



Environmental, Safety & Health Update

IME Annual Meeting 2023

Contents

- **Environmental**

- Air
- Water
- Permitting
- Toxics

- **Safety & Health**

- OSHA
- MSHA

Air - NAAQS

National Ambient Air Quality Standards (NAAQS)

- NAAQS underpin 2 major rulemakings currently impacting the fossil fuel industry – (i) “Good Neighbor”/Cross-State Air Pollution Rule (CSAPR) & (ii) Power Plant Rule; both designed to force compliance w/NAAQS
- Six “Criteria Pollutants” have NAAQS (reviewed every 5 years)
 - ozone
 - nitrogen dioxide
 - sulfur dioxide
 - particulate matter (PM10 and PM2.5)
 - lead
 - carbon monoxide

Air - NAAQS

- **Primary Standards** > public health protection, including "sensitive" populations such as asthmatics, children, and the elderly
- **Secondary Standards** > public welfare protection, including decreased visibility & damage to animals, crops, vegetation, and buildings

Substance	Primary NAAQS	Projected NAAQS	Status	Timeline
Ozone	70 ppb (2015)	55-60 ppb (recommended by Clean Air Scientific Advisory Committee (CASAC))	Aug. 18 > EPA scrapped ongoing review & began again Oct. 6 > Coalition of states want to restart litigation	2025
NO2	1-hour limit = 100 ppb (2010) Annual limit = 53 ppb (1971) (Levels retained in subsequent reviews)	?	Sept. 28 Enviro groups > notice of intent to sue to force review	Depends on litigation outcome
SO2	75 ppb (2019)	X	2019 - standard retained	Next review begins 2024
PM 2.5	12.0 µg/m3 (2012) (retained in 2019)	9.0 to 10.0 µg/m3 Proposed Jan. 2023	Industry urging EPA to retain existing standard to account for wildfires & other non-industrial sources	2024 final rule
Lead	15 µg/m3 as 3 month average (2016)	?	CASAC reviewing integrated science assessment	2024 proposed rule

Air - NAAQS

HOW NAAQS WORK

- Areas not meeting standard = “nonattainment”
- Nonattainment areas must develop plans to attain the NAAQS - State Implementation Plans or “SIPs”
- Failure of a state to reach attainment by the target date can trigger penalties
- Nonattainment also impacts businesses that want to locate or expand an operation in that area b/c of emissions restrictions
- *In addition*, companies wanting to build or expand a “major source” in a nonattainment area must go through **New Source Review (NSR)** permitting; associated emissions controls
- Major source = **potential to emit (PTE)** more than 100 tons of air pollutants per year (*e.g., power plants, certain industrial boilers, etc.*)

Air – NAAQS – PTE & Temporary Emissions

- **Sept. 18** > Appeals Ct. ruled that Colorado should have counted “temporary” emissions toward PTE in its state implementation plan (SIP) to meet NAAQS
- Temporary emissions include those from oil & gas well drilling
- Including temporary emissions may cause certain facilities to hit “major source” threshold = NSR permitting & application of stringent emissions controls
- Industry says ruling will impede oil & gas drilling in all 10th Circuit states (**CO, KS, OK, NM, UT, WY**)

