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2022 EARTH DAY CELEBRATION

Climate Change Regulation—From Emissions Standards to Disclosure Rules and Everything In Between

Douglas A. Hastings | Laura C. Williams | Erin E. Martin
April 21, 2022

Program Overview

- **APRIL 18** | Reaching Net Zero Together: Environmental & Regulatory Considerations in Alternative Energy Development
- **APRIL 19** | Emerging Contaminants—The Road Ahead
- **APRIL 20** | Major Federal Environmental Cases—What Lies Ahead
- **APRIL 21** | Climate Change Regulation—From Emissions Standards to Disclosure Rules and Everything In Between

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https://www.morganlewis.com/events/earth-day-celebration-series

Presenters

Douglas A. Hastings
Washington, D.C.
+1.202.373.6635
douglas.hastings@morganlewis.com

Laura C. Williams
Houston
+1.713.890.5199
laura.williams@morganlewis.com

Erin E. Martin
Washington, D.C.
+1.202.739.5729
erin.martin@morganlewis.com

“All of Government” Approach to Climate Change

- More than just stationary sources; more than just EPA
  - No “signature” actions yet, but many smaller ones
- Recent regs:
  - SEC Disclosure Rule
  - Oil and Gas Methane Rule
  - Mobile sources
- The future:
  - Litigation and legislation
  - Power sector emissions standards
  - Social Cost of Carbon
  - NEPA

PART 1: NOW – Recent Climate Regulations

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SEC's Proposed Climate-Related Disclosure Rules

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Background

- On March 21, 2022, the SEC proposed long-awaited rules that would require public companies to provide climate-related disclosure in registration statements and periodic reports.
- The SEC has signalled to public companies and stakeholders its position that climate-related information is material disclosure necessary to make an informed investment decision for some time.
  - Commission released guidance in 2010 that outlined how the existing rules may require climate-related disclosure.
  - In 2021, the then-acting chair of the SEC released a statement soliciting public input on the topic.
  - SEC’s Division of Corporation Finance published a sample comment letter to public companies regarding the types of climate-related disclosure that should be considered.
  - SEC’s Division of Enforcement announced a Climate and ESG Task Force.

Key Aspects of the Proposed Rules

- Separately captioned "Climate-Related Disclosure" section in registration statements and reports.
- Discussion of climate-related targets, goals and transition plans.
- Oversight and governance of climate-related risks.
- Process for identifying, assessing and managing climate-related risks and their impact.
- Location of properties, processes or operations subject to physical climate-related risks.
- Disaggregated climate-related impacts on existing financial statement line items and related disclosure.

Key Aspects of the Proposed Rules (cont'd)

- Disclosure of Scopes 1, 2 and 3 greenhouse gas (GHG) emission data.
  - All public companies will be required to disclose Scope 1 and Scope 2.
  - Certain public companies will be required to disclose Scope 3 to the extent material or otherwise subject to an emissions reduction target or goal.
- Accelerated and large accelerated filers must also obtain an attestation report from an independent attestation service provider covering Scope 1 and Scope 2 GHG emissions disclosure.

What’s Next

- Comment period for public input on the proposed rules is open until at least May 20, 2022.
- Unclear when final rules will be announced and implemented.
- The proposing release included phase-in periods for the rules based on filer status and provided sample compliance dates based on an effective date of December 2022.
- Legal challenges to the rules, if adopted as proposed, are expected.

Oil and Gas Methane Rule

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Background

- VOC emissions from new, modified, or reconstructed oil and gas sources regulated under the OOOO and OOOOa new source performance standards
- In 2020, EPA adopted the 2020 Policy Rule
  - Rescinded all NSPS regulating methane from oil and gas production and processing sources
  - Rescinded all NSPS regulating VOC, methane for oil and gas transmission and storage sources
- One day later, adopted the 2020 Technical Rule
  - Amended OOOOa to address technical and implementation issues

Background (cont'd)

- In June 2021, President Biden signed a joint resolution of Congress disapproving the 2020 Policy Rule
- On November 2, 2021, EPA announced a new proposal for NSPS and existing source emissions guidelines for methane, VOCs emitted by oil and gas sources

EPA’s New Proposal

- Proposed rule has three main pieces:
  - Update OOOOa to address CRA disapproval of 2020 Policy Rule
  - Create OOOOb regulations covering new, modified, reconstructed sources in oil and natural gas sector
    - Creates several new requirements for storage vessels, OGI inspections, well liquids unloading, etc.
  - Create OOOOc regulations creating emission guidelines for existing oil and gas sources
    - Generally mirror OOOOb, but different applicability thresholds
    - Intended to guide states in promulgating their own regs

