2016 REGULATORY FORECAST

ENVIRONMENTAL & ENERGY POLICY

BALCH
& BINGHAM LLP

ENVIRONMENTAL & ENERGY POLICY FORECAST

Looking ahead to 2016, federal environmental and energy policies will continue to have a significant impact on businesses across many sectors. That impact will be particularly pronounced as the current Administration aggressively finalizes its regulatory priorities before the next Administration takes office in January 2017. Changes in congressional leadership, electoral politics, court actions, and a host of other factors promise to play a role as well.

We sat down with three partners in Balch & Bingham's Washington, D.C., office who focus their law practices on federal environmental and energy policy. Each of these attorneys has deep experience serving as counsel on Capitol Hill and in the private sector, providing a unique perspective and targeted insight on the path of many anticipated environmental and energy regulations in a changing political climate.

BALCH'S ENVIRONMENTAL & ENERGY PRACTICES

BALCH'S ENVIRONMENTAL & NATURAL RESOURCES SECTION has helped clients across a broad range of industries navigate complicated environmental matters, including air quality, water quality, contaminated land and groundwater, land use, renewable energy issues, and complex litigation matters. Our lawyers are the preferred source of legal counsel on environmental matters for some of the nation's largest electric generating companies, manufacturers, business coalitions, and mining companies. The practice includes over two dozen dedicated environmental and natural resources attorneys across the South with regulatory relationships and courtroom experience throughout the country.

BALCH'S ENERGY SECTION has served the electric industry for more than 90 years. Our firm's attorneys have included some of the industry's leading practitioners before state public utility commissions, the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission (NRC). Our attorneys are heavily involved in consulting on developing energy legislation, and work with clients to anticipate and respond to potential effects. Because the needs of our energy clients often extend into areas that require different expertise, the balance of the firm is also heavily involved and versed in the business of producing, transmitting and delivering energy services, in both regulated and unregulated markets.

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MARGARET CARAVELLI counsels businesses, associations and other clients on energy, environmental and transportation matters. With over a dozen years of experience in federal policy, Margaret has handled complex legislative and regulatory matters both on and off Capitol Hill. Utilizing her expertise in developing and executing legislative strategies to shape public policy, Margaret helps clients solve regulatory and legislative challenges in order to achieve business objectives. Prior to joining Balch, Margaret served for a decade as lead counsel on Clean Air Act (CAA) issues for the three congressional committees with jurisdiction over the law and the Environmental Protection Agency.

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SEAN CUNNINGHAM focuses his practice on energy policy. He has extensive experience representing electric utilities on regulatory, legislative and appellate litigation matters pertaining to electric transmission and distribution, utility telecommunications, renewable energy, and energy efficiency. In addition to his regulatory experience, Mr. Cunningham has served as counsel to the U.S. House of Representatives' Committee on Energy and Commerce, and the Committee on Oversight and Government Reform. He was the lead negotiator and primary drafter for electricity and energy efficiency provisions of the Energy Policy Act of 2003.

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JEFF WOOD counsels businesses, associations, and other clients regarding complex legal, regulatory, and policy matters primarily in the environmental, natural resources, and energy contexts. For more than three years, Jeff served as legal counsel to U.S. Sen. Jeff Sessions (R-AL), where he provided counsel on environmental, energy, maritime, agriculture and forestry issues, and worked closely with members of Congress and federal agency officials. He also served as the Republican Staff Director for two U.S. Senate subcommittees and interacted regularly with senior officials at the U.S. Environmental Protection Agency, Department of the Interior, Nuclear Regulatory Commission (NRC), and other federal agencies.

TSCA REFORM

In recent months, Congress has taken significant steps toward amending the Toxic Substances Control Act ("TSCA"), which would be the first major reform of TSCA since it was enacted in 1976 and one of the most significant environmental laws passed since the 1990 Clean Air Act Amendments.