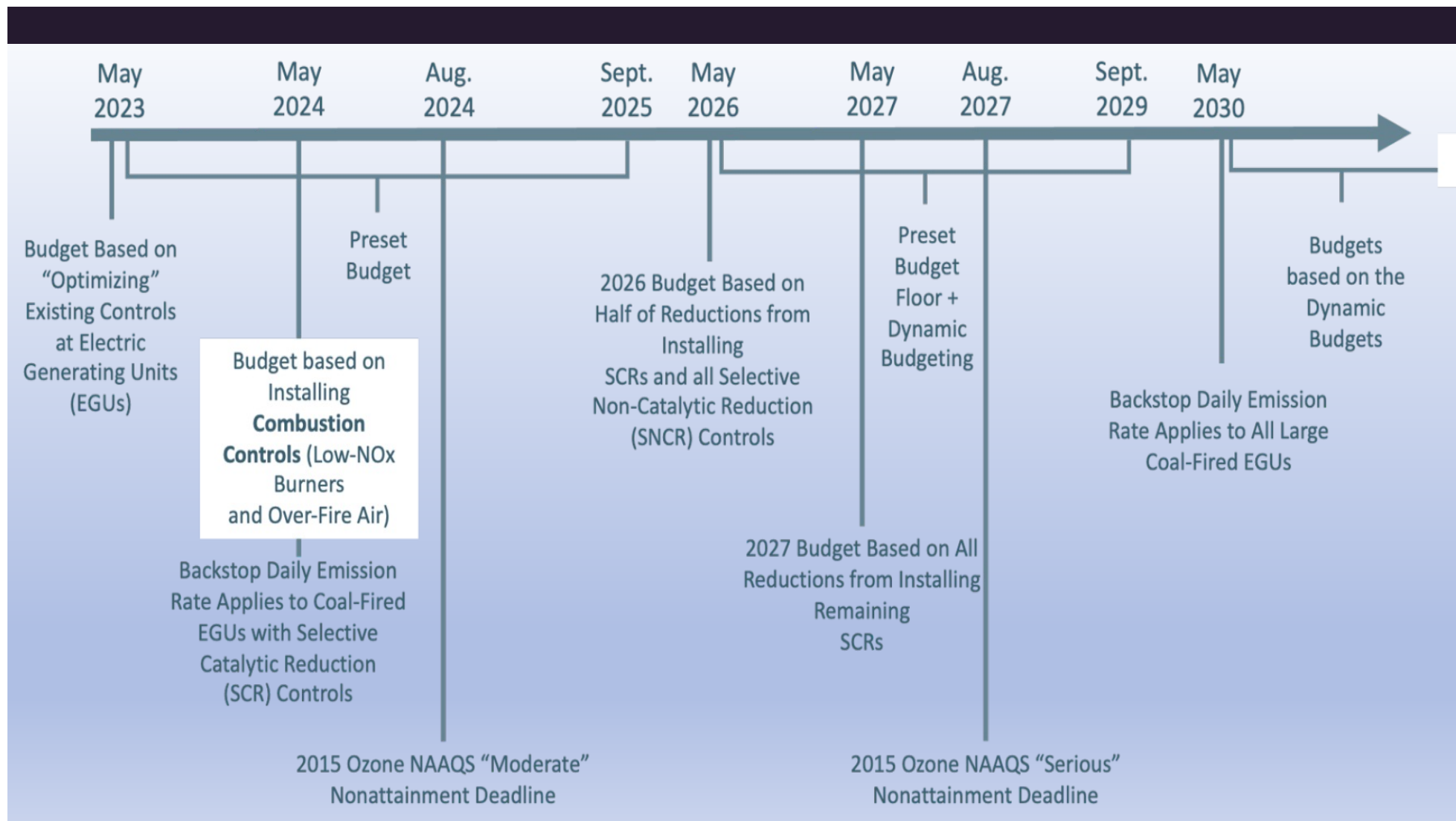
Air – NAAQS & the “GOOD NEIGHBOR Rule”

WHAT IS IT?

- Refers to the “Good Neighbor” provision of CAA (Section 110); states must ensure they are not contributing to NAAQS violations in downwind states
- If EPA finds that a SIP does not sufficiently reduce interstate air pollution, EPA can issue Federal Implementation Plan (FIP) to achieve needed reductions
- FIPs set standards for power plants to ensure that downwind states are able to meet the NAAQS for SO₂, NO_x, PM 2.5, Ozone
- **1997 Ozone NAAQS - Clean Air Interstate Rule (CAIR)**
- **2008 Ozone NAAQS (75 ppm) - Cross State Air Pollution Rule (CSAPR)**
- **2015 Ozone NAAQS (70 ppm) - Good Neighbor Rule a/k/a CSAPR Expansion Rule a/k/a CSAPR 2.0**

Air – “GOOD NEIGHBOR” Rule

- **March 2023** > Final Good Neighbor Rule/CSAPR 2.0 published
- FIPs for 23 states require emissions reductions from fossil fuel-fired power plants and industrial sources
 - *New industrial sources - gas pipelines, oil refining, coal processing, cement kilns, and steel plants*
 - *Three new states - NV, UT, MN (+ CA for non-power plant sources)*
- Specified emissions budgets that decline over time
- Specified control technologies for power plants



