Climate change developments

*This article is an excerpt of **The 2020 Babst Calland Report,** which represents the collective legal perspective of Babst Calland's energy attorneys addressing the most current business and regulatory issues facing the oil and natural gas industry. A full copy of the Report is available by writing info@babstcalland.com.*

The momentum to propose and adopt new legislation, regulation, policies and programs to address climate change steadily increased during 2019 and only subsided in early 2020 as the nation struggled to address the COVID-19 pandemic. As described below, the Trump administration continued its regulatory reform, reducing various obligations related to greenhouse gas (GHG) emissions, while state and federal courts continue to evaluate claims against both the government and industry regarding their risks, roles and responsibilities to confront the impacts of climate change.

Federal/regional issues

Trump administration continues rollbacks on climate change policy

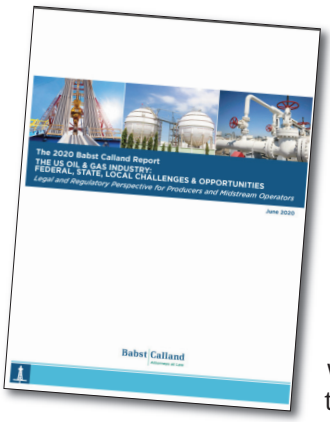
The Trump administration's regulatory rollback efforts continued in 2019, particularly regarding carbon dioxide, methane, hydraulic fracturing and vehicle efficiency regulations.

Carbon dioxide regulation. In July 2019, the U.S. Environmental Protection Agency (EPA) finalized the Affordable Clean Energy (ACE) rule to replace the Clean Power Plan (CPP) rule enacted under the Obama administration. Additional discussion regarding the ACE rule is provided on page 42 of the full *2020 Babst Calland Report*.

Methane regulation. As of this writing, a challenge to the U.S. Department of Interior Bureau of Land Management (BLM) September 28, 2018, rule is still pending in the U.S. District Court for the Northern District of California. The 2018 BLM rule revises a 2016 BLM rule that targeted methane emissions from crude oil and natural gas facilities on federal and Indian lands. The revised rule reduces compliance burdens, eliminating waste minimization plans, as well as eliminating or modifying requirements pertaining to well drilling, completion and maintenance, storage vessels, leak detection, and repair and reporting of volumes of gas vented and flared.

Hydraulic fracturing regulation. On March 27, 2020, the U.S. District Court for the Northern District of California upheld the Trump administration's December 2017 repeal of the BLM's March 26, 2015, rule that prohibited oil and gas extraction on public lands. The 2015 rule was scheduled to take effect on June 24, 2015, and had four primary elements: (1) updating well construction and testing requirements; (2) requiring the use of storage tanks instead of pits; (3) providing BLM greater oversight for all hydraulic fracturing operations; and (4) requiring disclosure of chemical additives used for hydraulic fracturing. An appeal to the Ninth Circuit appears likely.

Vehicle greenhouse gas and fuel efficiency regulation. In September 2019, the U.S. Department of Transportation's National Highway Transportation and Safety Administration and EPA finalized the first half of the August 2018 proposed rule and reduced greenhouse gas (GHG) emissions and fuel economy standards for vehicles in model years 2021 to 2026. The first half of the rule also rescinded EPA's waiver under the Clean Air Act that had allowed California to set more stringent vehicle emission standards, which other states then were permitted to adopt. The second half of the proposed rule, published on April 30, 2020, replaced the requirement to increase Corporate Average Fuel Economy standards 5 percent annually with a requirement to increase standards by only 1.5 percent annually.



The 2019 final rule is being litigated in the U.S. District Court for the District of Columbia. States, industry, and non-governmental organizations (NGOs) have filed or announced plans to file judicial challenges to the rule. The litigation raises significant questions regarding which emission standards will apply to model year 2021 vehicles.

SEC seeks to maintain status quo for disclosing climate change risks

For the first time in more than 30 years, the U.S. Securities and Exchange Commission (SEC) is seeking to significantly revise its rules governing what registered companies must disclose in public filings, issuing two proposals in the past year to modernize the requirements for quantitative and qualitative disclosures in Regulation S-K. Notably, in these proposals, the SEC has chosen not to alter or supplement the principles contained in its 2010 Guidance Regarding Disclosure Related to Climate Change, which establishes a principles-based materiality standard for determining when a company must disclose the risks that climate change may pose to its business.