TSCA, which empowers EPA to regulate the manufacture and use of chemicals, has been widely viewed as inadequate by both public interest groups and the regulated community, but political consensus on how to reform TSCA was elusive for many years.

A key breakthrough occurred in 2013 when Sen. Frank Lautenberg (D-NJ), a longstanding advocate for a comprehensive overhaul of TSCA, reached agreement with Sen. David Vitter (R-LA) and other Senate Republicans on a reform bill, the Chemical Safety Improvement Act of 2013, which was not enacted into law in 2013 but laid the foundation for future reform efforts.

In March of 2015, 16 Senators – equally split among Republicans and Democrats – introduced the Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. 697), named in honor of the now deceased senator from New Jersey. Similar to the 2013 bill, S. 697 would revise safety standards, require more EPA safety reviews for new and existing chemicals, and preempt certain state regulations. On April 28, 2015, the Senate Environment & Public Works Committee approved S. 697 by a vote of 15-5. Likewise, on June

3, 2015, the House Energy & Commerce Committee approved its own bill, the TSCA Modernization Act of 2015 (H.R. 2576), by a vote of 47-0, and the full House passed the bill on June 23, 2015.

On December 18th, the Senate approved the TSCA reform bill by unanimous consent, with enactment of a major reform bill in the 114th Congress seen as likely, although some questions remain over whether the President will sign a final House-Senate compromise bill. Preemption of state chemical regulations will likely remain a sticking point as TSCA reform moves through both chambers. In most respects, the House version provides fewer opportunities for states to establish their own standards than the Senate bill.

MANY EXPECT THE SENATE TO ACT SOON ON TSCA REFORM, WITH ENACTMENT OF A MAJOR TSCA REFORM BILL IN THE 114TH CONGRESS SEEN AS LIKELY

If TSCA reform is enacted, the impact would not be limited to the chemical sector. Any industry that manufactures or uses chemicals in the United States could be impacted by these changes and the ensuing new regulations, including the agriculture industry, oil and gas sector, and a wide array of manufacturing entities. As EPA completes a prioritized review of chemicals as contemplated by the TSCA reform bills, it is likely that new requirements will be established for industries that currently may not be expecting to be affected.

Assuming TSCA legislation is enacted, it is of critical importance to remain engaged with EPA and provide input when there is opportunity for comment. Moreover, through citizen suits and other means, TSCA still provides opportunities for third party groups to have a central role, which could lead to further friction or litigation over the implementation of the TSCA reforms. Many states, particularly California, have been active in pushing for tighter state standards than is likely to be allowed under federal law so monitoring state responses will be important, too. Comment periods will be announced by EPA and can be tracked via EPA's website.

"Upon enactment, we would expect a new slate of EPA proposals to come out," said Jeff Wood, partner in Balch's Washington, D.C., office. "At which point, it will be important for companies doing business in affected industries to participate early in the process and weigh in on those proposals."

"Looking ahead to 2016, a key goal of the TSCA modernization effort, in addition to protecting public health and the environment, should be to enhance the global competitiveness of the nation's chemical sector."

