

MOVING FORWARD

Law and Policy Panel, CMTc 2017

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OUTLINE

- Utilization should be the focus
- Many policy changes: Energy, Environmental, Economic
- What are the subjects of these current reversals and how will it work?
 - Paris Agreement – What is it?
 - Individual US Commitments
 - Regulatory Reform Realities –
 - Legislative Process:
 - New Rules: Congressional Review Act
 - Older Rules: Regulatory Process, with or without statutory revision
 - Regulatory Process:
 - How: Administrative Procedures Act
 - Notice and comment rulemaking
 - Judicial Review
 - What: 2-1; Best Available Science and Endangerment Finding >> CAA New Source Review?
 - Litigation and Market Response: States, NGO's, citizen suits, corporate governance and business reputation
- Impact on current projects
- Opportunities and challenges



BUT FIRST...

We've seen large scale swings before.

For calibration purposes:

President	Terms	Clean Air Act
Reagan	1981-1989	1988 – EPA applies New Source Review (NSR) strictly to Electric Generating Units (EGUs) – WEPCO; NSR recognized as not intended to allow significant life extension projects
Bush 1	1989-1993	1990 - Clean Air Act Amendments (no specific NSR revisions) 1992 – EPA adopts WEPCO Rule for EGUs
Clinton	1993-2001	1996 – EPA proposes NSR reform rules 1997 – NSR Enforcement Initiative – EGUs 1999 – EPA sues 7 EGU companies for NSR violations
Bush II	2001-2009	2001 – EPA/DOE conduct 90-day review of NSR impact on energy industry; USAG reviews NSR enforcement actions for CAA consistency. 2002 – EPA promulgates NSR reform rules: revised baseline actual; actual to projected actual; Plant-wide Applicability Limits (PALs); Clean Units; and Pollution Control Projects (PCP). 2002 – EPA proposes NSR reform for EGUs, including Equipment Replacement Provision (ERP) 2003 – EPA promulgates ERP 2005-2006 – <u>DC Circuit vacates Clean Unit, PCP and ERP revisions</u>

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PARIS AGREEMENT

- Comes into force if nations representing 55% of global GHG emissions ratify – Came into Force October 2016
- Kyoto governs to 2020. Paris to govern post-2020.
- Pivots from top down multinational agreement with overarching targets to bottom up submission of national emissions reduction plans without global reduction target.
- Establishes commitments by all parties to make “indicated nationally determined contributions” (INDCs) based on voluntary domestic measures to reduce emissions – includes developing countries.
- New INDCs every five years, with expectation they will ratchet up targets every five years.
- National emission targets under INDCs are not “binding” and enforceable, transparency and the five year review cycle are intended to drive performance
- Cannot withdraw for 3 years – 1 year notice

Use of markets:

At this time, the United States does not intend to utilize international market mechanisms to implement its 2025 target.

Domestic laws, regulations, and measures relevant to implementation:

Several U.S. laws, as well as existing and proposed regulations thereunder, are relevant to the implementation of the U.S. target, including the Clean Air Act (42 U.S.C. §7401 et seq.), the Energy Policy Act (42 U.S.C. §13201 et seq.), and the Energy Independence and Security Act (42 U.S.C. § 17001 et seq.).

Since 2009, the United States has completed the following regulatory actions:

- Under the Clean Air Act, the United States Department of Transportation and the United States Environmental Protection Agency adopted fuel economy standards for light-duty vehicles for model years 2012-2025 and for heavy-duty vehicles for model years 2014-2018.
- Under the Energy Policy Act and the Energy Independence and Security Act, the United States Department of Energy has finalized multiple measures addressing buildings sector emissions including energy conservation standards for 29 categories

of appliances and equipment as well as a building code determination for commercial buildings.

- Under the Clean Air Act, the United States Environmental Protection Agency has approved the use of specific alternatives to high-GWP HFCs in certain applications through the Significant New Alternatives Policy program.

At this time:

- Under the Clean Air Act, the United States Environmental Protection Agency is moving to finalize by summer 2015 regulations to cut carbon pollution from new and existing power plants.
- Under the Clean Air Act, the United States Department of Transportation and the United States Environmental Protection Agency are moving to promulgate post-2018 fuel economy standards for heavy-duty vehicles.
- Under the Clean Air Act, the United States Environmental Protection Agency is developing standards to address methane emissions from landfills and the oil and gas sector.
- Under the Clean Air Act, the United States Environmental Protection Agency is moving to reduce the use and emissions of high-GWP HFCs through the Significant New Alternatives Policy program.
- Under the Energy Policy Act and the Energy Independence and Security Act, the United States Department of Energy is continuing to reduce buildings sector emissions including by promulgating energy conservation standards for a broad range of appliances and equipment, as well as a building code determination for residential buildings.

In addition, since 2008 the United States has reduced greenhouse gas emissions from Federal Government operations by 17 percent and, under Executive Order 13693 issued on March 25th 2015, has set a new target to reduce these emissions 40 percent below 2005 levels by 2025.

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28. Congressional Review of Agency Rulemaking [5 U.S.C. 801, 802, 804]

The following excerpts of chapter 8 of title 5, United States Code, do not contain privileged procedures for the consideration of a measure in the House. They are depicted here because they constitute Rules of the House and potentially affect the legislative process. Detailed procedures for the consideration in the Senate of a joint resolution disapproving an agency rule may be found in the statute (5 U.S.C. 802).

SEC. 801. CONGRESSIONAL REVIEW.

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

- (i) a copy of the rule;
- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

[1247]

CONGRESSIONAL REVIEW ACT UP TO 2001 (1); 2017 (14)

SEC. 802. CONGRESSIONAL DISAPPROVAL PROCEDURE.

