DNR finds it first
- Participant discovers it before the audit
- Gives clear competitive business advantage/substantial economic benefit

# Compliance Audit Report

- Audit results
- If violations are found:
  - What are they
  - How long
  - Remedy completed
    - ✓ **Within 90 days**
    - ✓ OR propose a compliance schedule for remedy within 365 days



# “Limited Liability” Provisions

- DNR has discretion
- No civil penalties < 90 days after the audit report is submitted
- Maximum \$500/violation if corrected
- DNR coordinates with DOJ for criminal violations\*



# Misconceptions & Barriers

- People don't know about it
- Program value unclear
- Not just for Green Tier
- Audit costs
- Facilities can participate multiple times
- Nervous about extra DNR scrutiny





# Program Use

- Underused program
- Increased marketing efforts, name change, branding
- Trends
  - Total use
  - Types of facilities
  - Scope and violations found
  - Corrective actions

Column1	Column2
2004	2
2005	2
2006	5
2007	2
2008	6
2009	9
2010	8
2011	6
2012	2
2013	2
2014	4
2015	2
2016	4
2017	2
2018	5
	61





# Collaboration

The Enviro-Check program has great benefits for Wisconsin businesses. This program allows a company to review its compliance with environmental laws and, upon discovery of any noncompliance, use a voluntary disclosure and correction process to avoid penalties that might otherwise apply to such matters. This innovative program is a valuable method to ensure environmental compliance without the expenditure of agency enforcement resources.

- Arthur Harrington, Attorney, Godfrey and Kahn



# SBEC / Legislation

- Rebranding
- Align with EPA
  - Eliminate advanced notification
  - Change corrective action period
  - Eliminate public notice for extension requests
  - Consideration for small businesses





# EPA Audit Policies

- EPA Audit Policy and EPA Small Business Compliance Policy
- For federal requirements
- No prior notification
- Violation disclosure within 21 days of discovery; no report required; eDisclosure for some violations
- Correction within 60 days / 180 days



# Other State Programs

- Minnesota Environmental Audit Program
- Illinois Voluntary Self Disclosure
- Michigan Environmental Audit Privileges and Immunity
- Indiana Self-Disclosure and Environmental Audit Policy

# Questions or feedback?

Lisa Ashenbrenner Hunt

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608.371.4367

**enviro check**  
EXPLORE BENEFITS

**APPLY TO ENVIRO-CHECK**  
READ MORE

**START THE ASSESSMENT PROCESS**  
Learn the steps and get started today  
READ MORE

**UNDERSTAND EXCEPTIONS TO LIMITED LIABILITY**  
Verify your facility's eligibility  
READ MORE

**LEARN ABOUT EPA PROGRAMS FOR FEDERAL VIOLATIONS**  
Get information on U.S. EPA's Audit Policy and Small Business Compliance Policy  
READ MORE

**TRACK LEGISLATION**  
Review the existing law and see proposed changes  
READ MORE

[dnr.wi.gov](http://dnr.wi.gov), search "Enviro-Check"



## 2020 Clean Air Act Litigation Highlights

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Michael Best & Friedrich, LP  
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(608) 283-4432

# Clean Air Act Judicial Decisions - The Numbers

- In 2020, federal courts issued 26 reported decisions interpreting the Clean Air Act.
  - NAAQS and Implementation Plans – 7
  - PSD, NA NSR and Title 5 Permitting – 4
  - Hazardous Air Pollutants - 3
  - Mobile Sources and Fuels – 3
  - Stratospheric Ozone – 1
  - Preemption of State Claims -2
  - Enforcement – 2
  - Procedural Issues - 4

# Biden Administration – Big Picture

- Emphasis on climate change
- Environmental Justice
- Reversing Trump Administration Agenda



# Congress

- Slimmest of majorities in the Senate.
- Difficult politics to navigate within the Democratic Party.
  - Centrists in states reliant on the fossil fuel industry.
  - Liberals demanding aggressive action on many policies.
- Significant promises made during the campaign on numerous and diverse issues.
- Desire for bipartisanship.
- Bottom line: Political realities may temper aggressiveness of Congressional actions.



