AFPM
American
Fuel & Petrochemical
Manufacturers

AFPM Committee Reports
June 8, 2016

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EEOC Revision of the Employer Information Report (EEO-1)

Recent Activities:

- The Equal Employment Opportunity Commission (EEOC) announced on February 1 that it intends to submit to OMB a request for a threeDyear Paperwork Reduction Act approval of a revised Employer Information Report (EEO–1) data collection. AFPM filed comments on April 1.

Background: This revised data collection has two components. Component 1 collects the same data that is gathered by the currently approved EEO–1: specifically, data about employees' ethnicity, race, and sex, by job category. Component 2 collects data on employees' W–2 earnings and hours worked, which EEO–1 filers already maintain in the ordinary course of business. For the 2016 reporting cycle, all EEO–1 filers would submit the data under Component 1. Starting in 2017, filers with 100 or more employees (both private industry and Federal contractor) would submit data in response to both Components 1 and 2. Contractors with 50 to 99 employees would only submit data for Component 1. In this notice, the EEOC solicits comment on the utility and burden of collecting pay and hoursDworked data through the EEO–1 data collection process.

Upcoming Activities:

- Labor Relations/HR Committee, July 14D15, 2016. Minneapolis, MN

Committee: Legal Committee

AFPM has an active litigation docket. Some of the more significant cases are summarized below and recent developments are *italicized in red*. For additional details on AFPM's litigation, contact Rich Moskowitz at: [redacted]@afpm.org

- ***RFS 2014-2016 –*** On January 8, a group of seven biofuel trade associations filed a petition for review challenging EPA's RFS implementation rule for 2014D2016. According to press statements, the petitioners are challenging EPA's decision to exercise its waiver authority to reduce the amount of biofuels required by the Energy Independence and Security Act of 2007. AFPM intervened in this lawsuit to defend EPA's interpretation of the general waiver authority and filed a separate petition for review challenging other aspects of the final rule. Several refiners filed separate lawsuits challenging EPA's original decision to fix the point of obligation at the refiner and importer – these separate cases have been placed in abeyance while EPA considers the administrative petitions for reconsideration filed on the issue. *The court has not issued a case management order (no briefing schedule has been set).*

- ***MTBE Liability (Federal Preemption) –*** On February 22, AFPM and the American Tort Reform Association filed an amicus brief in support of a petition for certiorari asking the U.S. Supreme Court to review the New Hampshire state court decision holding Exxon liable for MTBE groundwater contamination based upon the sale of gasoline into the state. This case is the first MTBE liability case based solely upon supplying gasoline into the state and did not address "spiller" liability. AFPM's brief explains the significant potential liability to the industry and argues that state tort law should be preempted based on the federal requirement to add an oxygenate to gasoline and the fact that MTBE was the only viable oxygenate that could be used in New Hampshire at the time. *On April 16, the Supreme Court denied Exxon's petition for a writ of certiorari.*

- ***Minnesota's Biodiesel Mandate –*** AFPM along with API, the Minnesota Trucking Association and the Automobile Alliance challenged Minnesota's biodiesel mandate on the grounds that the mandate is preempted by federal law because it conflicts with the RFS. The petitioners also raised procedural challenges to Minnesota's decision to increase the mandate from B5 to B10 from April to September. On April 21, the federal district court in Minnesota heard oral argument on petitioners' motion for summary judgment and defendants' motion for judgment on the pleadings. *No new action to report.*

- ***OSHA Process Safety Management (RAGAGEP – Definition) –*** On June 8, 2015, OSHA issued a memorandum to its inspectors on the enforcement of the Recognized and Generally Accepted Good Engineering Practices (RAGAGEP) requirements under the Process Safety Management (PSM) regulations. The enforcement memorandum significantly expands industry's PSM obligations and narrows the definition of RAGAGEP to published codes and standards. On August 3, AFPM, ACC and API filed a petition for review challenging OSHA's action as a legislative rule that should have been promulgated through notice and comment rulemaking. On May 2, following extensive settlement negotiations, the parties signed a settlement agreement addressing AFPM's principle concerns. *On May 12,*

OSHA issued a revised enforcement memorandum. On May 16, the court approved the stipulation voluntarily dismissing the case.