–JEFF WOOD

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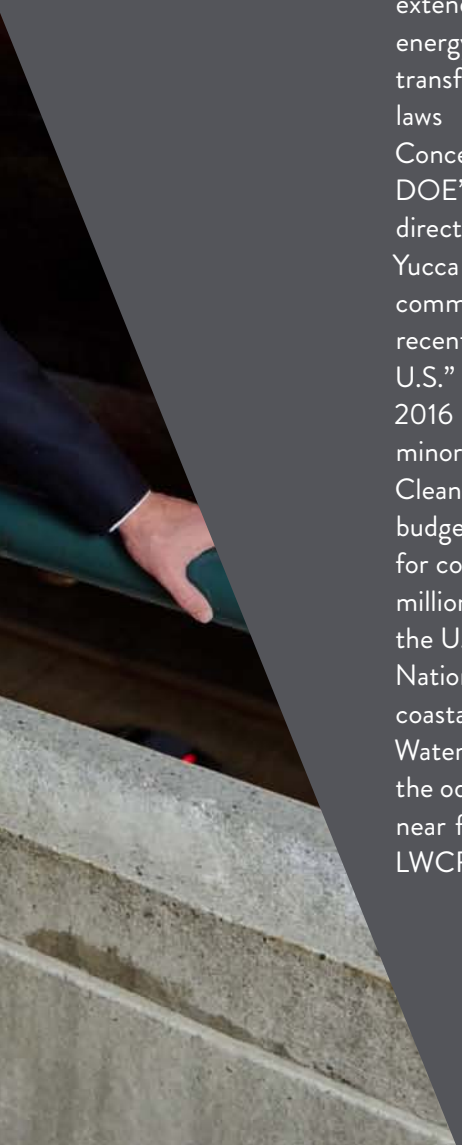
Q&A

We sat down with three members of our Washington, D.C., office for a roundtable discussion of emerging environmental and energy legislation moving on the Hill that will continue to affect businesses in 2016.

Q: Congressional leaders just released a $1.1 trillion dollar omnibus bill for fiscal year 2016. How will this legislation impact federal energy and environmental policy in the year ahead?

JEFF: The final 2,000-page spending bill and 200-page tax extenders package, issued jointly last night, contain consequential provisions on low-tier, mid-tier, and top-tier energy and environmental issues. For starters, the bill lifts the 1970s ban on crude oil exports while also extending tax credits for solar and wind energy. By some estimates, expanding oil exports may increase domestic oil production by over a million barrels per day and reduce gasoline prices by about a dime per gallon. In addition, this legislation extends tax incentives for electric vehicles, biofuels, certain residential and commercial energy efficiency projects, electric utility transmission transactions, and real estate transfers for conservation purposes. The bill also adds new comprehensive cybersecurity laws to protect against cyber attacks impacting critical energy infrastructure. Concerning nuclear power, the bill presses regulatory reforms at the NRC and supports DOE's efforts on small modular reactors, although it does not include any congressional direction regarding spent nuclear fuel and high level waste (such as funding for the Yucca Mountain repository license). To the disappointment of many in the regulated community, the bill fails to block the most contentious environmental rules issued recently such as the Clean Power Plan, the ozone standard, or the "Waters of the U.S." rule. In that respect, key parts of the Administration's regulatory agenda for 2016 will, in essence, proceed without major congressional hurdles, with a few fairly minor exceptions (such as riders blocking efforts by the Administration to revise the Clean Water Act's definition of "fill material"). However, the bill does cut EPA's overall budget to 2008 levels. While the bill does not accommodate the President's request for contributions to the U.N. Green Climate Fund, it does contain approximately $50 million for other international climate change programs and an additional $10 million for the U.N. IPCC Framework Convention on Climate Change. The bill also creates a new National Oceans and Coastal Security Fund to "better understand and utilize ocean and coastal resources and coastal infrastructure…" Finally, by reauthorizing the Land and Water Conservation Fund (LWCF) until 2018, the spending bill substantially increases the odds that Congress will be able to move forward with chemical safety reform in the near future as that unrelated effort had been stymied by political maneuvers tied to LWCF.



Q: What about congressional efforts to block the controversial "Waters of the U.S." regulation that EPA and the Army Corps of Engineers issued this summer?

JEFF: The "WOTUS" rule is definitely a focus of concern on the Hill, as it should be. Recent judicial orders about the rule, which have not favored the Administration, may also embolden Congress as it works toward a final spending deal to aggressively block it. The Congressional Review Act process has already been initiated, too. One such court action is an appeals court order staying that rule nationwide and another is a judicial panel order denying the Administration's request to consolidate the nine pending WOTUS legal challenges into one proceeding. These actions add credence to the view that this particular regulation shouldn't be put into effect. An appropriations rider addressing this rule may not be surprising, although any efforts along those lines is certain to face stiff opposition by the White House.