Rule Implementation

- EPA's November 2021 proposal did not actually include proposed rule language for OOOOb/OOOOc
  - 2021 proposal sought comment, stated EPA will be issuing another proposal with actual proposed rule language
- Timing of rule implementation remains unclear
  - Comment period on November 2021 proposal ended in January 2022
  - Proposed rule language anticipated in 2022; full implementation – including state regs under OOOOc – may not occur until 2025 or later

Implications

- More stringent GHG, VOC standards for new, modified, reconstructed oil and gas facilities
- Regulation of existing oil and gas sources under OOOOc
  - These sources have previously been regulated under state rules, but not the NSPS

Vehicle Emissions and Fuel Economy Standards

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Light Duty Vehicles: Background

- Two types of standards: GHG emissions and fuel economy
- Less stringent standards for passenger cars and light trucks under Trump administration
- Biden’s EO 13990 asked EPA to consider revising
- In December 2021, EPA finalized new, more stringent GHG emissions standards
- In April 2022, NHTSA finalized more stringent fuel economy standards

GHG Emissions Rule

- Increase in stringency year-over-year by 10% in MY 2023, 5% in MY 2024, 6.6% in MY 2025, and by more than 10% in MY 2026
- Based on assumption of increased EV adoption from 7% market share in MY 2023 to about 17% in MY 2026

Fuel Economy Rule

- Increase fuel efficiency 8% annually for model years 2024-2025 and 10% annually for model year 2026
- Fleet average of approximately 49 mpg in 2026
  - 10 mpg more than 2021

Implications

- In line with auto industry goals
- Could help drive further electrification
- Opposed by liquid fuels interests; GHG standards being challenged in the DC Circuit

PART 2: THE FUTURE – Potential Climate Regulations and Actions

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Litigation Implications

- *West Virginia v. EPA*
  - Major questions doctrine
  - Narrower grounds for ruling?
- Climate torts suits

Legislation Implications

- Bipartisan Infrastructure Law
  - E.g. decarbonizing school buses
- Build Back Better (or replacement)
  - Clean Electricity Standard (or not)
  - Spending and incentives

Clean Power Plan 2.0?

- Depends on outcome of *Michigan v. EPA*
- Also faces another potential legal argument: that power plants cannot be regulated under Section 111 when already regulated under 112
  - US Supreme Court stayed CPP in 2016

Possibilities for Future CAA GHG Regulation

- Tightening existing NAAQS
- Promulgation of new GHG NAAQS
- Regulation of GHGs as "hazardous air pollutants" under CAA Section 112
- Regulation of GHGs under CAA Section 115 (preventing/eliminating endangerment in foreign countries caused by air pollutants)

GHG Regulation: Petitions

- During the Trump Administration, Administrator Wheeler denied several petitions seeking regulation of GHGs under the CAA
- Acting Administrator Nishida reversed those denials in March 2021
- Petitions remain pending; however, reversal could be indication that Biden Administration is not ruling out CAA possibilities for GHG regulation

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

March 4, 2021

I am withdrawing the denial of your petition, as the agency did not fully and fairly assess the issues raised by the petition. The EPA intends to further consider the important issues raised by your petition before responding.

Thank you for your interest in these issues, and please contact me if you have further questions about the status of the EPA's response to your petition.

Sincerely,

Jane Nishida
Acting Administrator

Social Cost of Carbon

- Cost reduced to about $7 per ton under Trump Administration
- Executive Order 13990 directed agencies to reconsider
- Working group established interim measure of $51 per ton, could raise it further
- Implications across all types of agency decisions (DOE, BLM, EPA)
- Litigation
  - Preliminary Injunction
  - 5th Circuit Overturned
  - Cert Petition?

NEPA Regulations

- On April 19, Council for Environmental Quality adjusted NEPA review processes that had been expedited under Trump Administration
- "Phase 1" of a two-step process, which reinstates Obama-era process
  - Includes consideration of indirect and cumulative impacts
- Phase 2 may include further guidance on analyzing climate impacts

Questions???

Biography

Doug Hastings focuses his practice on environmental and administrative law. Doug represents clients in matters arising under a variety of federal and state environmental statutes, including the Clean Air Act, Clean Water Act, National Environmental Policy Act (NEPA), and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). He also assists clients in navigating agency proceedings and litigation involving the Administrative Procedure Act.