The SEC appears to have debated whether the relatively imprecise materiality standard is sufficient to provide investors with the information they need to make informed investments. While the status quo stands for now, the SEC will continue to evaluate this issue, and encourages interested parties to engage with the commission to assist it "in better understanding how issuers and investors use climate-related information to make capital allocation decisions."

Regional Greenhouse Gas Initiative reduces emissions from power generators in the Northeast

Pennsylvania and Virginia are currently in the process of joining the Regional Greenhouse Gas Initiative (RGGI), which is the country's first regional, market-based cap-and-trade program designed to reduce carbon dioxide emissions from the power sector. The RGGI program sets a base annual emission cap for each state and provides that each state's annual allocation will decline by 2.5 percent per year after 2015, which is the RGGI base year. RGGI developed a model rule, which was modified and adopted by participating states through their respective legislative or rulemaking processes that provides for the administration of the program.

Under RGGI, fossil-fuel-fired electric power generators with a capacity of 25 megawatts (MW) or greater (i.e., regulated sources) are required to hold allowances equal to their CO2 emissions over a three-year compliance period. Each allowance is equal to one short ton of CO2. Regulated sources must purchase state-issued allowances at quarterly auctions or through secondary markets and may use allowances issued by any RGGI state to comply. The market price for allowances at the June 3, 2020 Auction was $5.75. Regulated sources may also use offsets, allowances awarded to certain acceptable environmental projects, to meet a maximum of 3.3 percent of its allowances.

Transportation and Climate Initiative proposes to reduce emissions from the transportation fuels

Twelve Northeast and Mid-Atlantic states and the District of Columbia are considering whether to adopt the Transportation and Climate Initiative (TCI), a new regional program similar to RGGI. TCI would create a cap-and-invest program for GHG emissions from fossil fuels used in transportation.

The TCI program will cover all gasoline and on-road diesel fuel dispensed at the terminal rack and require fuel suppliers to hold emissions allowances equal to the GHG emissions from the fuel they distribute in the participating jurisdictions. The cap-and-invest program would begin with an initial GHG emissions allowance cap assigned to each participating jurisdiction, which would then decline each subsequent year. These emission allowances would be distributed at auctions, and funds generated from these auctions are anticipated to fund low-carbon and clean mobility options in urban, suburban, and rural communities.

TCI's December 17, 2019, draft memorandum of understanding anticipates that each participating jurisdiction will adopt a program consistent with a jointly developed Model Rule to implement the final TCI program. The model rule is likely to be finalized by the end of 2020 and could be implemented in 2022.

State issues

Pennsylvania moves ahead to join RGGI

Governor Tom Wolf has identified climate change as "the most critical environmental threat facing the world." On October 3, 2019, the governor signed Executive Order 2019-07, "Commonwealth Leadership in Addressing Climate Change through Electric Sector Emissions Reductions," which directs the Environmental Quality Board (EQB) to propose, by July 31, 2020, a carbon dioxide cap-and-trade program for fossil-fuel-fired electric power generators that is at least as stringent as that developed under RGGI.

In response, in November 2019, members of the Pennsylvania House and Senate referred bipartisan companion bills HB 2025 and SB 950, both known as the Pennsylvania Carbon Dioxide Cap and Trade Authorization Act, to their respective Environmental Resources and Energy committees for consideration. The bills prohibit the Pennsylvania Department of Environmental Protection from adopting any measure to establish a GHG cap- and-trade program unless the General Assembly specifically authorizes it by statute. The House committee voted on June 9, 2020, to move HB 2025 to the full House for consideration.

Despite the pending legislation, DEP presented its draft proposed rulemaking to establish a carbon dioxide budget trading program to a joint meeting of the Air Quality Technical Advisory Committee (AQTAC) and the Citizens Advisory Council on April 23, 2020. The proposed trading program would apply to fossil fuel-fired electricity generators of greater than 25 MW and parallels the model rule prescribed by RGGI. Motions for concurrence by AQTAC and the Citizens Advisory Council to send the draft proposed rule to the EQB for consideration both failed. Nevertheless, DEP still anticipates submitting the proposal to the EQB by July 2020 as required by Executive Order 2019-07, despite circumstances caused by COVID-19, to try to promulgate a final rule to become effective in the first quarter of 2022.