Air – “GOOD NEIGHBOR” Rule

HOWEVER, LITIGATION

- **Sept. >** EPA proposes interim regulatory stay of the rule in 12 states where litigation is ongoing:
 - **AR, KY, LA, MS, MO, TX, AL, MN, NV, OK, UT, WV**
- As of Sept. 23, other 11 states must still comply:
 - **IL, IN, MD, MI, NJ, NY, OH, PA, VA, WI**

Air – “GOOD NEIGHBOR” Rule

- **State v. State:** PA opposes EPA’s proposed stay; State of OH wants EPA to withdraw the entire rule b/c judicial stays render it “no longer viable”
- **Industry v. EPA:** Natural gas pipeline industry also seeking a judicial stay – but on an industrial sector basis, not a state-by-state basis

Air – Proposed Power Plant Rule (PPR)

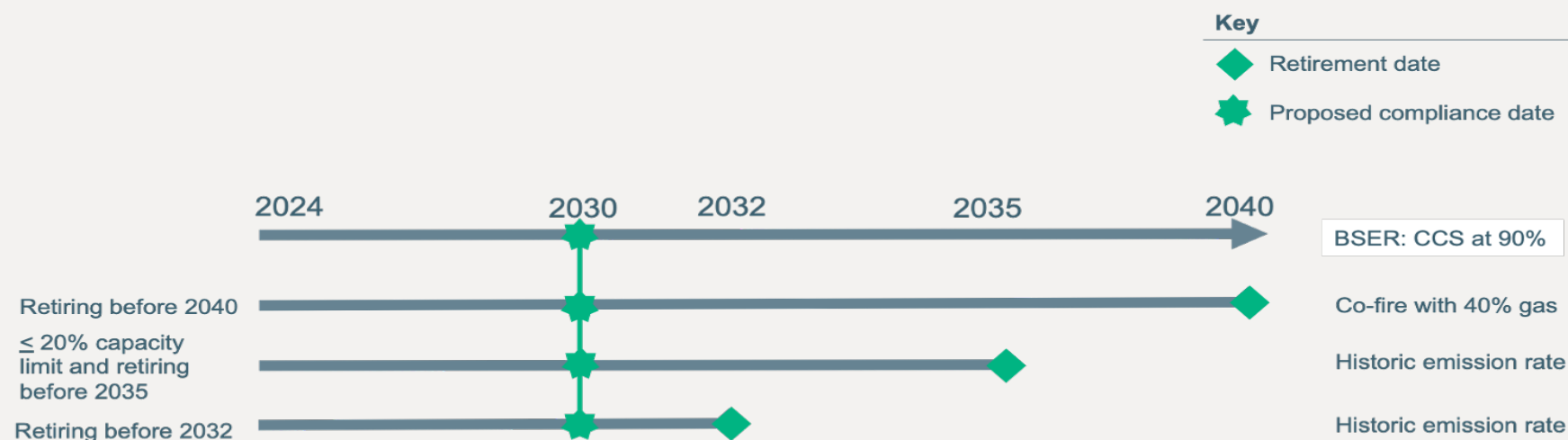
- 2015 Clean Power Plan (CPP) – struck down by US Supreme Ct.
- 2019 Affordable Clean Energy (ACE) Rule – vacated & remanded to EPA
- **May 11, 2023**, > *Proposed* new emission limits & guidelines for new and existing fossil fuel-fired power plants
 - *Based on technologies already being pursued (CCS, Hydrogen)*
 - *Technologies boosted by incentives in Inflation Reduction Act of 2023*

Air – Proposed Power Plant Rule

- Proposed performance standards for coal plants based on **carbon capture & sequestration (CCS)** technologies
- For natural gas plants, performance standards based on use of **low-GHG hydrogen**
- Proposal focuses on *baseload plants*
- Control requirements keyed to planned retirement dates
- Other pathways for power plants with roles other than baseload or those nearing retirement

