AIR QUALITY AND CLIMATE CHANGE: A YEAR IN REVIEW

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This paper highlights several notable legal developments concerning air quality and climate change since the 2022 Texas Environmental Superconference. This includes proposals for industry-wide regulations with significant impacts on Texas operators, reclassification of areas within Texas based on failure to attain ozone National Ambient Air Quality Standards ("NAAQS"), challenges to specific provisions of federally approved Texas air programs, and final action on the Texas State Implementation Plan ("SIP") for interstate ozone transport.

I. Focus on Emissions from Oil and Gas Operations

In recent years, EPA has increasingly focused on the control of volatile organic compounds ("VOCs") and methane from oil and gas operations.[1] In just the short time since August 2022, EPA has announced a suite of related regulatory changes targeting compliance and reporting obligations for oil and gas operators. While these regulatory changes apply across the country, they have a significant impact on Texas, given its concentration of oil and gas activity. Further, recent EPA enforcement actions have specifically focused on activity in the Permian Basin.

A. New Source Performance Standards

In November 2021, EPA published a proposed rule that would revise existing New Source Performance Standards ("NSPS") and establish emissions guidelines for facilities in the "Crude Oil and Natural Gas" source category.[2] EPA's proposal consists of two parts: 1) NSPS OOOOb, which would impose new and more stringent restrictions on methane and VOC emissions from new, reconstructed, and modified sources; and 2) NSPS OOOOc, which would establish emissions guidelines to inform the development of state programs to regulate existing sources.[3] While EPA has previously regulated new/modified/reconstructed oil and gas sources under NSPS

[1] EPA publicly describes the oil and natural gas industry as "the largest industrial source of the po-tent greenhouse gas methane and smog-forming volatile organic compounds." EPA, Controlling Air Pollution from the Oil and Natural Gas Industry (last updated February 1. 2023), https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry.

[2] This source category includes: (1) crude oil production, which includes the well and extends to the point of custody transfer to the crude oil transmission pipeline or any other form of transportation; and (2) natural gas production, processing, transmission, and storage, which include the well and extend to, but do not include, the local distribution company custody transfer station. For purposes of this proposed rulemaking, for crude oil, EPA's focus is on operations from the well to the point of custody transfer at a petroleum refinery, while for natural gas, the focus is on all operations from the well to the local distribution company custody transfer station commonly referred to as the "city-gate." EPA Proposed Rule, Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63,110, 63,263 (November 15, 2021).

[3] *Id.*

OOOO and NSPS OOOOa, this proposal marked the first time EPA sought to regulate existing sources. Notably, EPA's November 2021 proposal did not include any regulatory language.

EPA provided its proposed regulatory text in a supplemental proposal published in December 2022. EPA's supplemental proposal also expanded the requirements originally proposed in November 2021. Selected highlights from EPA's supplemental proposal include:

- Prohibitions on flaring of associated gas. Associated gas from oil wells must be routed to sales, used as onsite fuel, reinjected/used for enhanced oil recovery, or utilized for other beneficial use unless the operator can demonstrate that it is infeasible to do so for technical or safety reasons.[4]

- Creation of a new super-emitter response program. The proposed rule defines super-emitters as any source of emissions located at an individual well site, centralized production facility, or compressor station with emissions detected, using remote detection methods, with a quantified emission rate of 100 kg/hr or greater of methane.[5] This program would allow qualified third parties (as determined by the EPA Administrator) to investigate and submit notifications of super-emitter emissions events to an owner or operator. Upon receipt of such a notification, the owner or operator is required to investigate the issue, complete a root cause analysis, and complete corrective actions on set timeframes.