## Members Of The Problem Solvers Caucus

Rep. Tom O'Halleran [D-AZ]	Rep. Daniel Lipinski [D-IL]	Rep. Tom Reed [R-NY]
Rep. Ami Bera [D-CA]	Rep. Bradley Schneider [D-IL]	Rep. Bill Johnson [R-OH]
Rep. Scott Peters [D-CA]	Rep. Adam Kinzinger [R-IL]	Rep. David P. Joyce [R-OH]
Rep. Jim Costa [D-CA]	Rep. David Young [R-IA]	Rep. Kurt Schrader [D-OR]
Rep. Jared Polis [D-CO]	Rep. Lynn Jenkins [R-KS]	Rep. Charles W. Dent [R-PA]
Rep. Mike Coffman [R-CO]	Rep. Fred Upton [R-MI]	Rep. Glenn Thompson [R-PA]
Rep. Elizabeth H. Esty [D-CT]	Rep. Richard M. Nolan [D-MN]	Rep. Patrick Meehan [R-PA]
Rep. Charlie Crist [D-FL]	Rep. Jacky Rosen [D-NV]	Rep. Brian K. Fitzpatrick [R-PA]
Rep. Stephanie Murphy [D-FL]	Rep. Josh Gottheimer [D-NJ]	Rep. Vicente Gonzalez [D-TX]
Rep. Darren Soto [D-FL]	Rep. Thomas MacArthur [R-NJ]	Rep. Peter Welch [D-VT]
Rep. Carlos Curbelo [R-FL]	Rep. Thomas Suozzi [D-NY]	Rep. Mike Gallagher [R-WI]
Rep. Ileana Ros-Lehtinen [R-FL]	Rep. John Katko [R-NY]	

Source: The Office Of Rep. Peter Welch, February 2027



# Executive Branch Tools to Implement Environmental Agenda

## Executive Orders (EO)

- Reverse President Trump EOs
- Issue new EOs

## Presidential Actions re Public Lands and Resources

- Block new lease, permits on Federal land
- Close lands to oil development and leasing

## Federal Approval Process

- More lengthy and comprehensive NEPA reviews
- Increased focus on environmental justice issues

## Climate Change

- Rejoin Paris Agreement
- Executive Orders to Leverage Agency Actions

## Reversing or Revising EPA Rules

- Requires “notice and comment” rulemaking
- Judicial Review

## SEC and Fed Reserve Regulation

- Restrict access to low-cost capital for GHG intense industries.

## Revise or Create Policy and Guidance

- Many efforts underway

# Executive Branch Tools to Implement Environmental Agenda (cont.)

## Increase Federal Enforcement

- Leverage agency enforcement discretion (EPA and US DOJ)
- Redefine priorities and budgets

## Increased Funding of Programs

- Use budgeting process to direct EPA action

## Compel State Action

- Use federal delegation approvals to compel state regulation

## Subject Rules to Less Stringent Cost-Benefit Analyses

- Discretion on calculation of regulatory costs and benefits

## Abandon Judicial Defense of Trump Regulations/Policies

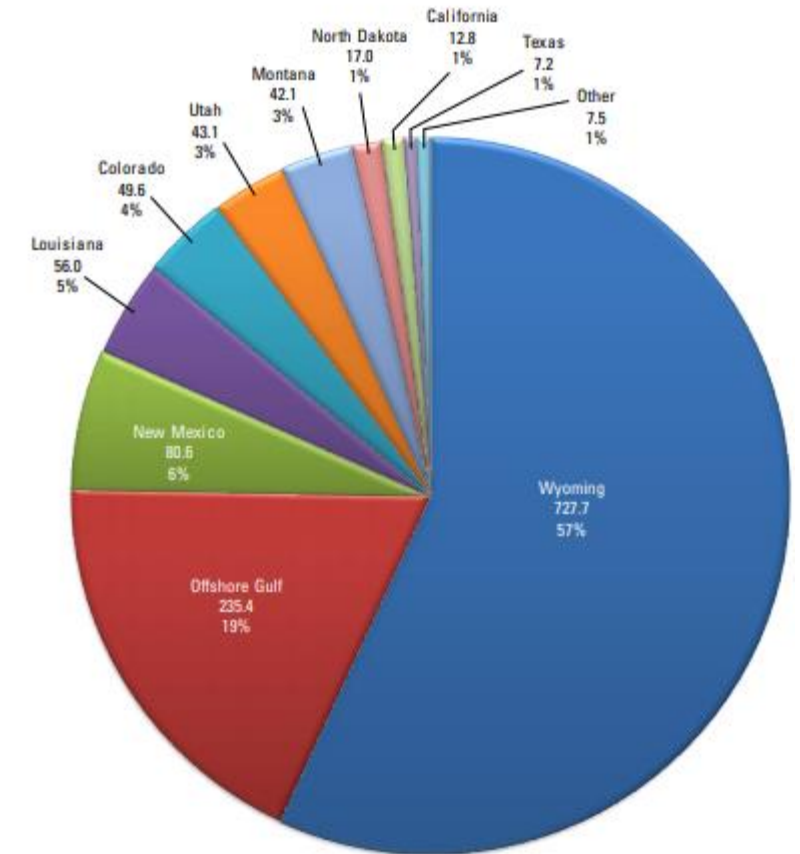
- US EPA and US DOJ can stop defending Trump era regulations in pending court challenges