Existing Coal Standards – Timing and Subcategories

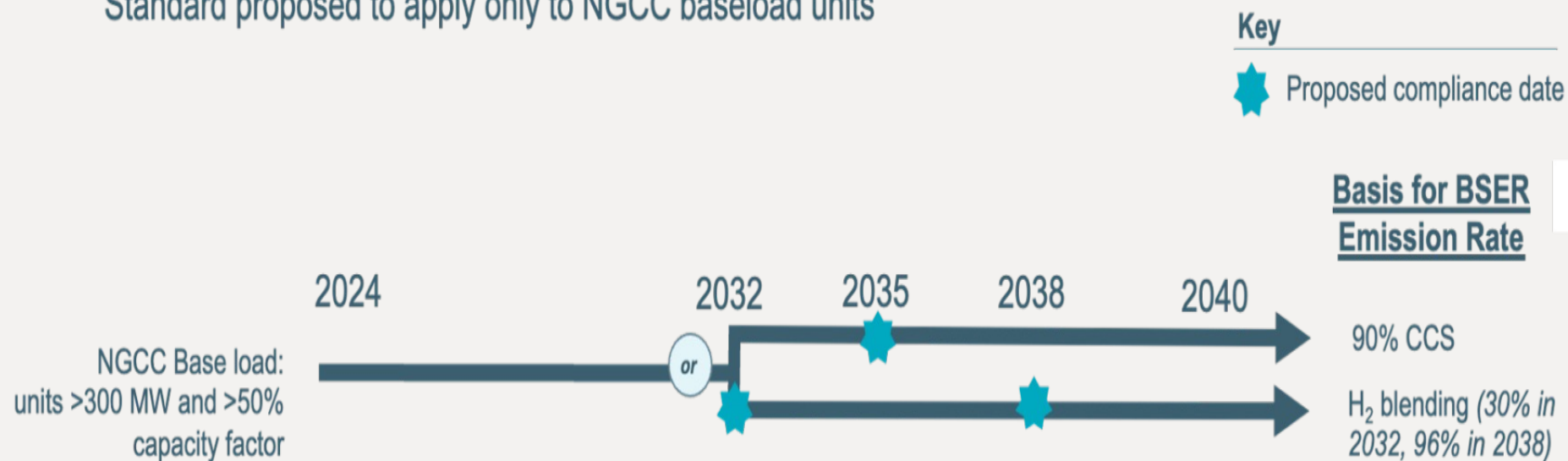
BSER based on CCS with Three Alternative Pathways



If a coal plant plans to operate beyond 2040, EPA is proposing use of CCS by 2030. If the plant will operate until 2035 or 2040, then EPA proposes standards based on how much it will run or what fuels it uses. If a plant will be retired by 2032, no costly investments would be required.

Existing Gas Standards – Timing and Subcategories

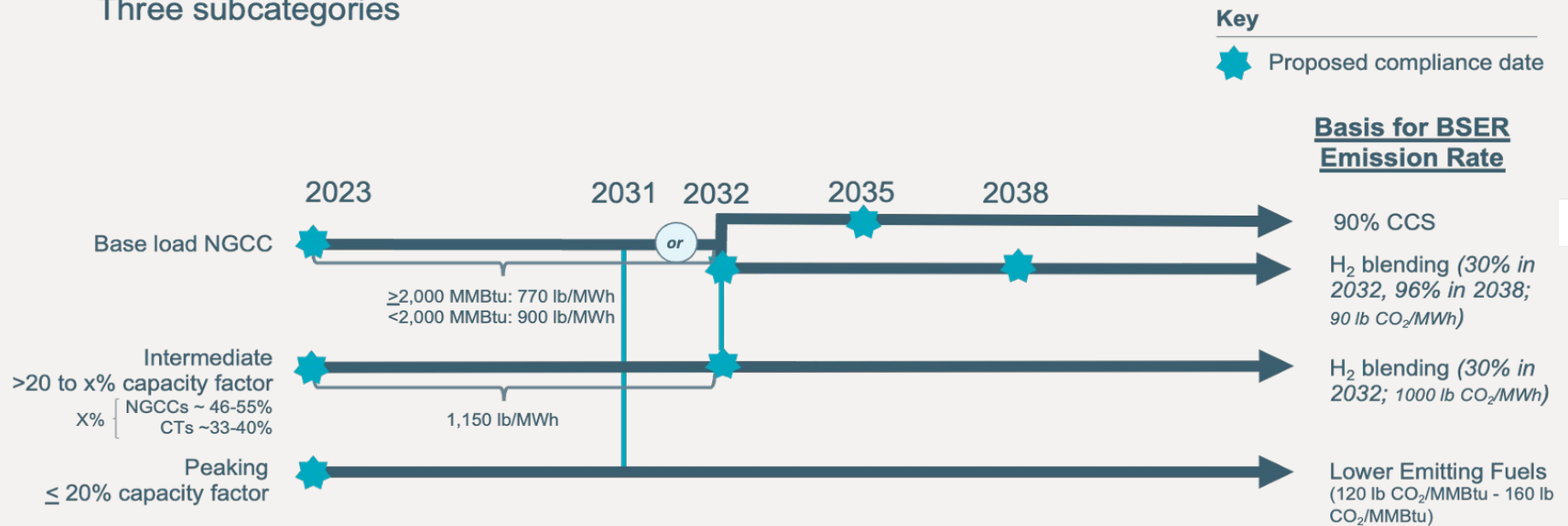
Standard proposed to apply only to NGCC baseload units