- Restrictions on emissions from pneumatic controllers and pumps. The proposed rule would require that pneumatic controllers be designed and operated with zero methane and VOC emissions to the atmosphere.[6] Similarly, pneumatic pumps must not be powered by natural gas.[7]

- Increased inspections. The proposed rule would increase the frequency of leak detection and repair ("LDAR") inspections and expand inspection requirements to include sites with limited production equipment (e.g., wellhead only locations).[8]

If finalized as currently proposed, the prescriptive requirements of NSPS OOOOb will become effective sixty days after the final rule is published and will apply to all facilities that were newly constructed, reconstructed, or modified after November 15, 2021. In contrast, NSPS OOOOc establishes guidelines for development of state programs to regulate existing sources (*i.e.*, those constructed, reconstructed, or modified prior to November 15, 2021). States are required to submit their proposed plans to EPA within eighteen months after publication of the final rule, with an expected compliance date no later than thirty-six months following the state plan submittal

[4] EPA, Supplemental Notice of Proposed Rulemaking, Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 87 Fed. Reg. 74702, 74779, 74781 (December 6, 2022).
[5] *Id.* at 74,747.
[6] *Id.* at 74,708.
[7] *Id.*
[8] *Id.* at 74,807.

deadline.[9] The specific dates for implementation will vary based on the timing of each state's submittals.

B. Methane Charge and GHG Reporting

In August 2022, President Biden signed the Inflation Reduction Act of 2022 ("IRA"). Among other things, the IRA directs EPA to establish a methane waste charge for oil and gas sources that report GHG emissions pursuant to the Greenhouse Gas Reporting Program ("GHGRP") at 40 CFR Part 98, Subpart W.[10] Specifically, Section 60113 of the IRA requires EPA to "impose and collect a charge on methane emissions that exceed an applicable waste emissions threshold under subsection (f) from an owner or operator of an applicable facility that reports more than 25,000 metric tons of carbon dioxide equivalent of greenhouse gases emitted per year pursuant to subpart W of part 98 of title 40, Code of Federal Regulations."[11] It further requires EPA to engage in periodic reviews "to ensure the reporting under such subpart, and calculation of charges . . . accurately reflect the total methane emissions and waste emissions from the applicable facilities."[12]

In response to these IRA mandates, EPA announced proposed amendments to Subpart W in July 2023. The proposed amendments include updates to calculation methodologies and reporting requirements for equipment not currently subject to Subpart W, including nitrogen removal units, produced water tanks, mud degassing, and crankcase venting.[13] The amendments also establish reporting requirements for "other large release events," defined to include "well blowouts, well releases, pressure relief valve releases from process equipment other than hydrocarbon liquids storage tanks, storage tank cleaning and other maintenance activities, and releases that occur as a result of an accident, equipment rupture, fire, or explosion."[14] In addition to this definition, the proposed amendments set a 100 kg/hr methane trigger for other large release events to "align with the super-emitter response program proposed in the NSPS OOOOb."[15]

If finalized, EPA's proposed amendments could result in additional costs to operators. This includes direct costs in the form of methane charges and indirect costs associated with additional resources needed to refine GHG emissions calculations and comply with the interconnected super-emitter obligations under NSPS OOOOb and the GHGRP.

C. Enforcement

In addition to the regulatory changes discussed above, EPA has also targeted oil and gas operations – and Texas operators in particular – in recent enforcement initiatives. For example, EPA has conducted helicopter flyovers in the Permian Basin across New Mexico and

[9] *Id.* at 74,831.
[10] Subpart W applies to owners or operators of facilities that contain petroleum and natural gas systems and emit 25,000 metric tons or more of GHGs per year (expressed as carbon dioxide equivalents).
[11] H.R.5376, Inflation Reduction Act of 2022 (117th Congress, 2021-2022), Section 60113, p. 258.
[12] *Id.* at p. 260.
[13] EPA, Greenhouse Gas Reporting Rule: Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems – Federal Register Notice (Signed June 30, 2023) (will be replaced upon forthcoming official publication in the Federal Register), Docket No. EPA-HQ-OAR-2023-0234, p. 14.
[14] *Id.* at p. 638.
[15] *Id.* at p. 71.

Texas since 2019. However, recent flyovers have included a particular focus on identification of "potential super-emitters," building off EPA's approach to both NSPS OOOOb and the GHGRP amendments.[16]

EPA completed its most recent set of flyovers in August 2022. These flyovers have identified issues across operators – from small companies to super majors. The issues generally involve 1) fugitive emissions from tank hatches and pressure relief valves and/or 2) unlit or improperly operating flares or other control devices. EPA takes the position that these issues represent violations of NSPS OOOO/OOOOa and federally enforceable state regulations.

