

**COUNTRY REPORT: UNITED STATES**  
**EPA Continues Significant Regulatory Initiatives as Opponents of  
Environmental Regulation Prepare to Take Control of Both Houses of  
Congress**

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### **Introduction**

During 2014 the U.S. Environmental Protection Administration (EPA) continued to move ahead with significant regulatory initiatives while the judiciary continued largely to uphold the EPA's regulatory actions. In April 2014 the Supreme Court granted EPA a significant victory when it reversed a lower court decision striking down the Agency's regulations to control interstate air pollution. In June 2014 the Supreme Court largely upheld the EPA's regulations on greenhouse gas (GHG) emissions from new power plants, though it invalidated a small portion of them. In November 2014 the Supreme Court announced that it will review a lower court decision upholding EPA's regulations on power plant emissions of mercury and air toxics (MATS). The Court's decision, which likely will be released by the end of June 2015, could have significant implications for environmental law.

EPA launched several new regulatory initiatives in 2014. In April 2014 EPA proposed new regulations defining the breadth of federal jurisdiction under *the Clean Water Act*. In June 2014 EPA proposed the "Clean Power Plan" to control GHG emissions from existing power plants. In November 2014 EPA proposed a revised national ambient air quality standard (NAAQS) for ozone. Each of these proposals has generated fierce opposition from industry groups, who are likely to find a sympathetic ear in the new Congress that will be controlled by Republican opponents of federal environmental regulation.

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In the November 2014 midterm elections the Republican party won control of the U.S. Senate with the election of many candidates fiercely opposed to federal environmental regulation. Thus, beginning in January 2015, both houses of the U.S. Congress will be controlled by the political party opposing President Obama and considerable anti-environmental legislation may pass both houses. However, such legislation is unlikely to become law because President Obama will veto it and Republicans do not have the two-thirds super majority required in both houses to enact a law over the president's veto. Congressional Republicans likely will try to use the "power of the purse" to seek to block environmental initiatives by refusing to provide funds to implement them. Thus, the battle between the President and Congress will shift to budget matters with the prospect of a repeat of the October 2013 government shutdown within the realm of possibility.

### **Air Pollution and Climate Change**

#### *Supreme Court Upholds Regulation of Interstate Transport of SO<sub>2</sub> and NO<sub>x</sub>*

As noted in the last edition of this eJournal, on April 29, 2014, the U.S. Supreme Court upheld EPA's regulations to reduce interstate transport of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxide (NO<sub>x</sub>).<sup>1381</sup> By a 6-2 majority the Court ruled that *the Clean Air Act* did not mandate any particular allocation of emissions reductions to control interstate transport and that EPA's decision to require measures that can be undertaken most cost-effectively was reasonable. The Court also held that EPA did not have to wait for states to develop their own pollution control plans in response to a finding that their existing plans are inadequate to control transboundary pollution. Instead, EPA could promulgate a federal implementation plan at any time after EPA the existing plans were declared inadequate. After a long delay on remand, the panel of judges from the U.S. Court of Appeals for the D.C. Circuit who initially struck down the EPA regulations lifted the stay on the regulations and allowed them to go into effect.

#### *EPA Regulation of GHG Emissions from Power Plants*

Pursuant to the Climate Action Plan announced by President Obama in June 2013, EPA has launched several regulatory initiatives to control GHG emissions. The U.S. Supreme Court

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<sup>1381</sup> EPA v. EME Homer City Generation, L.P., 134 S.Ct. 1584 (2014).

reviewed EPA's regulations requiring new or major modified sources of GHG emissions to obtain permits *under the Clean Air Act's Prevention of Significant Deterioration (PSD) program*. In a decision released on June 23, 2014, the Court largely upheld EPA's regulations, while striking down a portion of them.<sup>1382</sup> By a 7-2 vote the Court held that EPA properly determined that GHG emissions were among the pollutants that had to be controlled by stationary sources that already are required to obtain permits. But, by a 5-4 vote, the Court rejected the conclusion that all large stationary sources of GHG emissions automatically were subject to permitting requirements due to EPA's regulation of GHGs from motor vehicles. Because the vast majority of these sources already are required to obtain permits, the decision does not represent a major setback to EPA's efforts to control GHG emissions under *the Clean Air Act (CAA)*. EPA's crucial finding that emissions of GHGs endanger public health and welfare and can be regulated under the CAA and the agency's regulation of emissions of GHGs from mobile sources were left standing by the Court. Only two Justices – Justices Alito and Thomas – stated that they continue to believe that GHGs cannot legally be regulated under the CAA, a position they articulated in dissent in the Court's landmark 2007 *Massachusetts v. EPA* decision.