## Mobile Sources/Fuels

- Recertify California waiver for ZEV program
- Stop issuance of small refiners exemptions (SRE) waivers to oil refineries and reallocate credits to renewable fuel standard

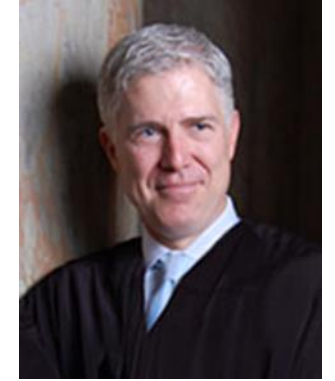
# Executive Branch – Whole of Government Approach

- Public Lands
  - In 2014, 23% of US CO<sub>2</sub> are attributed to the combustion and extraction of fossil fuels from U.S. Federal lands.\*
  - Public land royalty payments to the government are second only to IRS collections.
- Power of the Purse - DOD
  - Largest user of transportation fossil fuels.
  - \$700 billion budget.
  - Purchase zero-emission vehicles and biofuels.
- Research and development budgets.



\*[sir20185131.pdf](#) - Federal Lands Greenhouse Gas Emissions and Sequestration in the United States: Estimates for 2005-14 ([usgs.gov](#))

# The Supreme Court of the United States



# Clean Power Plan and Affordable Clean Energy Rules - Procedural History

- Clean Power Plan (2015)
  - Implementation of the CPP by EPA was stayed by the SCOTUS in 2016.
  - DC Circuit heard arguments in the appeal of the CPP, but the appeal was stayed after Trump Administration took office.
  - The CPP appeals were dismissed in September 2019 at the request of the CPP opponents.
  - Legality of the CPP was never decided.
- Affordable Clean Energy Rule (2019)
  - Repealed the CPP.
  - Created ACE Rule as a replacement to the CPP.
  - Created regulations governing implementation of Section 111(d) guidelines

# Section 111 (d) and Just Five Words....

- Directs EPA to promulgate regulations establishing a federal-state process for setting standards of performance for existing sources that limit emissions of pollutants not otherwise regulated in other specified sections of the CAA.
- EPA issues “guidelines” for states to use in developing compliance plans using the “**best system of emission reduction**” (BSEER) for source category.
- States submit plans to meet BSEER targets using standards of performance for the covered sources in that state.

# Deference to a Federal Agency's Interpretation of a Statute

- Landmark decision is *Chevron v. NRDC* (1984):
  - If a statute is *unambiguous*, a court must follow that clear legislative directive.
  - If a statute is *ambiguous*, a court must defer to the agency's interpretation unless it is unreasonable.

# A Tale of Two EPAs

## Obama EPA – Clean Power Plan

- BSER is an *ambiguous* term and therefore EPA has discretion to extend controls beyond the fence line of a power plant.
- EPA hoping for *Chevron* deference from the reviewing DC Circuit.
- Allows future administrations to ratchet down EGU GHG emissions.
- Allows EPA to extend approach to other industry sectors.



## Trump EPA – Affordable Clean Energy

- BSER is *unambiguous* and precludes EPA from defining BSER as extending beyond the fence line of a stationary source.
- EPA hoping to prevent use of *Chevron* deference by the reviewing DC Circuit.
- Limit future administrations from using Section 111(d) as a tool to reconfigure the US generation portfolio.





# The DC Circuit's ACE Order

- Unanimous panel decision (3 – 0) vacating the ACE Rule.
- The majority opinion (2 judges) order did three things:
  - Vacated the ACE Rule.
  - Seems to have vacated the repeal of the CPP.
  - Vacated the 111(d) implementation rule.