While EPA has not yet publicly posted resolutions from the August 2022 flyovers, the agency continues to settle alleged violations from prior flyovers in 2020. EPA's administrative settlements include significant penalties and a standard suite of corrective actions covering permitting reviews, site inspections, engineering assessments, optical gas imaging surveys, and tank pressure and control device monitoring.

The scope of EPA's inspections and associated enforcement will likely expand following finalization of NSPS OOOOb and implementation of NSPS OOOOc for existing sources. In particular, EPA's proposed super-emitter program could result in increased enforcement and targeted investigations of specific operators. Even without any regulatory changes, operators should anticipate continued implementation of flyovers on a routine basis.

II. GHG NSPS for Electric Generating Units

In May 2023, EPA proposed a new rule to regulate GHG emissions from electric generating units ("EGUs").[17] The proposed rule is the latest in a series of attempts to regulate GHG emissions from EGUs. In October 2015, EPA published the Clean Power Plan ("CPP") to set emission limits on existing EGUs.[18] By June 2019, however, EPA issued a final repeal of the CPP, replacing it with the Affordable Clean Energy ("ACE") rule.[19] In January 2021, the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") struck down the ACE rule.[20]

EPA's current proposal would impose more stringent NSPS requirements for GHG emissions from new and reconstructed combustion turbine EGUs. The specific requirements vary based on the capacity factor of the units and contemplate a suite of technologies, including highly efficient generating practices, hydrogen co-firing, and carbon capture and sequestration.[21] The

[16] EPA Announces Flyovers in the Permian Basin in New Mexico and Texas (August 1, 2022), https://www.epa.gov/newsreleases/epa-announces-flyovers-permian-basin-new-mexico-and-texas.
[17] EPA, 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; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33,240 (May 23, 2023).
[18] EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (October 23, 2015).
[19] EPA, Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (June 8, 2019).
[20] *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir 2021).
[21] EPA, 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

proposed rule also includes emissions guidelines for existing steam generating EGUs above a certain generating capacity and annual capacity factor.

III. Ozone Reclassifications in Texas

EPA has taken recent action to reclassify major metro areas in Texas pursuant to the 2008 and 2015 ozone NAAQS.

A. 2008 Ozone NAAQS (75 ppb)

In November 2022, EPA reclassified the eight-county Houston-Galveston-Brazoria ("HGB") and the ten-county Dallas-Fort Worth ("DFW") areas from serious to severe nonattainment for the 2008 eight-hour ozone NAAQS.[22] The attainment date for the HGB and DFW severe nonattainment areas is July 20, 2027, with a 2026 attainment year. The 2008 ozone NAAQS require an area to achieve an ambient ozone design value of 75 parts per billion ("ppb") to reach attainment.[23] Redesignation to severe nonattainment carries additional requirements, including lower New Source Review ("NSR") major source thresholds, which could have a significant impact on air permitting for new or modified sources.

However, one of the most significant financial impacts of the redesignation to severe nonattainment is the potential for fees under Section 185 of the Clean Air Act. Section 185 imposes a fee if an area fails to meet its severe or extreme attainment date for an ozone NAAQS.[24] Texas is required to submit to EPA, by November 7, 2025, a proposed SIP implementing an appropriate fee program for the HGB and DFW areas, reflecting 2028 as the first payment year.[25] Once in place, Section 185 fees are statutorily required to be assessed until the area is redesignated as attainment. If Texas fails to submit a SIP or EPA disapproves the state's SIP submittal, EPA could issue a Federal Implementation Plan ("FIP"), which, as well as requiring an EPA-designed program, would see fee revenue allocated to the U.S. Treasury rather than Texas air quality initiatives. The Texas Commission on Environmental Quality ("TCEQ") recently estimated that the total fee assessment in the HGB area could be more than $150 million per year beginning in 2028.[26]

From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33,240, 33,244 (May 23, 2023).

[22] EPA, Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Areas Classified as Serious for the 2008 Ozone National Ambient Air Quality Standards, 87 Fed. Reg. 60,926 (October 7, 2022).

[23] EPA, National Ambient Air Quality Standards for Ozone, 60 Fed. Reg. 16,436 (March 27, 2008).

[24] 42 U.S.C. § 7511d.