Even as it continues its rulemaking to establish new source performance standards (NSPSs) for emissions of GHGs from new fossil-fueled power plants, EPA on June 2, 2014, announced its Clean Power Plan to regulate GHG emissions from existing power plants. The plan relies on §111(d) of the CAA. This section allows EPA to require states to regulate a pollutant for which it has established an NSPS if it is not already regulated as a criteria air pollutant with a national ambient air quality standard (NAAQS) or as a hazardous air pollutant subject to a national emissions standard for hazardous air pollutants (NESHAP). EPA's proposal seeks to reduce GHG emissions from power plants by 30 percent from 2005 levels by the year 2030. The plan sets state-specific goals for reductions in GHG emissions from power plants. Each state will develop its own plan concerning how to achieve these reductions or let EPA develop a plan for reductions in the state. The proposed rules emphasize four "building blocks" for state GHG reductions: improvements in the efficiency of existing coal-fired power plants, increased utilization of existing plants using natural gas, expanded use of renewable energy, and increased energy efficiency in homes and businesses to reduce demand for electricity. EPA's proposal has spawned considerable controversy (and even some lawsuits that are premature because the agency will not adopt the rules in final form until June 2015). Critics of EPA's Clean Power Plan argue that a

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<sup>1382</sup> Utility Air Regulatory Group v. EPA (2014).

drafting error in the 1990 CAA Amendments precludes regulation of power plants under § 111(d) and that EPA has no authority to require demand side reductions in energy use through efficiency improvements outside the grounds of power plants.

#### *EPA Proposes to Strengthen Controls on Ground-Level Ozone*

On November 25, 2014, EPA proposed new regulations to lower the national ambient air quality standard (NAAQS) for ground-level ozone. The agency proposed to lower the current standard for ozone from 75 parts per billion (ppb) to a range between 65 and 70 ppb. Former EPA Administrator Lisa Jackson had sought to make a similar proposal in 2011, but it was blocked by opposition from President Obama and the Office of Management and Budget. EPA is required to review and revise, if necessary, the NAAQS every five years, a deadline that expired in 2013 for the ozone NAAQS. The agency released its ozone proposal shortly in advance of a court-ordered deadline.

#### *Supreme Court to Review Regulations on Power Plant Emissions of Mercury and Air Toxics*

On November 25, 2014, the U.S. Supreme Court announced that it would review a lower court decision upholding EPA's regulations on emissions of mercury and air toxics (MATS) from power plants. On April 15, 2014 a divided panel of the U.S. Court of Appeals for the D.C. Circuit upheld the regulations, which were issued in 2012. The regulations require power plants to reduce emissions of mercury, chromium, arsenic and other air pollutants. The question the Court will consider is whether EPA "unreasonably refused to consider costs in determining whether it is 'appropriate' to regulate hazardous air pollutants emitted by electric utilities". Oral argument is likely to be held in March or April 2015 with the Court's decision expected by the end of June 2015.

### **Protection of Water Quality**

#### *EPA Proposes to Clarify Reach of Federal Jurisdiction under the Clean Water Act*

Eight years after a badly divided U.S. Supreme Court split 4-1-4 in deciding a case involving the breadth of federal *Clean Water Act* (CWA) jurisdiction, EPA has proposed new regulations to clear up the confusion. Because no interpretation of the Clean Water Act commanded a majority of the Justices in *Rapanos v. U.S.*, confusion has reigned concerning

the meaning of “waters of the United States,” the waters covered by CWA permit requirements. In April 2014 EPA issued a proposed rule to further define “waters of the United States.” The proposal is based on a report issued in September 2013 by EPA’s Science Advisory Board on the “Connectivity of Streams and Wetlands to Downstream Waters.” A two-page summary of EPA’s proposed rule is available online at:

[http://www2.epa.gov/sites/production/files/2014-](http://www2.epa.gov/sites/production/files/2014-06/documents/proposed_regulatory_wus_text_40cfr230_0.pdf)

[06/documents/proposed\\_regulatory\\_wus\\_text\\_40cfr230\\_0.pdf](http://www2.epa.gov/sites/production/files/2014-06/documents/proposed_regulatory_wus_text_40cfr230_0.pdf) A copy of the proposed rule

is available at: [http://www2.epa.gov/sites/production/files/2014-04/documents/fr-2014-](http://www2.epa.gov/sites/production/files/2014-04/documents/fr-2014-07142.pdf)

[07142.pdf](http://www2.epa.gov/sites/production/files/2014-04/documents/fr-2014-07142.pdf). Farm groups are waging an aggressive campaign in opposition to the proposed

rule. In response EPA has published a short document entitled “Ditch the Myth,” which is

online at: [http://www2.epa.gov/sites/production/files/2014-](http://www2.epa.gov/sites/production/files/2014-07/documents/ditch_the_myth_wotus.pdf)

[07/documents/ditch\\_the\\_myth\\_wotus.pdf](http://www2.epa.gov/sites/production/files/2014-07/documents/ditch_the_myth_wotus.pdf).

## **International Environmental Law**

### *U.S. and China Announce Historic Climate Agreement*

On November 12, 2014, President Obama and Chinese President Xi Jinping jointly announced an historic, bilateral climate agreement. The agreement pledges that both countries will work to achieve an “ambitious” global agreement to control emissions of greenhouse gases (GHGs) at the UN Climate Conference in Paris in December 2015. For the first time, China agreed to cap its GHG emissions by 2030, if not earlier, and to increase the share of its energy generated by renewable sources to 20 percent by 2030. The U.S. pledges to reduce its GHG emissions by 26-28 percent below 2005 levels by 2025. Both countries agreed to form an international private/public consortium to develop an innovative new carbon capture and storage project at a location in China. They also pledge to develop an Enhanced Water Recovery pilot project that would use CO<sub>2</sub> injection into deep saline aquifers to produce fresh water. Because China and the U.S. are the two countries with the largest GHG emissions, the U.S./China agreement may enhance chances for negotiating a new global climate agreement at the Paris conference in 2015.