For existing NG plants, EPA proposes a standard only for large baseload units (greater than 300 MW and operating more than 50% of the time).

New Gas Standards – Timing and Subcategories

Three subcategories



New NG plants can continue to be built. But, if plant will be baseload, EPA proposes that it implement CCS by 2035, or use an alternative compliance pathway if using hydrogen. Lastly, EPA proposes tailored approaches for units that will not be operating frequently (intermediates & peakers).

Air – Proposed Power Plant Rule

EPA has received thousands of comments

- Environmental groups - encourage tighter controls, more plants
- Labor coalition (including coal miners) question EPA's authority to set a rule based on when a plant may be retired
- A group of state Attorneys General is concerned that operators falling into middle categories could be "squeezed" if they must increase operation
- Edison Electric Institute (EEI) maintains that CCS will not be viable in time

[[Federal Energy Regulatory Commission (FERC) will discuss grid reliability considerations at its annual technical conference in November]]

Air – Methane (Oil & Gas)

- Three final rules are being reviewed by OMB & should be released this month
 - GHG Reporting Rule > calculating methane emissions
 - Methane Fee > Inflation Reduction Act fee on excess methane emissions
 - *Methane emission standards for new & existing facilities (originally proposed in 2021)

Water – Waters of the United States (WOTUS)

- **May 25** > Sackett v. EPA; U.S. Supreme Court addressed definition of WOTUS under the Clean Water Act (CWA)
 - *WOTUS defines the geographic reach and authority of the U.S. Army Corps of Engineers (Corps) and EPA to regulate wetlands, streams, and other water bodies under the CWA - Determines who does & who does not need a federal discharge permit*
- Court rejected “significant nexus” standard in favor of a “relatively permanent” test

Water – Waters of the United States (WOTUS)

What This Means

- Relatively Permanent Test:
 - (i) establish that the body of water is ***a relatively permanent body of water connected to traditional interstate navigable waters***; and
 - (ii) the wetland has a “***continuous surface connection***” with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

Water – Waters of the United States (WOTUS)

- Dramatically narrows jurisdiction of Corps and EPA over projects requiring permits to dredge, fill, or discharge into federally protected waters
- **Significant** setback for any future attempt to expand CWA jurisdiction to wetlands & streams that are isolated, ephemeral or not *obviously* connected to a navigable lake or stream. Will be particularly stark in the arid west given that many waters are not permanently wet
- **63% of all US wetlands**
- **4.9 million miles of streams**

Water – Waters of the United States (WOTUS)

- Sackett & EPA's Jan. 2023 final WOTUS Rule??
- **Sept. 8 >** In response to Sackett, EPA publishes revised "**WOTUS Conforming Rule**"
 - Purges Jan. 2023 rule of "significant nexus" foundation
 - Narrowest scope of jurisdiction in decades
 - That said, **Conforming Rule** retains Jan. 2023 rule's agricultural permitting exemptions & various exclusions (e.g., *prior converted cropland, waste treatment systems, ditches, artificially irrigated areas, artificial lakes or ponds, waterfilled depressions, swales & erosional features*)