# The Majority Opinion of the Two Obama Appointed Judges

- Section 111 (d) is *ambiguous* and EPA can consider “outside the fence line” controls.
- EPA’s failure to consider “outside the fence line” controls in the ACE Rule requires its vacatur.
- Rejected all other challenges to the ACE Rule.
- Congress imposed no limits on the types of measures EPA may consider [as potential BSERs] beyond three additional criteria:” cost, non-air health impacts, and energy requirements.
  - This description of EPA’s BSER authority exceeds what EPA itself described in the CPP.

# The Dissenting Opinion of the Trump Appointed Judge

- Agreed that the ACE Rule should be vacated, but rejected the majority's reasoning as to why.
- *Expressed criticism* of whether Section 111(d) authorizes EPA to consider “off-site solutions,” citing the “major questions” and “non-delegation” doctrines.
  - The “major question doctrine” posits that Congress must explicitly delegate authority to an agency for any rule that would have profound and wide-reaching effects on society.
  - The “non-delegation doctrine” posits that a Congressional delegation of authority to the executive branch must be limited by some “intelligible principle” that represent the legislature's view on exercising that power.
- *Held* that the ACE Rule is unlawfully because EPA cannot regulate emissions from existing EGUs under Section 111(d) since that source category is already regulated under Section 112.

# What is Next in the Courts?

- A mandate must issue to formally terminate the DC Circuit's authority and transfer jurisdiction back to EPA.
  - The DC Circuit's order and judgment do not become effective until the mandate issues.
  - By rule, the mandate will issue on March 12, 2021 unless a party petitions for a stay, extension or rehearing.
- Aggrieved parties have several choices:
  - Request a rehearing from the full DC Circuit panel.
  - Petition SCOTUS to review under its discretionary authority.
- Recent SCOTUS decisions have signaled a willingness by the conservative majority to revisit the major question and the non-delegation doctrines in a future case(s).
  - The DC Circuit's opinion could present that opportunity.

# Likely Issues on Appeal

- Prelusive effect of regulating EGUs under Section 112.
- Extent of EPA's authority to regulate GHG emissions under Section 111 (d) and perhaps, the CAA.
  - Major Questions Doctrine.
  - Non-Delegation Doctrine.
  - Federalism.
- Must EPA make a separate endangerment finding for EGU GHG emissions?

# What About the CPP?



- Remember, the ACE Rule repealed the CPP.
- The DC Circuit vacated the ACE Rule's repeal of the CPP.
  - The CPP appeal was dismissed in September 2019 before a decision was rendered.
  - The legality of the CPP has never been adjudicated.
  - Has the CPP sprung back to life?
- There are many procedural options that could provide clarity, a few of them are:
  - Ask the panel to reconsider the remedy and remand ACE.
  - Ask the DC Circuit to vacate the CPP part of the mandate.
  - Ask the DC Circuit to stay the mandate pending a petition for review in the SCOTUS.
  - Ask the SCOTUS to stay the mandate pending a petition for review in the SCOTUS.
  - Reinstate the CPP appeal.
- Stay tuned.

# EPA Options

- Implement the CPP:
  - Significant legal uncertainty remains as to “outside the fence” emission control strategies.
  - CPP goals are on track to be met without the rule.
  - Need new deadlines which will require a new rule.
- Reconsider the CPP (create new deadlines, new emission targets, and bolster defensibility).
- Start the rulemaking process for a new CPP type rule.
  - More aggressive “inside the fence” BSER such as CCS?
- Focus resources and political capital on creating a purposefully designed GHG emission control program through legislation.

# EPA Significant Contribution Finding Rule (January 13, 2021)

- EPA finalized a rule that all stationary sources of GHG emissions in the US (except coal-fired power plants) do not reach the threshold for GHG regulation under the NSPS program.
  - Takes the form of a “significant contribution finding.”
  - Sets a 3 percent threshold (of total U.S. GHG emissions) for establishing whether an industry sector should be regulated under the NSPS program.
- California has filed a lawsuit challenging the rule.



# Public Trust Litigation (27 Federal Cases)



- *Juliana v. United States* - Youth plaintiffs argue that the federal government violated their substantive due process rights and public trust obligations by failing to protect them from the adverse effects of climate change.
- The Ninth Circuit dismissed the case for failure to meet the redressability prong of the standing doctrine. Courts are not capable of fashioning effective remedies for climate change.
- Before the Ninth Circuit awaiting a ruling on the plaintiffs' motion for rehearing *en banc*.
- Unclear whether the case will ultimately be presented to the SCOTUS.

