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Legal Storm Clouds Gather As New Climate Change Policies Are Released

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Concurrent with commitments made during the twenty-sixth meeting of the United Nations' COP26 summit in Glasgow, Scotland, the Biden Administration released two significant policies aimed at analyzing and curtailing the impact of greenhouse gas (GHG) emissions from the development of federal minerals reflective of its “whole of government” approach to climate change. But the Supreme Court's surprise decision to hear a monumental case addressing the authority of the Environmental Protection Agency to regulate GHG emissions from industrial sources under the Clean Air Act could curtail the Biden Administration's aggressive climate change agenda.

BLM Specialist Report on Annual GHG Emissions

On October 29th, the Bureau of Land Management (BLM) issued its “2020 BLM Specialist Report on Annual Greenhouse Gas Emissions and Climate Trends from Coal, Oil, and Gas Exploration and Development on the Federal Mineral Estate.” The 113-page BLM Specialist Report is a comprehensive effort to “estimat[e] GHG emissions from coal, oil and gas development that is occurring, and is projected to occur, on the federal onshore mineral estate.” BLM views this Report as “an important tool for evaluating the cumulative impacts of GHG emissions from fossil fuel energy leasing and development authorizations on federal onshore mineral estate.”

BLM's Specialist Report:

- Is designed to be “incorporated by reference” as BLM (and other agencies) prepare National Environmental Policy Act (NEPA) analyses for proposals to lease and develop federal onshore oil, gas, and coal. Report uses terminology and analytical framework from the Biden Administration's proposed revisions to the NEPA regulations even though a number of those provisions are not part of the current 2020 NEPA regulations.
- Provides estimates of “reasonably foreseeable” direct and indirect emissions of three major GHGs—carbon dioxide (CO2), methane (CH4), and nitrous oxide (N20)—associated with extraction, processing, transportation, and combustion of federal onshore oil, gas and coal. The three GHGs are converted into “CO2 equivalents” for comparative emissions estimates.
- Provides aggregate and state-by-state estimates for GHG

emissions attributable to twenty-seven states with federal mineral development. Cumulative emissions are also presented in two cumulative scales: geographic (emissions from total federal estate managed by BLM) and temporal (estimated emissions over several different timescales).

- Offers both “static” printed report and “dynamic web tool” which “allows for real-time data incorporation and transformations.” The “static” printed report is designed to be included in a federal agency's administrative record when it prepares a NEPA analysis for individual projects, such as oil and gas and coal leases, drilling permit approvals, or mining plans to expand existing coal mines.
- Notes that non-U.S. GHG emissions continue to rise even as GHG emissions from several domestic sectors have been falling: “The large increases in global coal emissions since 2000 can mostly be attributed to China's increase in coal fired power plants, while in the U.S. emissions from this fuel type continue to decline due in part to the competitiveness of natural gas and renewable sources of energy.”
- Highlights various mitigation measures that might be used “to align BLM decision making with the goal of achieving net-zero emissions by 2050.” However, it is unclear what role these proposed measures—or, more generally, BLM's new GHG emissions analysis—will play in substantive BLM decisions to authorize (or deny) leases and related mineral development. The Specialist Report recognizes that “the majority of GHG emissions resulting from federal fossil fuel authorizations occur outside of the BLM's authority and control.”

BLM is expected to use its Specialist Report to analyze the impact of GHG emissions in its upcoming quarterly oil and gas lease sales and for all future proposals for the leasing and development of federal oil, gas, or coal.

Supreme Court Agrees to Hear Challenges to Obama EPA's Clean Power Plan

As a well-timed counterpoint to the Biden Administration's aggressive approach to addressing GHG emissions, on October 29th, the U.S. Supreme Court agreed to hear four consolidated legal appeals to the D.C. Circuit's decision striking down the Trump Administration's Affordable Clean Energy (“ACE”) rule and its rescission of the Obama-era Clean Power Plan, the generation shifting rulemaking designed to reduce GHG emissions across the power generation sector. *West Virginia v. Environmental Protection Agency*, No. 20-1530. Opening briefs in the case are due mid-December with oral argument slated for late February or early March. The Supreme Court's decision to grant certiorari to an eighteen-state coalition led by West Virginia, as well as three related petitions, is highly significant as the Biden EPA initiates yet another rule governing GHG emissions from the power sector and embarks on a broad regulatory plan to regulate GHG emissions from other industrial sectors, including oil and gas.

The procedural posture of this case is highly unusual as the Court will be reviewing a decision governing rules that have been withdrawn and therefore will never go into effect. In this case, the Biden Administration has stated it will not reinstate the Obama-era CPP but will instead issue its own regulation under section 111(d) of the Clean Air Act to limit GHG emissions from existing power plants. More importantly, the legal bases upon which the State of West Virginia and other petitioners are challenging the D.C. Circuit's decision could, if successful, drastically curtail EPA's authority to limit GHG emissions from existing sources under the Clean Air Act and fundamentally alter the manner in which agencies interpret and implement statutory directives.