[25] TCEQ, Section 185 Fee Overview of the Houston-Galveston-Brazoria (HGB) 2008 Eight-Hour Ozone Nonattainment Area (April 26, 2023), https://www.tceq.texas.gov/downloads/air-quality/point-source/hgb_185fee_final_042623.pdf, p. 14; TCEQ, Section 185 Fee Overview of the Dallas-Fort Worth (DFW) 2008 Eight-Hour Ozone Nonattainment Area (February 17, 2023), https://www.tceq.texas.gov/downloads/air-quality/point-source/dfw_nctcog_185fee_final_postweb.pdf, p. 13.

[26] TCEQ, Section 185 Fee Overview of the Houston-Galveston-Brazoria (HGB) 2008 Eight-Hour Ozone Nonattainment Area (April 26, 2023), https://www.tceq.texas.gov/downloads/air-quality/point-source/hgb_185fee_final_042623.pdf, p. 7.

Section 185 requires fees to be assessed on major sources of VOCs, which are precursors to ozone formation. While the statutory language of Section 185 only references VOCs, EPA has taken the position that the fee applies to both VOCs and nitrogen oxides ("NOx").[27] The fees are assessed on a per ton basis over 80% of a baseline value. EPA has indicated in public meetings that it will likely look for an approvable SIP to include a baseline year of 2027. However, Section 185 also provides that, for sources with emissions that "are irregular, cyclical, or otherwise vary significantly from year to year," EPA may authorize an alternative baseline procedure using a baseline period of more than one calendar year. Additionally, in past Section 185 fee programs, such as the Texas program implemented under the revoked 1997 one-hour ozone NAAQS, additional flexibilities have played an important role in an effective fee program. Such flexibilities have included site aggregation, precursor aggregation, and credit for mobile source emissions reductions.[28] TCEQ has publicly indicated an intention to seek public input on fee program design in anticipation of the 2025 program submission.[29]

B. 2015 Ozone NAAQS (70 ppb)

In November 2022, EPA reclassified the six-county HGB area, the nine-county DFW area, and the one-county San Antonio area (Bexar County) from marginal to moderate nonattainment for the 2015 eight-hour ozone NAAQS.[30] The attainment date for the HGB and DFW moderate nonattainment areas is August 3, 2024, with a 2023 attainment year; the attainment date for the Bexar County moderate nonattainment area is September 24, 2024, with a 2023 attainment year. The 2015 ozone NAAQS require an area to achieve an ambient ozone design value of 70 ppb to reach attainment.[31] Redesignation to moderate nonattainment carries additional requirements for SIPs, including implementation of reasonably available control technology, reasonable further progress ("RFP") targets, and contingency measures, among others.

In May 2023, the TCEQ proposed the HGB, DFW, and Bexar County Moderate Area Attainment Demonstration ("AD") SIP Revisions for the 2015 Eight-Hour Ozone NAAQS. If HGB, DFW, and Bexar County do not reach attainment by the 2024 attainment dates, EPA will likely propose to redesignate the areas from moderate to serious nonattainment, with a 2027 attainment date and a 2026 attainment year. Redesignation to serious nonattainment carries further requirements, including more stringent RFP targets.

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[27] EPA Memorandum, Clean Air Act Section 185 Fee Rates Effective for Calendar Year 2022 – Corrected (October 7, 2022), see footnote 1 ("CAA section 185 references only VOC emissions, however, CAA section 182(f) provisions extend the section 185 requirements to include NOx emissions, unless the nonattainment area has an EPA-approved NOx waiver granted under the conditions specified in CAA section 182(f).").

[28] TCEQ, Section 185 Fee Overview of the Houston-Galveston-Brazoria (HGB) 2008 Eight-Hour Ozone Nonattainment Area (April 26, 2023), https://www.tceq.texas.gov/downloads/air-quality/point-source/hgb_185fee_final_042623.pdf, p. 12.

[29] TCEQ, Houston-Galveston-Brazoria (HGB) Technical Information Meeting, Section 185 Fee (July 28, 2022), https://www.tceq.texas.gov/downloads/air-quality/modeling/meetings/hgb/2022/20220728-185fee-tceq-dickey-hull.pdf, p. 9; TCEQ, Dallas-Fort Worth (DFW) Technical Information Meeting, Section 185 Fee (August 24, 2022), https://www.tceq.texas.gov/downloads/air-quality/modeling/meetings/dfw/2022/20220824-section-185-fee-tceq-dickey-hull.pdf, p. 10.