Another proposed economy-wide cap-and-trade regulation presents significant challenges to Pennsylvania's economy and the oil and gas industry

As discussed in our 2019 *Report*, on April 16, 2019, the EQB directed DEP to develop a report and recommendation on a petition for a Pennsylvania cap-and-trade regulation that was submitted by the Clean Air Council, Widener Commonwealth Law School Environmental Law and Sustainability Center and others. This proposal is not limited to fossil-fuel-fired generators but would apply to many other sources of GHG. DEP selected a contractor for this analysis and expected to have the report available in early 2020, but the report had not been released as of the date of this *Report*.

Energy companies and governments continue litigating climate change issues

Climate change issues continue to catalyze significant litigation in state, federal, and administrative courts. The Sabin Center for Climate Change Law United States Litigation Chart reports 119 new climate change-related cases filed in 2019, an increase from 2018 (103), but fewer than in 2016 and 2017 (135 and 124, respectively).

Plaintiffs are asserting claims under federal and state statutes, the Constitution, public trust principles, securities law, and common law. Select significant cases are summarized below.

• *Juliana v. United States.* This is a public trust-style climate change case where plaintiff minors alleged numerous agencies of the federal government failed to protect their alleged constitutional right to a climate capable of sustaining life by allowing fossil fuel companies to produce and consume fossil fuels at dangerous levels. On March 2, 2020, Plaintiffs filed a petition for rehearing en banc, after a divided panel of the Ninth Circuit dismissed the suit for lack of standing by failing to establish the redressability requirement.

• *People of the State of New York by James v. Exxon Mobil Corporation* and *Commonwealth of Massachusetts v. Exxon Mobil Corporation.* State attorneys general in New York and Massachusetts filed similar state law consumer protection and securities fraud climate change cases, alleging, generally, that Exxon misled its investors about the risks of climate change. The New York court ruled in favor of Exxon on December 10, 2019, finding the state failed to prove that Exxon made any material misrepresentations that misled its investors. In the *Massachusetts* case, Exxon was unsuccessful in removing the case to federal court and the case remains pending.

• *Mayor & City Council of Baltimore v. BP p.l.c.* and related climate change tort cases. State and municipal governments have sought to hold energy companies responsible for alleged climate change-related damages in tort cases initiated in their respective state courts. Energy companies have sought to remove these cases to federal court. On March 6, 2020, the Fourth Circuit affirmed a Maryland district court decision that the City of Baltimore's lawsuit should remain in state court, a decision that could influence other circuits' consideration of challenges to venue by energy companies. BP petitioned for Supreme Court review on March 31, 2020. In May, the Ninth Circuit followed the Fourth Circuit's holding by remanding similar climate tort cases to state court.

• *In re Exxon Mobil Corp. Derivative Litigation.* Some energy companies face climate change claims filed by their investors. In Texas, Exxon shareholders alleged the company misled the public on the risks of climate change, including its effect on Exxon's reserve values and long-term business prospects. ■

Member Commentary

Natural gas energy

The following is a letter to the editor that PIOGA member George Maier submitted recently to a Pittsburgh newspaper. We thought it was worth sharing with the membership.

Energy is the lifeblood of all nations. Someday we may enjoy the unlimited bounty of nuclear fusion, but this could be centuries off. When it is harnessed, probably the reactors will be offshore where we will break seawater into hydrogen and oxygen. The oxygen may be used in brackish shore waters for oxygenating massive fish farms and agriculture products while the hydrogen can be shipped to shore, reconstituted into methane and distributed through our existing pipelines for unlimited heating, byproducts and fuel cell produced electricity. Natural gas (methane, ethane, propane, butane, et al.) is the energy and raw material which will propel Pennsylvania, the U.S. and the world into space and bring prosperity to all.

Before the Second World War, our skies were dirty with inefficient home furnaces and unregulated industry and power effluent; but after the war our emergency-constructed pipelines from the Gulf and Southwest were purchased and used to convert these inefficient processes to natural gas, providing the clean energy needed for the post-war boom. Because our politicians denied leases in the Gulf and Southwest, we ran out of our thousand-year supply and we lost most of our steel mills and other heavy industry to China, India, et al. It wasn't the unions.

Now we have unlimited natural gas for the entire world here in Appalachia, and industry will expand once more in our "Valleys of Opportunity." Methane, ethane, propane, et al., is not only a thermal energy but is synthesized into polyethylene, polypropylene, polybutylene, etc. About 30 percent is used for these raw materials converted to paint, plastics, tires—even pharmaceuticals and cosmetics and thousands of products.

Methane (the closest energy to the perfect hydrogen molecule on earth) will be used to propel our future to Mars and the universe where the homes may be made of polys.

Let's keep Pennsylvania as its best producer. ■