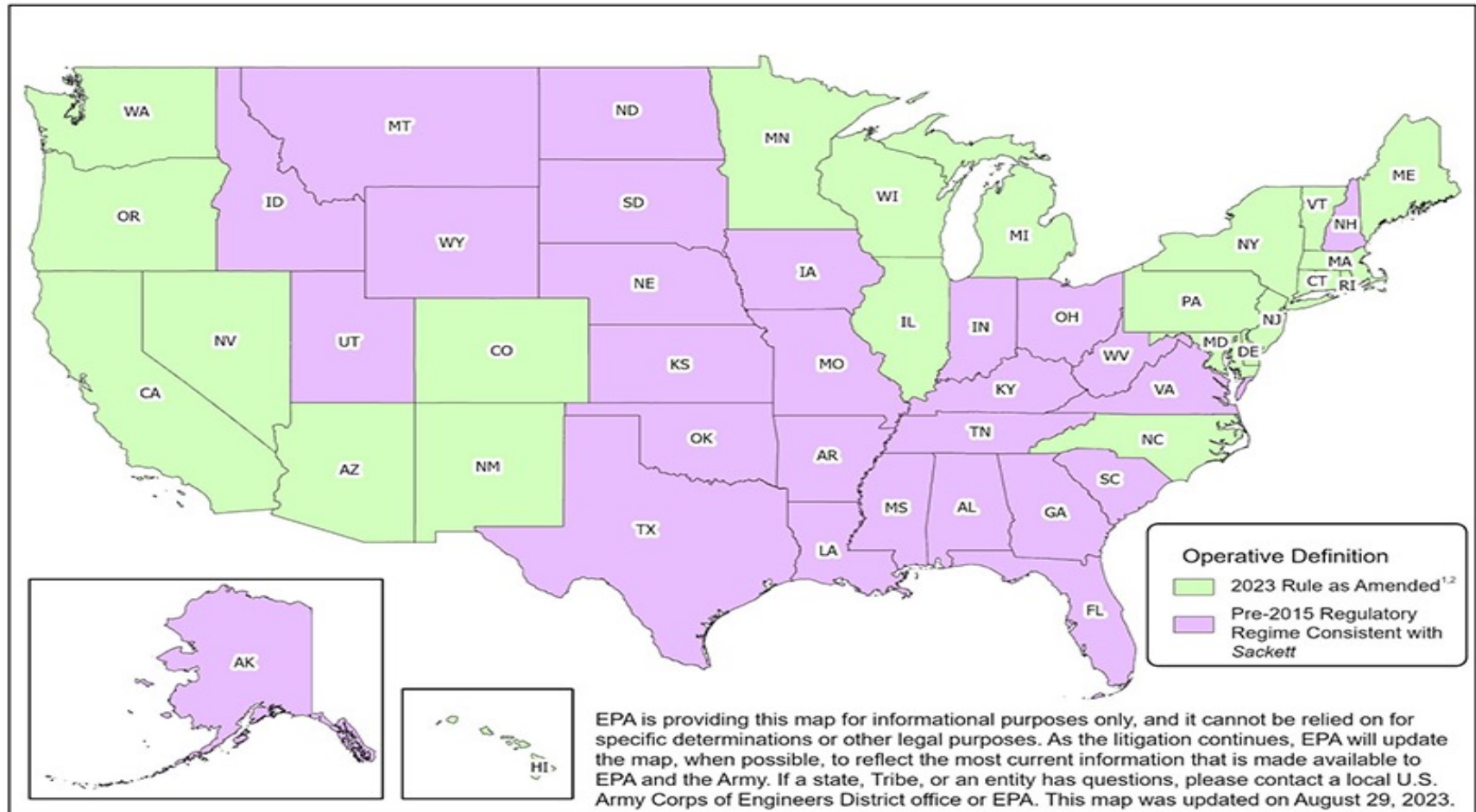
Water – Waters of the United States (WOTUS)

However,

- Prior to *Sackett*, 27 states sued EPA over the Jan. 2023 WOTUS rule & obtained an injunction on implementation of the rule
- Because the rule was enjoined, those states must operate under a much *more stringent* pre-2015 rule w/o the benefit of the exemptions & exclusions in the [Conforming Rule](#)

#BeCarefulWhatYouWishFor

Operative Definition of "Waters of the United States"



¹Also operative in the U.S. territories and the District of Columbia

²The pre-2015 regulatory regime implemented consistent with *Sackett* is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in *Kentucky Chamber of Commerce, et al. v. EPA* (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).