# Non-Attainment Designations - The 2015 Ozone NAAQS

- In 2018, EPA designated as attainment all but the riparian areas of certain counties along Wisconsin's Lake Michigan shoreline.
  - ENGOs, City of Chicago and State of Illinois challenged the designations arguing:
    - EPA failed to provide reasoned, science-based explanations for its attainment decisions.
    - EPA inappropriately relied upon information provided by the WDNR.
    - They are victims of pollution transport, harmed by EPA's delay and refusal to address the upwind sources of ozone pollution.
- In [\*Clean Wisconsin v. EPA\*](#), the D.C. Circuit remanded to EPA numerous area designations for the 2015 ozone NAAQS.
  - The court held that some of the designations were arbitrary and capricious (often because of a lack of reasoned explanation), and for other areas accepted EPA's request for a voluntary remand -- treating those as "a concession [by EPA] that they are arbitrary and capricious."



# Non-Attainment Designations - The 2015 Ozone NAAQS

- In [\*Texas v. EPA\*](#), the Fifth Circuit denied petitions seeking review of EPA's designation of one county in nonattainment and three counties in attainment or unclassifiable with the 2015 Ozone NAAQS.
  - The Fifth Circuit, not the D.C. Circuit, was the appropriate venue for the legal challenge because the designations were “locally or regionally applicable” and EPA did not publish a finding that the designations were based on a “determination of nationwide scope or effect.”
  - For the county in nonattainment, the CAA gave EPA discretion to make changes to a state's designation that the EPA “deems necessary” and EPA did not need to consider the modeling data when designating the county as in nonattainment.
  - EPA sufficiently conveyed its reasoning for finding three counties as in attainment or unclassifiable and did not arbitrarily reverse its interpretation of “contribution” in such a designation.

# Interpollutant Trading Rule

- In *Sierra Club v. EPA*, the D.C. Circuit vacated major parts of the 2018 rule that allowed for interpollutant trading of NO<sub>x</sub> and VOC emissions for purposes of the 2008 ozone NAAQS. The court vacated:
  - The ozone precursor interpollutant trading program;
  - An option for states to demonstrate reasonable further progress of NAAQS attainment through compliance with control measure requirements, rather than models based on actual emissions data; and
  - A provision allowing states to include already implemented measures as contingency measures in their SIPs.

# Pollution Transport

- In [Maryland v. EPA](#), the D.C. Circuit granted in part and denied in part a challenge to EPA's denial of several section 126(b) petitions.
  - EPA was required to evaluate the 126 petition with respect to the next applicable downwind attainment deadline
  - A 126 petition could apply to receptors located outside of a petitioning state if the receptors were within a multistate nonattainment area that included the petitioning state.
- In [New York v. EPA](#), the D.C. Circuit vacated and remanded EPA's denial of a petition from New York that specific facilities in nine upwind states were violating the CAA's Good Neighbor provision.
  - EPA had not provided "a coherent explanation" for why New York had failed to meet its burden, calling it a "shifting" explanation.
  - EPA had used 2023 as the reference year in determining whether sources were contributing to nonattainment in New York, even though 2021 was the attainment deadline.

# Trump Administration EPA Initiatives

- In [\*Sierra Club v. EPA\*](#), the D.C. Circuit dismissed a challenge to EPA's SILs Guidance\* for ozone and PM<sub>2.5</sub> emissions holding that the guidance was not a final agency action subject to judicial review.
- In [\*EDF v. EPA\*](#), the U.S. District Court for the District of Montana vacated and remanded to EPA the science transparency rule.
- [\*California v. EPA\*](#) is a pending challenge to EPA's final rule entitled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act" published at 85 Fed. Reg. 73,854 (Nov. 19, 2020).
- [\*New York v. EPA\*](#), is a pending challenge to EPA's decision not to revisit the 2015 ozone NAAQS.
- [\*New York v. EPA\*](#), is a pending challenge to EPA's final rule entitled "Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process" published at 85 Fed. Reg. 84,130 (December 23, 2020).

\* "Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program," from Peter Tsigotis, Director of EPA Office of Air Quality Planning and Standards, (April 17, 2018)

# Environmental Justice

- In [\*Friends of Buckingham\*](#), the Fourth Circuit vacated and remanded to the Virginia Air Pollution Control Board its award of a permit for construction of a compressor station supporting the Atlantic Coast Pipeline.
  - The Board failed to make findings required under state law regarding the “character and degree of injury to...health” and “suitability of the activity to the area,” in light of environmental justice concerns.