- ***Oregon LCFS – Oregon LCFS –*** On March 23, 2015, AFPM filed a complaint challenging Oregon's Low Carbon Fuel Standard (LCFS) on grounds that it is unlawful because it: (1) discriminates against outDofDstate fuel producers in purpose and effect; (2) is an impermissible extraterritorial regulation; and (3) is preempted by the federal Clean Air Act. The case was assigned to Chief Judge Ann Aiken at her request. California, Washington and several environmental groups' intervened in support of Oregon. On June 5, the state and the intervenors filed motions to dismiss, which AFPM opposed. On September 23, Judge Aiken granted the motion to dismiss. AFPM appealed the dismissal to the Ninth Circuit on October 22. AFPM filed its opening brief on February 1, 2016. *The state and state intervenors filed their reply briefs on April 29 and AFPM will file a response on June 13.*

- ***California LCFS –*** On September 18, 2013, a divided Ninth Circuit panel upheld California's LCFS, overturning the District Court's 2011 ruling that the LCFS was unconstitutional. The majority upheld the discriminatory effect embedded within California's life cycle analysis, reasoning that the geographic differences penalized under the program and the advantages assigned to California were applied evenD handedly and were rationally linked to California's goal of reducing total carbon emissions. The panel also held that California could regulate the conduct of outDofD state manufacturers, effectively requiring them to switch from coalDderived electricity to natural gas through an elaborate economic incentive scheme on the grounds that the regulation did not ban them from selling their products into the state. On January 22, 2014, the Ninth Circuit denied AFPM's petition for rehearing *en banc*. Seven judges dissented from the decision, calling the Ninth Circuit's panel ruling a "dramatic and unwarranted change of course" in the circuit's application of the dormant Commerce Clause. AFPM petitioned the Supreme Court for certiorari on March 21. On June 30, the Supreme Court denied our petition for certiorari. Aspects of our challenge to the CA LCFS regulation remain pending before the federal district court in Fresno, CA. On September 26, AFPM filed a motion to amend its complaint. California consented to part of AFPM's motion but opposed the inclusion of two additional Constitutional claims. California filed its motion to dismiss on January 23, 2015. AFPM filed a response on February 23. On May 1, the District Court ordered a second round of supplemental briefing on California's motion to dismiss, asking AFPM to explain the precise basis of its crude oil discrimination claim. On August 13, the district court granted the motion to dismiss the amended complaint with the exception of the cause of action related to whether the LCFS discriminates in purpose and effect. CARB recently revised the LCFS regulations. AFPM filed an amended complaint on February 24 to incorporate a challenge to the revised regulations. On March 25, California filed its opposition to AFPM's motion to amend its complaint. On April 22, AFPM filed its reply. *No new action to report.*

- ***Refinery Sector Risk and Technology Review (MACT Residual Risk) –*** AFPM and API are challenging EPA's final rule implementing the Refinery Sector Risk and Technology Review. AFPM members are concerned with EPA's implementation of standards applicable to periods of startup, shutdown, and malfunction, the 2 psig requirement for depressurizing delayed cokers, and the new fenceline monitoring

regulations. AFPM also will intervene in the suit filed by NGOs, challenging EPA's estimate of risk, regulation of emissions from flares and pressure relief devices, as well as exemptions from fenceline monitoring requirements. At the parties' request, the Court placed this case in abeyance while EPA addresses the issues raised in petitions for reconsideration. *No new action to report.*

- ***Clean Power Plan (Utility GHG Controls) –*** AFPM along with the U.S. Chamber of Commerce, National Association of Manufacturers and the National Federation of Independent Businesses are leading a coalition of trade associations challenging EPA's Clean Power Plan, which regulates carbon emissions from electric generating units. AFPM's primary concerns relate to the impact on electricity prices and reliability and the precedential impact of EPA using the NSPS/ESPS regulations to control emissions beyond the source category that is the subject of the standard. There are numerous other petitions for review, which have been consolidated, including petitions filed by 26 states. Several petitioners filed motions to stay the rule pending the outcome of this litigation. On January 21, the DC Circuit denied the petitioners' motions to stay the rule during litigation, but granted the motion for expedited review. On February 9, the U.S. Supreme Court granted an extraordinary writ, staying the rule during the litigation. On February 19, the petitioners filed their opening briefs with the DC Circuit and the government filed its responsive brief on March 28. The DC Circuit panel scheduled oral argument on June 2D3. *On May 16, the DC Circuit canceled oral argument before the panel and scheduled an en banc hearing on September 27.*

- ***BNSF Crude Oil Tank Car Surcharge –*** On March 13, 2015, AFPM filed a complaint against BNSF Railway in federal district court in Houston, Texas. The lawsuit challenges BNSF's imposition of a surcharge for transporting crude oil in DOTDauthorized tank cars that do not meet the CPCD232 specifications. At issue in the case is whether a railroad violates its common carrier obligations by charging more money to transport certain tank cars that do not meet the railroads specifications, even if those tank cars meet DOTDapproved tank car specifications. BNSF filed a motion to dismiss and sought to have the case moved from f district court to the Surface Transportation Board. Union Pacific instituted a similar surcharge, but they are not a party to this litigation. On March 11, the court dismissed this lawsuit without prejudice on the grounds that the court lacked subject matter jurisdiction. AFPM refiled this case before the Surface Transportation Board on April 22. *No new action to report.*