Q: The last major energy bill to be enacted was the 2005 energy legislation, although the 2007 energy bill was, perhaps arguably, a significant undertaking as well. Looking back over the last ten years or so, how successful has the 2005 law been?

SEAN: As counsel to the House Energy and Commerce Committee in 2001-2003, my mandate was to draft and negotiate an electricity title as part of a comprehensive energy bill. The title we negotiated in 2003 was later enacted unchanged as part of EPACT 2005. In terms of Congressional intent, the electricity title has been successful in part, but in some ways has been rendered less effective by agency interpretation and court decisions. For example, PUHCA was repealed, but FERC has taken a more aggressive role in merger reviews. Congress provided for transmission rate incentives, but low interest rates have made FERC reluctant to approve substantial incentives. Also, surprisingly, the FERC "backstop" for transmission siting was gutted by a court decision that prevented the FERC from acting in cases where the States have simply failed to act on transmission siting applications.

Q: On the other hand, are there any aspects of the 2005 legislation that you feel have been less successful?

SEAN: An interesting case study of underwhelming success is the fate of EPACT 2005's amendments to the Public Utility Regulatory Policy Act of 2005. PURPA was enacted in 1978 in part to decrease reliance on foreign oil and promote renewable energy. The original Section 210 of PURPA required electric utilities to purchase electricity offered for sale by "qualifying facilities" ("QFs"), which can be either cogeneration units, where a facility simultaneously produces electricity and either "process heat" or steam that is used for another industrial purpose, or small power production facilities, which are renewable projects of 80 MW or less. To address the overbuild of "PURPA machines," which forced utilities to buy unneeded power from QFs at "avoided costs" typically at above market rates, Congress repealed the application of the mandatory purchase obligation where FERC finds that the QFs have access to competitive wholesale electricity markets. In doing so, Congress recognized that the development of "day two" organized energy

markets and open access policies had provided the market access for renewable resources that PURPA was intended to provide. However, FERC's implementation of this amendment has been too restrictive. Although FERC has eliminated the mandatory purchase obligation for most large QFs in the organized markets, it continues to grant QF status to virtually all renewable QFs of 20 MW or less, regardless of access to markets. If these QFs are not satisfied with market opportunities in organized markets, they can essentially forum shop until they find a utility with high enough "avoided costs" and force a long-term obligation. Furthermore, FERC often allows large renewable QF projects, such as wind and solar, to be split creatively configured into 20 MW segments to secure QF status. A recent letter from the House and Senate energy committee chairmen spotlights the shortcomings of FERC's permissive approach and asks FERC to hold a technical conference to address PURPA reform. Regardless of whether FERC takes up this request, it appears likely that further statutory changes will be needed to bring PURPA into the 21st century.

Q: Margaret, you had a significant role on Capitol Hill advising on Clean Air Act policies including those impacting the oil and gas industry. What are some of your observations about the results of the 2005 and 2007 energy bills?

MARGARET: Only after a couple of false starts and years of input did the Energy Policy Act of 2005 ("EPACT 2005") make it to the President's desk. With 18 titles, EPACT 2005's provisions went through multiple hearings, markups, and a formal conference committee process prior to being signed into law in August of 2005. Conversely just two years later, enactment of the Energy Independence and Security Act of 2007 ("EISA 2007") took just under a year, shuttling back and forth between the House and Senate without undergoing a formal conference committee process. The result included, in my view, one important misfire – the thus far unsuccessful revisions to and significant expansion of the Renewable Fuels Standard (RFS).