Water – Waters of the United States (WOTUS)

- **However, again,** even after *Sackett*, the states still have authority to regulate & certain states' jurisdiction is broader than the federal authority
- Some states will act to tighten restrictions & permitting to dull impact of *Sackett*
- **But,** *enforcement* will be key
- For example, in Florida some water laws are more stringent than CWA, but the state does not enforce them, i.e., what happens on paper & in practice can be two different things

Water – Waters of the United States (WOTUS)

And Lastly,

- Sackett decision does not impact earlier US Supreme Ct. case, *County of Maui v. Hawaii Wildlife Fund*
- Discharges to non-jurisdictional waters that flow into jurisdictional waters may need a federal permit, e.g., *fill/pollutants from mining operations that eventually drain into a federally protected river*

Permitting - NEPA

National Environmental Policy Act

Sets out requirements for federal agencies to evaluate environmental impacts of projects that are “major federal actions”

Administered by Council on Environmental Quality (CEQ)

NEPA Process in a Nutshell

1. Does action fit a categorical exclusion?
2. If no, determine if action will have a significant environmental impact (environmental assessment or EA)
3. If yes, prepare a draft environmental impact statement (EIS)
4. Public comment period
5. Prepare final EIS
6. Publish record of decision
7. Implement the decision

Permitting - NEPA

- Administration completed “**Phase 1**” reforms in 2022, reversing many of the prior administration’s changes & reinstating principles used since 1978
- NEPA amended by **Bipartisan Fiscal Responsibility Act** (FRA) of 2023

Permitting - NEPA

- FRA Reforms – intended to shorten permitting process primarily for energy projects (including renewables)
- ***Narrows definition of “major federal action”***
- ***Narrows scope of agency review***
- ***Allows project sponsors (rather than agencies) to prepare EISs***
- ***Sets new deadlines & page limits for EISs & EAs***
- ****Grants project sponsors option to challenge agency delays via the courts***

Permitting – NEPA – Phase 2 Rule

- **July 31, 2023** > **"Phase 2"** proposed rule- *"Bipartisan Permitting Reform Implementation Rule"*
- Notable proposals in the Phase 2 rule:
 - **Beneficial Projects** - with "beneficial" effects would not need an EIS
 - **Categorical Exclusions** - more flexibility for agencies to establish CEs
 - **Innovative Approaches** - allow agencies to modify NEPA compliance to address "extreme environmental challenges" e.g., sea level rise, wildfire risk, water scarcity
- Comment period on Phase 2 rule closed Sept. 29

Permitting – CWA Section 401

- A federal agency may not issue a **permit** to conduct any activity that may result in any discharge into WOTUS unless a section 401 water quality “certification” is issued by the affected state -
 - *Clean Water Act Section 402 (point source) & 404 (dredge & fill) permits issued by EPA or Corps*
 - *Federal Energy Regulatory Commission (FERC) licenses for natural gas pipelines*
- Concern was that states were using certification to slow “undesirable” projects

Permitting – CWA Section 401

- 2020 Rule – narrowed the scope of state 401 Certifications
- **Sept. 14 >** New final rule returns to pre-2020 requirements (mostly)
 - *Allows states to consider “activity” affecting water quality – more expansive than 2020 rule that allowed consideration only of direct “discharges” but less permissive than pre-2020 rules*
 - *Allows feds/states to collaborate on “reasonable period of time” for certification*
 - *New rule will not be retroactive*
- Sackett & WOTUS Conforming Rule may mean that fewer projects will be subjected to Section 401 review
- Congress > renewed call to narrow CWA, e.g., review of “direct impacts” only & repeal need for gas pipelines to receive Section 401 approval

Permitting – CWA Section 404

- **Section 404** > regulates the discharge of dredged or fill material into WOTUS, including wetlands
 - Fill for development,
 - Water resource projects (such as dams and levees),
 - Infrastructure development (such as highways and airports)
 - Mining projects
- Administered by Corps & EPA