(a) For purposes of this section, the term “joint resolution” means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: “That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect.” (The blank spaces being appropriately filled in).

[1250]

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

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ADMINISTRATIVE PROCEDURES ACT

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

CCUS?

All regulatory changes must comply with the **Administrative Procedures Act**:

- General:
 - Regulatory Reform Task Forces
 - Removing Two Rules for every new One Rule
 - Imposing new “Best Available Science” requirements
- Revising Clean Air Act Regulation
 - Clean Power Plan and NSPS 111(b)
 - Oil and Gas Methane Rules
 - ***Endangerment Finding? Supports Application of New Source Review***
 - ***New Source Review? Provides authority for imposing CCS requirements as Best Available Control Technology (BACT) for major stationary GHG “Anyway” Sources***

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CCUS?

- Litigation in rulemaking, enforcement and innovative common law claims
 - California and other state activism
 - Delegated States
 - Non-Governmental Organizations (NGO) environmental advocacy
 - Industry Groups
 - Citizen suits

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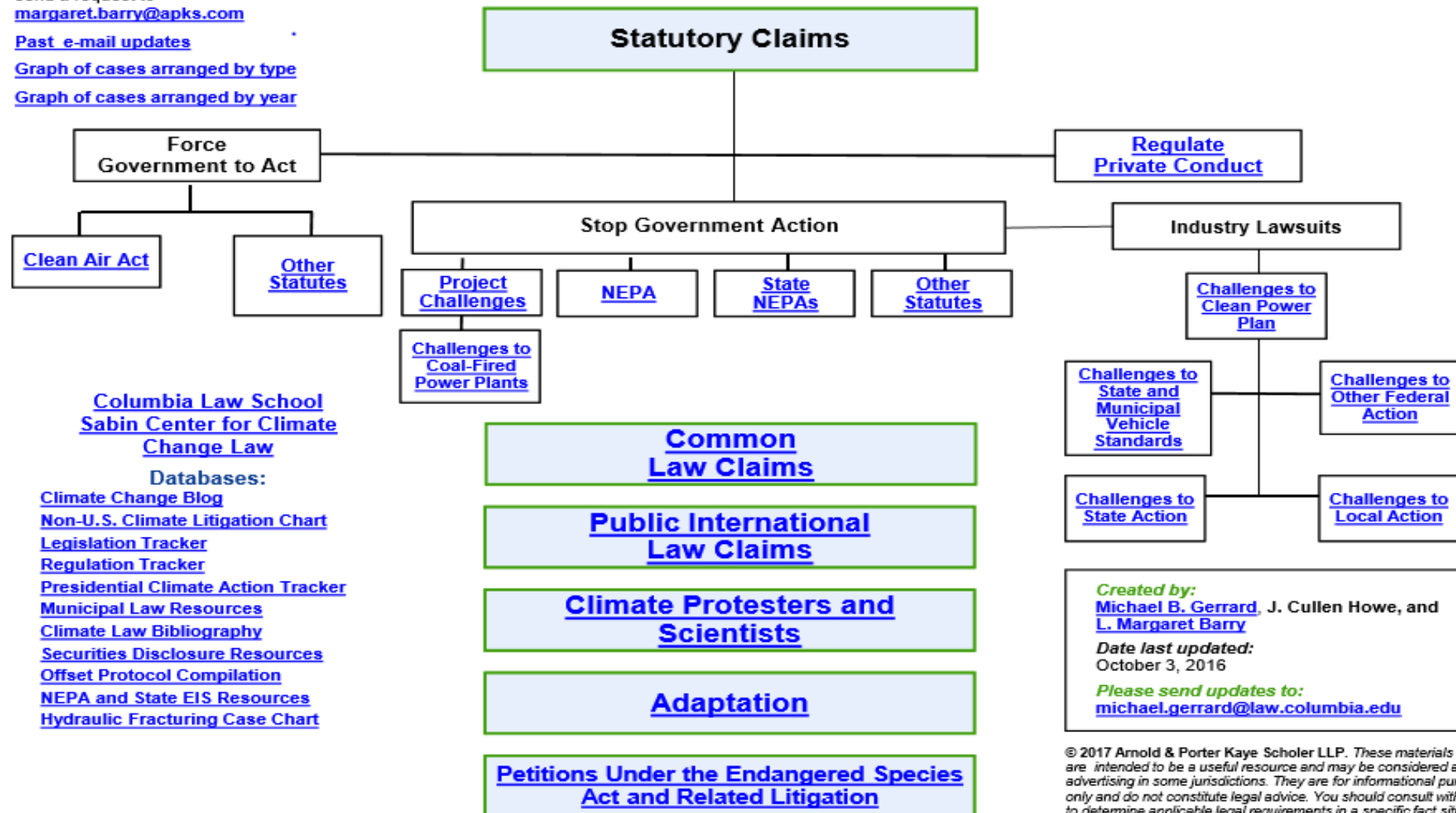
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CLIMATE CHANGE LITIGATION IN THE U.S.



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CCUS?

- Corporate Governance
 - Disclosure requirements?
 - Materiality regardless of SEC enforcement
 - AG Lawsuits
 - Shareholder initiatives: petitions, lawsuits
 - Market driven global sustainability initiatives and business reputation
 - Financial Stability Board (FSB) Task Force on Climate-Related Financial Disclosures (TCFD),
 - Power Forward 3.0,
 - Annual Sustainable Innovation Forums,
 - Global Reporting Initiative,
 - Carbon Disclosure Project,
 - ISO 20400 Sustainable Procurement Guidance

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