The RFS, an amendment to the Clean Air Act, first established in EPACT 2005 originally mandated at least 4 billion gallons of renewable fuel be used in 2006, increasing to 7.5 billion gallons by 2012. This 3.5 billion gallon increase was to occur over a six year period. However, just two years later, EISA 2007 extended the program through 2022 and significantly expanded the mandated volumes. This RFS2 mandated 9 billion gallons of renewable fuel for 2008, ultimately requiring 36 billion gallons by 2022. Adding to the complexities of the RFS2 are nested, yet separate, volumetric mandates for four categories of renewable fuels: total renewable fuel, advanced biofuels, biomass based diesel, and cellulosic biofuels. By 2022, cellulosic biofuels are to contribute 16 billion gallons to the 36 billion gallon total mandate with conventional corn ethanol being capped at 15 billion gallons starting in 2015. In addition, each fuel category includes certain minimum thresholds for lifecycle greenhouse gas emissions.

The enthusiasm accompanying enactment of the RFS2 hit a wall of reality almost immediately. The necessary production of cellulosic biofuels failed to come to fruition; the projected demand for gasoline decreased instead of increasing, limiting the amount of renewable fuel that could be safely blended into the transportation fuel pool; and EPA was unable to implement the program in a timely manner, repeatedly missing annual deadlines for the promulgation of volumetric requirements. These dynamics resulted in a program that has failed, in one way or another, to achieve its central goals. While EPA looks to place the program back on track by finalizing 3 years' worth of volumetric requirements, the RFS2 remains a cautionary tale of unintended consequences and it appears action by Congress may be the only way to remedy the situation.

CLEAN POWER PLANNING:

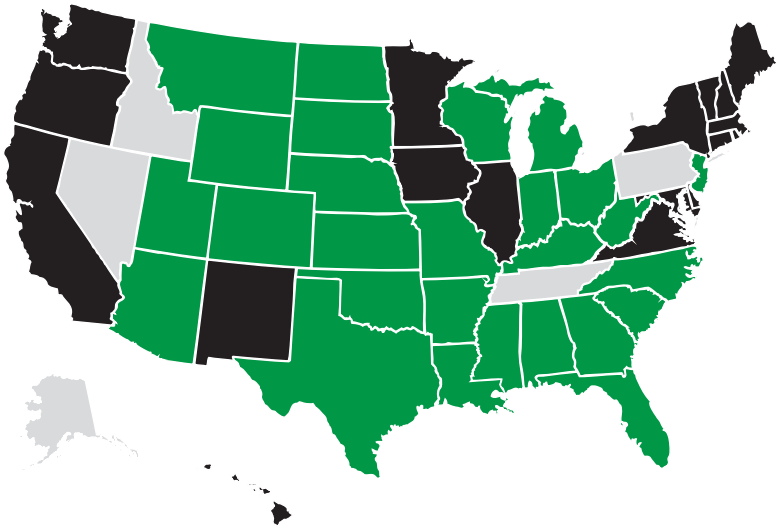
Preparing for Clean Power Plan Implementation

THE ENVIRONMENTAL PROTECTION AGENCY'S CLEAN POWER PLAN (CPP) establishes mandatory greenhouse gas emission reductions on a state-by-state basis, requiring states to reduce carbon dioxide (CO_2) emissions from existing electricity generating units. According to EPA, when fully implemented in 2030, CO_2 emissions from power plants will be 32 percent below 2005 levels.

With publication in the Federal Register on October 23, 2015, the CPP triggered a wave of legal actions, both for and against the rule, and started the clock ticking for states to respond to the rule's deadlines.

Since October, more than half of all states have filed lawsuits opposing the CPP, with less than 20 states joining the litigation on the side of EPA. It is widely expected that judicial decisions on the various motions to stay the rule will not come until early 2016. Rulings on the merits will likely not come until late 2016 or early 2017. Given the significance of this regulation and uncertainties surrounding EPA's legal authority to adopt it, the CPP is more likely than most other federal rules to ultimately garner the attention of the U.S. Supreme Court, where a ruling would likely not occur until 2018 or beyond. Of course, between now and then, another national election will take place. A new administration is guaranteed, although it remains to be seen whether the next President will keep the CPP in place entirely, modify it, or repeal it altogether.