[30] EPA, Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, Extensions of the Attainment Date, and Reclassification of Areas Classified as Marginal for the 2015 Ozone National Ambient Air Quality Standards, 87 Fed. Reg. 60,897 (October 7, 2022).

[31] EPA, National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,291 (October 26, 2015).

IV. Startup, Shutdown, and Malfunction ("SSM") SIP Call

In February 2023, EPA proposed to reinstate its 2015 SSM SIP call and finding of substantial inadequacy for the Texas SIP based on TCEQ's affirmative defense provisions at 30 TAC 101.222(b)-(e) (the "2015 SIP Call").[32] EPA's proposal reiterates its 2015 assertion that these provisions are inappropriate and substantially inadequate to meet the requirements of the Clean Air Act. Specifically, EPA asserts that the affirmative defense alters or eliminates federal court jurisdiction and conflicts with the Clean Air Act requirement for continuous controls on a source.[33] However, as industry groups and the TCEQ noted in response to the proposed rule, affirmative defense provisions are an integral part of the Texas maintenance, startup, and shutdown ("MSS") program.[34]

EPA's position on the adequacy of the Texas affirmative defense has changed dramatically in the years leading up to the February 2023 proposal. In February 2020, EPA Region 6 published a final action withdrawing the 2015 SIP Call. Building on this, the EPA Administrator issued a guidance memorandum in October 2020 that superseded components of the 2015 SIP Call and confirmed that exemptions and affirmative defenses were acceptable SIP provisions.[35] However, in September 2021, EPA issued another memorandum reversing the October 2020 memorandum and reinstating EPA's position supporting the 2015 SIP Call.[36] EPA then reinstated its findings of substantial inadequacy and reinstated its Texas SIP call in the current proposal.

If the February 2023 proposal is finalized, Texas would then have eighteen months after the final finding of inadequacy to revise the SIP. If Texas fails to revise the SIP or EPA finds the SIP to be inadequate, EPA has two years to impose a FIP. EPA's presumed action if Texas makes no submittal or if EPA disapproves the state's submittal is to remove the defenses from the SIP. At that point, the affirmative defense would not operate in citizen suits or EPA civil enforcement cases. However, EPA has not yet indicated whether it would take action if Texas maintained the affirmative defense solely as to state enforcement cases. Litigation concerning EPA's 2015 SIP Call is ongoing in the D.C. Circuit. The court heard oral argument in the case, *Environmental Committee of the Florida Electric Power Coordinating Group, Inc. v. EPA*, in March 2022. If the court were to invalidate the 2015 SIP Call, EPA may withdraw the 2023 proposal, as it relies on the same legal justification.

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[32] EPA's action included SIP calls for several other states. However, this summary focuses on the Texas SIP call.
[33] EPA, Findings of Substantial Inadequacy and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 88 Fed. Reg. 11,842 (February 24, 2023).
[34] TCEQ, Comments on the United States Environmental Protection Agency's (EPA) State Implementation Plans: Findings of Substantial Inadequacy and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction (Docket ID No. EPA-HQ-OAR-2022-0814) (April 25, 2023); Texas MSS Working Group, Comments on EPA's Proposed Findings of Substantial Inadequacy and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction (Docket ID No. EPA-HQ-OAR-2022-0814) (April 25, 2023).
[35] EPA, Memorandum on Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans (October 9, 2020).
[36] EPA, Memorandum on Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy (September 30, 2021).