Permitting – CWA Section 404

- **July 19** > EPA proposes Section 404 “Assumption Rule” that would allow states & tribes to assume administration of the program; *(could help avoid duplicative state programs)*
- Currently only 2 states have primacy (NJ, MI), and permitting elsewhere is done by Corps
- EPA has proposed to allow primacy for Florida
- Suit to block the assumption by Florida has failed thus far

Permitting – Endangered Species Act (ESA)

- ESA dictates how developers, drillers, miners are required to avoid/mitigate impacts to animals, plants, habitats
- **June 2023 >** Three proposed rules published by US Fish & Wildlife Service (FWS) and National Marine Fisheries Service
 - Update to 2019 ESA regulations
 - Rule governing designation of critical habitat
 - Rule for interagency cooperation on endangered species
- Likely to be finalized in 2024

Permitting – Endangered Species Act (ESA)

- Proposal would reinstate the **“Blanket Rule”** which extends endangered species protections/permitting to “threatened” species until FWS tailors protections to their needs
- New provision for **“incidental take.”** *In addition to* taking measures to avoid negative impacts, FWS could require developers to conduct damage-offsetting measures
- ***Expect litigation when final rule is published***

Permitting – CO₂ Pipelines for CCS

- EPA plans to ramp up issuance of draft & final approvals for CCS over the next two years – CCS is cornerstone of power plant rule
- Recent laws provide tax credits for CCS – up to \$85/ton of carbon captured & stored
- PHMSA is developing CCS pipeline safety rules – June 2024
- EPA has proposed to grant authorization to LA for Class VI carbon storage permits (injection wells); consideration is underway for other states, including TX
- Opposition remains – environmental groups, citizen groups

Toxics – Toxic Substances Control Act (TSCA)

- **2016** > Lautenberg Chemical Safety Act was signed into law, amending TSCA
- One provision allows EPA to set **Existing Chemical Exposure Limits (ECELs)** in workplaces
- Sets up a potential conflict w/OSHA's Permissible Exposure Limits (PELs)

Toxics – Toxic Substances Control Act (TSCA)

- **July** > Carbon Tetrachloride
 - Solvent, Firefighting, Propellants
 - *EPA proposes ECEL of 0.03 ppm*
 - *OSHA's PEL is 10 ppm*
- Will **ECELS** supplant **PELs**?
- Will OSHA use General Duty Clause to enforce ECEL's even where there is a PEL?
- Joint enforcement b/w EPA and OSHA?

#ItDepends. #ButProbablyYes.



Department of Labor: OSHA & MSHA



OSHA – HazCom Standard (HCS)

- Feb. 2021 > Proposed rule published
- **Oct. 11** > Final HCS rule sent to OMB
- Incorporates UN Globally Harmonized System of Labelling of Chemicals (GHS), Revision 7
- GHS includes requirement that chemical warnings/labels must address “any hazards associated w/a change in the chemical’s physical form or resulting from a reaction w/other chemicals under normal conditions of use”

OSHA – HazCom Standard (HCS)

- **Industry's Concerns:**

- GHS “[A]ny hazards” language is cradle-to-grave *i.e.*, manufacturers must consider downstream customers & their mixtures, uses & account for those in SDSs & labels
- Final rule could be more expansive than 2021 proposal

OSHA – **Heat** Standard

- **2021** > Advance Notice of Proposed Rulemaking
- **2022** > National Emphasis Program
- **July 27** > Heat Hazard Alert & Enforcement Inspections; focus on states that preempt localities from adopting heat protections
- **Aug. 24** > “Regulatory Framework” document released
 - Outlines a proposed rule
 - Programmatic standard; written Heat Injury & Illness Prevention Program (HIIPP)

MSHA – Silica

- **July 13** > Proposed Rule
- **Sept. 11** > IME comments filed
- Lowered PEL and Action levels are acceptable (50, 25 $\mu\text{g}/\text{m}^3$) = OSHA PEL & AL
- MSHA should allow specific exposure control methods in the mining industry to qualify for exemption from monitoring & other requirements (akin to “Table 1” in OSHA rules)
- MSHA should define “temporary” use of respirators
- IME encourages longer phase-in period
- IME supports comments from NMA

END