Douglas A. Hastings
Washington, D.C.
+1.202.373.6635
douglas.hastings@morganlewis.com

Biography

Laura C. Williams
Houston
+1.713.890.5199
laura.williams@morganlewis.com

Laura Williams’ practice covers a wide variety of matters, focusing on regulatory counseling and enforcement defense involving air quality, water quality, hazardous materials, and climate change. She regularly helps clients navigate permitting matters, including federal and state air permits, Clean Water Act Section 404 and 408 permits, and permitting requirements for renewable energy projects. Laura also advises clients on compliance with federal, state, and local regulations, including enforcement actions and environmental audits. In addition, she provides support for transactional and environmental litigation matters.

Biography

Erin E. Martin
Washington, D.C.
+1.202.739.5729
erin.martin@morganlewis.com

Erin Martin focuses on counseling public companies and their boards with respect to securities regulation, capital market transactions, and corporate governance matters, drawing on her long tenure at the US Securities and Exchange Commission (SEC) in the Division of Corporation Finance. Erin brings extensive and specialized experience relating to complex matters of SEC disclosure and compliance.

Before joining Morgan Lewis, Erin served as legal branch chief in the SEC's Office of Real Estate and Construction, where she oversaw the legal reviews of transactional filings and periodic reports filed by a wide range of public companies, including special purpose acquisition companies (SPACs), real estate investment trusts (REITs), real estate platforms, and real estate-related finance companies. She is admitted in New York only, and her practice is supervised by DC Bar members.

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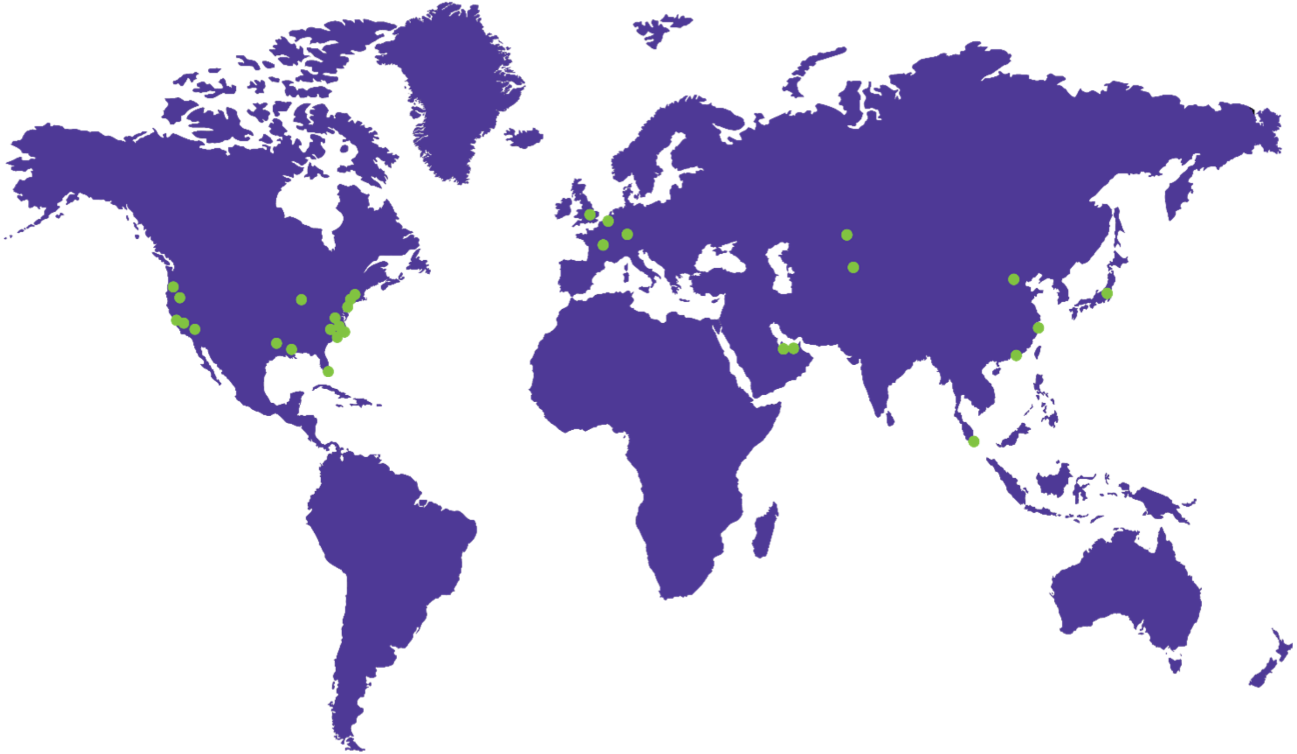

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