- ***Union Pacific (UP) Tariff for Transporting Empty Tank Cars –*** On March 13, 2015, AFPM joined a coalition of shippers in an action before the Surface Transportation Board (STB), challenging the UP Railroad's tariff governing the transportation of empty tank cars (Count 1). Federal law requires railroads to supply tank cars necessary for the provision of transportation services or compensate tank car owners for the tank cars that they supply (Count 2). At issue is whether the UP's new fees for transporting certain empty rail cars to maintenance facilities is lawful. UP filed an answer and motion to dismiss on April 20, 2015, and our response to the motion to dismiss was filed on June 1. On October 28, petitioners filed a motion to bifurcate and expedite Count 1 of the complaint (empty tariff). UP supported expediting the litigation but opposed bifurcation. On December 21, the STB denied

UP's motion to dismiss and denied the shippers' motion to expedite and bifurcate the two counts. AFPM members have authorized the association to drop Count 2. *The parties are in the process of negotiating stipulations and discovery demands. No new action to report.*

- ***GHG "Public Trust" –*** An environmental organization called Our Children's Trust (OCT) filed multiple lawsuits and administrative petitions seeking to compel the regulation of GHGs under an expansion of the "public trust" doctrine. The lawsuits seek to impose a 6% annual reduction of GHG emissions until atmospheric concentrations fall below 350 ppm. AFPM is monitoring these lawsuits and developing legal arguments opposing an expansion of the public trust doctrine. *A public trust litigation report is available upon request.*

  <u>*Federal Litigation*</u>: AFPM intervened in the federal lawsuit to oppose OCT's effort to mandate a capDandDtrade program. The District Court for the District of Columbia dismissed the plaintiffs' case with prejudice, citing preemption under the Clean Air Act and questioning whether the public trust doctrine could be extended to the atmosphere or imposes duties upon the federal government. On June 6, 2014, the D.C. Circuit affirmed the D.C. District Court dismissal. On December 8, the Supreme Court denied the petition for certiorari, effectively ending the federal litigation. On September 3, 2015, OCT filed suit in the Oregon District Court. In addition to raising the public trust claim, the petitioners allege the federal government's failure to limit CO2 emissions and phase out fossil fuels infringes upon the plaintiffs' constitutional rights to life, liberty and property, and discriminates against younger citizens, who will disproportionately experience the destabilized climate system. AFPM, API and NAM intervened in this case. The NGOs opposed our intervention, and the court held a hearing on the matter on January 13. That same day, the court granted our motion to intervene. On March 9, the magistrate heard oral argument on the motion to dismiss and on April 8, the magistrate issued recommendations to deny the motion to dismiss. *On May 2, the AFPM coalition filed objections to the magistrate's recommendations and the plaintiffs filed their response to our objections on May 15. On June 1, Judge Aiken scheduled oral argument in the matter, which will take place on September 13.*

  <u>*State Litigation*</u>:

  Oregon – On May 11, 2015, the Oregon case was dismissed based on the separation of powers doctrine, with the court concluding that it could not create a standard for GHG emission reductions stricter than what is called for by the legislature. The Oregon court also ruled that the public trust doctrine applies only to submerged and submersible lands and does not extend to the atmosphere. On July 7, the petitioners appealed. Appellants' opening brief was filed on February 26. Appellee's Answering Brief was filed on April 14. *No new action to report.*

  Washington – Last November King County Superior Court Judge Hollis Hill issued the first decision in the nation to extend the public trust doctrine to the atmosphere (it did so by linking GHG emissions to an increase in fish mortality

due to warm waters, sea level rise, and ocean acidification). The decision had little practical impact in Washington, since the DEC was in the process of implementing Governor Inslee's cap and trade plan. When DEC withdrew its proposed rule in April, Our Children' s' Trust filed motion to compel DEC to regulate GHGs. On April 29, Judge Hill issued an order requiring the Washington Department of Ecology (DEC) to promulgate a GHG reduction plan by the end of the year. The ruling also requires DEC to make GHG reduction recommendations to the legislature in 2017. *On May 31, DEC issued a revised version of its GHG reduction regulations.*

Pennsylvania – On September 16, 2015, a group of youth plaintiffs filed a complaint in the Commonwealth Court of Pennsylvania, seeking to require the Commonwealth to Pennsylvania's emissions of GHGs in furtherance of the Commonwealth's duty as a public trustee to conserve and maintain public natural resources for the benefit of present and future generations. The chief clerk put this case on the June, 2016 argument list. *The court scheduled oral argument on June 6.*

State Administrative Petitions: Of the 46 administrative petitions filed by OCT, all were denied. *No new action to report.*

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