# Title I Permitting

- In [\*Voight v. Coyote Creek Co.\*](#), the Eighth Circuit rejected a challenge to PSD major source determination issued by the State of North Dakota. The decision is notable because the Court concluded that the *federal* PSD regulations are ambiguous and deferred to the State of North Dakota's interpretation of the federal regulations.
  - This is step beyond *Chevron* deference with a federal court deferring to a state agency interpretation of federal law.



# Title V Permitting

- In [\*Sierra Club v. EPA\*](#), the Tenth Circuit vacated an EPA order denying a petition for review objecting to a renewed Title V operating permit that incorporated a 1997 minor NSR permit issued by the State of Utah determining that previous modifications of the facility did not trigger PSD requirements.
  - Title V permits must include all “applicable requirements” which unambiguously includes Title I PSD permitting obligations.
  - Title V permits must include more than the conclusions reached by the State of Utah in its 1997 minor NSR permit.
- In [\*Environmental Integrity Project v. EPA\*](#), the Fifth Circuit upheld EPA’s denial of a petition for review requesting that EPA object to a revised Title V permit that incorporated a Title I preconstruction permit that Petitioners claimed was invalid.
  - “Where EPA has approved a state’s Title I permitting program, duly issued preconstruction permits will establish the ‘applicable requirements,’ and the terms and conditions of those permits should be incorporated into a source’s Title V permit without further review.”

# Enforcement

- In [\*Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.\*](#), the Fifth Circuit granted a limited remand of a citizen suit action alleged over 16,000 violations of emissions standards involving a Texas facility.
  - Plaintiffs must demonstrate the traceability of an alleged violation to their injuries.
  - Plaintiffs must show that each violation causes or contributes to the kinds of injuries they allege and demonstrate the existence of a specific geographic or other causative nexus that the violation could have affected their members.
  - An “Act of God” defense can be claimed for violations occurring during Hurricane Ike concluding that the repealed Texas statute creating the defense had been incorporated into the Texas SIP

# Section 112 (r)

- [In the Matter of Hazlehurst Wood Pellets, LLC](#), EPA denied a petition objecting to a Title 5 permit for asserting that such permits must include Section 112 (r) general duty requirements s applicable requirements.
  - The General Duty Clause is not an “applicable requirement” for the purposes of Title V, and as such, “Title V permits need not—and should not— include terms to assure compliance with the General Duty Clause as it is an independent requirement outside of the scope of title V.”

# Hazardous Air Pollutants

- In [\*Louisiana Environmental Action Network v. EPA\*](#), the D.C. Circuit granted a petition for review challenging EPA's final rule reevaluating the NESHAP for chemical recovery processes at kraft, soda, sulfite, and stand-alone semi-chemical pulp mills.
  - When reevaluating a NESHAP, section 112(d)(6) requires EPA to review all listed HAPs emitted by a source category, not just those addressed in the NESHAP undergoing review.

# Mobile Sources

- In [\*Renewable Fuels Association v. EPA\*](#), the Tenth Circuit granted a challenge to three small refinery exemptions from the CAA's renewable fuels mandate.
  - The CAA does not authorize granting an extension to a small refinery that did not seek or receive an exemption in prior years from which an extension could be granted.
  - EPA relied on disproportionate economic hardship to the small refineries that was not caused by compliance with the renewable fuel standards.

# Preemption

- In [\*United States v. California\*](#), the U.S. District Court for the Eastern District of California ruled that California's cap-and-trade program for GHG emissions is not preempted by the foreign affairs doctrine.
- In [\*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation\*](#), the Ninth Circuit held that the CAA expressly preempts state and local governments from imposing anti-tampering laws for emission control systems on pre-sale new motor vehicles, but the CAA does not preempt state and local governments from issuing anti-tampering rules for emission control systems on post-sale vehicles.

# 2017 Act 369 - Limits on Attorney General's Power

- Limits the power of the Wisconsin Attorney General to unilaterally settle civil litigation by:
  - Requiring settlements first be submitted to the Legislative Joint Committee on Finance for approval.
  - Requiring settlement funds to be deposited into the state's general fund.
  - Authorizes the legislature to intervene in any WDOJ litigation pending in state or federal court.
- Legal challenges to Act 369 are awaiting decision.
- WDOJ has been filing Stipulations for Judgements with state circuit courts asserting that Act 369 does not apply to cases settled before the filing of a complaint.

# Questions?



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# 2021 Meeting Dates

- Thursday, May 6
- Thursday, August 5
- Thursday, November 4



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