V. "Good Neighbor" FIP

Clean Air Act Section 110(a)(2)(D)(i)(I) requires states to develop interstate transport SIPs to prohibit in-state sources from "contribut[ing] significantly" to nonattainment or interfering with maintenance of a NAAQS in another state (i.e., the "Good Neighbor" provision).[37] Interstate transport SIPs must be submitted to EPA within three years of publication of a NAAQS.[38] If a state fails to submit a SIP that satisfies the Good Neighbor provision, EPA is required to issue a FIP for that state at any time within two years unless the state corrects the deficiency and the administrator approves the revision before EPA promulgates the FIP.[39]

On February 13, 2023, EPA published a final rule disapproving interstate transport SIPs for Texas and eighteen other states.[40] EPA also partially approved and partially disapproved SIPs for two other states: Minnesota and Wisconsin. Before signing the final disapprovals, EPA agreed as part of a consent decree to issue a final action on SIPs for three additional states—Arizona, Tennessee, and Wyoming—by December 15, 2023.[41]

On June 5, 2023, EPA published the FIP, addressing the interstate transport obligations under the 2015 ozone NAAQS for the twenty-one states for which EPA issued full or partial SIP disapprovals and for two states that did not submit a SIP.[42] The FIP seeks to resolve the transport obligations for states whose transport SIPs EPA disapproved. The FIP applies the provisions of the Cross-State Air Pollution Rule ("CSAPR") NOx Ozone Season Group 3 Trading Program to EGUs within the covered states beginning in the 2023 ozone season.[43] For certain non-electric generating units ("non-EGUs"), the FIP sets source-specific NOx limits during the ozone season (May 1 – September 30) starting in 2026 for twenty states, focusing on the pipeline transportation of natural gas, as well as cement kilns, glass manufacturing furnaces, iron and steel mills, metal ore mining, basic chemical manufacturing, petroleum and coal products manufacturing, solid waste incinerators, and pulp, paper, and paperboard mills.[44]

Although the FIP is scheduled to take effect on August 4, 2023, it has been judicially challenged in several states. In Arkansas, Louisiana, Mississippi, Missouri, and Texas, the SIP disapprovals supporting the FIP were temporarily stayed pending judicial review on the merits.[45] The SIP disapproval has been administratively stayed with respect to Kentucky pending review of Kentucky's motion to stay.[46] A motion to stay EPA's Oklahoma SIP disapproval remains

[37] 42 U.S.C. § 7410(a)(2)(D)(i)(I).
[38] 42 U.S.C. § 7410(a)(1).
[39] 42 U.S.C. § 7410(c)(1).
[40] EPA, Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9,336 (February 13, 2023).
[41] EPA, Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654, see footnote 100 (June 5, 2023).
[42] *Id.*
[43] *Id.* at 36,658.
[44] *Id.* at 36,659.
[45] Order, *Texas v. EPA*, No. 23-60069 (5th Cir. May 1, 2023); Order, *Texas v. EPA*, No. 23-60069 (5th Cir. June 8, 2023); Order, *Arkansas v. EPA*, No. 23-1320 (8th Cir. May 25, 2023); Order, *Missouri v. EPA*, No. 23-1719 (8th Cir. May 26, 2023); Order, *Union Electric Co. v. EPA*, No. 23-1751 (8th Cir. May 26, 2023).
[46] Order, *Kentucky v. EPA*, No. 23-3216 (6th Cir. May 31, 2023).

pending.[47] In response to the stays of the SIP disapprovals, EPA issued an interim final rule that temporarily stays the effectiveness of the FIP in the states with a judicial stay of the disapproval.[48] The temporary administrative stay delays the effectiveness of the FIP in these states until the SIP disapproval litigation is resolved.

Depending on the outcomes of these state-specific court challenges, it is possible for each "stay state" that (i) the FIP will never take effect, (ii) the FIP will take effect and regulated entities will have to comply by 2026, or (iii) the FIP will take effect, but EPA tolls the compliance deadline until after 2026. Following resolution of these challenges, EPA could take subsequent action to lift the temporary stay and reinstate the FIP in one or more of these states. The interim final rule does not address the timing of compliance with the FIP in the event that EPA lifts the temporary stay. Accordingly, companies must weigh the risk of deferring expenditures pending resolution of these cases with the possibility that the 2026 deadline may remain in place.

[47] Oklahoma Petitioners' Joint Opposed Motion to Stay the Final Rule of the U.S. Environmental Protection Agency, *Oklahoma v. EPA*, No. 23-9514 (10th Cir. June 6, 2023).

[48] EPA, Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards; Response to Judicial Stays of SIP Disapproval Action for Certain States – Federal Register Notice (Signed June 29, 2023) (will be replaced upon forthcoming official publication in the Federal Register), Docket No. EPA-HQ-OAR-2021-0668.