The Supreme Court will review the January 19, 2021 decision in *American Lung Ass'n v. EPA*, 98 F.3d 914 (D.C. Cir. 2021), issued by a split panel of the D.C. Circuit Court of Appeals. That 2-1 decision invalidated two related 2019 EPA decisions issued by the Trump Administration. The first of these decisions vacated the Obama-era CPP on the ground that the CPP exceeded EPA's legal authority under the Clean Air Act by imposing GHG emissions restrictions beyond the physical contours of power plants themselves. The second decision formally replaced the CPP with the ACE Rule. Whereas the CPP aimed to reduce GHG emissions primarily by requiring utilities (through state-developed standards of performance) to switch from coal-fired power generation to electricity generated by natural gas and renewable energy sources, the ACE Rule was limited to reducing GHGs through various operational constraints at the individual utilities.

This marks the second time the Supreme Court has weighed in on the legality of the CPP. On February 9, 2016, the Supreme Court granted a stay to prevent the implementation of the CPP pending a full review on the merits by the D.C. Circuit and any subsequent review of the Supreme Court itself. That marked the first time the Supreme Court had ever stayed a regulation before a lower court had reviewed the merits of the rule. Following the Supreme Court's stay, the consolidated legal challenges to the CPP were briefed and argued before the full D.C. Circuit. However, neither the D.C. Circuit nor the Supreme Court has ruled on the merits of the CPP. Following the 2016 presidential election, the D.C. Circuit stayed its review of the pending legal challenges after the Trump Administration said it would replace the CPP with an alternative proposal for limiting GHG emissions.

In agreeing to review the D.C. Circuit's decision in *American Lung Ass'n* now, the Supreme Court has signaled its desire to review the broad authority that EPA asserted formed the legal underpinning of the CPP and ultimately was confirmed by the D.C. Circuit. At issue is whether section 111 of the Clean Air Act provides EPA with authority to regulate GHGs through procedures, such as fuel-switching requirements and other generation shifting activities, that go well beyond the physical boundaries of existing utilities (e.g., the CPP), or whether EPA is limited to requiring GHG emissions restrictions at the power plants themselves (e.g., the ACE Rule).

In sum, the Supreme Court is reviewing the D.C. Circuit's determination that the Clean Air Act's performance standards are not limited by the plain

language of the statute to adjustments or controls that would only exist “at the source” In resolving this question, the high Court could issue a broad ruling that not only prohibits EPA from restricting GHG emissions “outside the fence line” of a particular source, but also restricts the ability of EPA (and other federal agencies) to issue *any regulation* without a “sufficiently definite and precise” statutory directive from Congress. Such a ruling would impair the Biden Administration's efforts to limit GHG emissions from both the power sector and potentially other industrial sectors through section 111 of the Clean Air Act. Potentially of greater significance, however, would be a ruling that broadly limits the authority of federal agencies' to issue global climate change regulations under a variety of federal environmental and land management laws if those laws do not speak directly to climate change or GHG emissions. Whatever the outcome, the Supreme Court's decision to hear these challenges will likely delay the Biden Administration's issuance of any CPP replacement rule until after the Court rules. A decision from the Supreme Court is expected by summer of 2022.

EPA Proposed Limits on Methane Emissions from the Oil & Gas Sector

Within days of the Supreme Court's decision to grant certiorari, EPA issued a proposal under the same Clean Air Act authority at issue in *West Virginia v EPA* to regulate emissions of volatile organic compounds (“VOCs') and methane from equipment at new, modified, as well as existing oil and gas well sites and natural gas compressors as well as sources in the natural gas processing, transmission, and storage segments. Complicating this rulemaking is the use of the Congressional Review Act to rescind final regulations issued by the Trump Administration that rolled back Obama-era rules.

The proposal for new and modified sources under the CAA's New Source Performance Standards (“NSPS”) would both expand the scope and increase the stringency of current standards found at 40 C.F.R. Part 60, Subparts OOOO and OOOOa (Quad O and Quad Oa). Although the precise language of these new standards, referred to as Quad Ob, has not yet been developed, the proposal signals that EPA is likely to double down on emissions from this sector. For example, EPA is proposing to regulate, for the first time, compressors and liquids unloading at centralized tank batteries at well sites, pneumatic pumps at natural gas compressor stations, and pneumatic pumps within the natural gas transmission and storage segment. In an unusual move, EPA will wait for stakeholder input before proposing specific regulatory language.

EPA also is proposing regulating existing sources under section 111(d) of the CAA. Specifically, EPA is proposing Emission Guidelines that states would follow in developing state plans for approval by EPA. These Guidelines, which would be codified at Subpart OOOOc (Quad Oc), reflect what EPA has determined to be the Best System of Emission Reduction that has been adequately demonstrated. These Guidelines are worthy of serious review by industry, as they would in many cases impose the same type of control requirement on existing facilities as otherwise would be

limited to new and modified facilities.

EPA is accepting comment through December 15, 2021.

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