CLEAN POWER PLAN – STATE LEGAL ACTION FOR AND AGAINST



27 STATES FILED SUIT IN OPPOSITION TO THE RULE

18 STATES AND THE DISTRICT OF COLUMBIA FILED IN SUPPORT OF THE RULE

While the litigation over the CPP is playing out in the courts and the presidential candidates banter back and forth about their plans to either restrain or reinforce EPA, those states opposing the CPP are faced with important questions: ignore the deadlines EPA seeks to impose, seek an extension of the plan submission deadline, or begin plan development.

At last check, a number of states were considering a combination of these to protect their ability to challenge both the regulation on its face and as applied to the specific state in the context of an EPA determination on the adequacy of its plan submittal.

LOOKING AHEAD:
NUCLEAR

Within the overall Clean Power Plan debate, a broader conversation has been taking place about the role nuclear power should play in America's energy future. The administrative record for the CPP suggests an internal struggle within the Executive Branch—and among stakeholders—concerning nuclear power's place in the broader context of emission reduction programs, with some in the Administration pressing for nuclear energy to be elevated while others seemed inclined to leave nuclear out of the discussion altogether. With respect to nuclear power specifically, some aspects of the EPA proposal were problematic from the start. For instance, as part of the target-setting formula, EPA included new nuclear reactors currently "under construction," essentially disqualifying these reactors from helping their host states achieve designated emissions goals. For states investing in new nuclear power plants, it was disconcerting, to say the least, to be told that their emissions targets would be substantially more stringent (that is, more difficult to achieve) because those states made the proactive decision to invest early in new nuclear power. Fortunately, this component of the Clean Power Plan was corrected in the final rule. Whether the final rule goes far enough to support nuclear power – or even whether the rule is legally valid at all – remains the subject of continual debate. Balch had a key role in crafting the comments on that rule for the companies that are constructing new nuclear power plants.

2015

CLEAN POWER PLAN: KEY DATES

AUGUST 3 Prepublication of the Final Rule by the EPA

OCTOBER 23 Publication in the Federal Register (80 FR 64661)

OCTOBER 23 Motions for Stay and Petitions for Review Filed in the D.C. Circuit by various states, industry coalitions, utilities, and other parties

OCTOBER 27 Motion to Intervene In Support of EPA by environmental groups

OCTOBER 29 D.C. Circuit order scheduling briefing of stay motions

NOVEMBER 5 Motions to Intervene In Support of EPA by various states

NOVEMBER 17 U.S. Senate passed joint resolutions under the Congressional Review Act disapproving the Clean Power Plan (as well as the rule for new sources)

NOVEMBER 30-DECEMBER 11 United Nations Framework Convention on Climate Change (UNFCCC) Conference meeting – Paris, France

DECEMBER 1 U.S House of Representatives passed joint resolutions under the Congressional Review Act disapproving the Clean Power Plan (as well as the rule for new sources). Upon passage the joint resolutions were sent to the President for his signature or veto.

DECEMBER 3 EPA's consolidated response to motions for stay

DECEMBER 8 Respondent Intervenors' responses to motions for stay

DECEMBER 23 Replies in support of motions for stay

A key decision point for each state is whether, as mandated by the CPP, to make an initial submittal to EPA on September 6, 2016, and if so, the composition of any such submission. For states that do make a submssion that includes a state plan, they must choose either rate-based or mass-based and between two general approaches: an emissions standards plan places federally enforceable emissions standards on the power plants in the state; while a state measures plan may include not only federally enforceable emissions standards but also renewable energy and energy efficiency measures, enforceable by the state. Both approaches allow for multi-state trading systems. The initial submission by a state may consist of a request for a two year extension to submit a final plan. With actual compliance beginning in 2022, EPA provides a glide path for achieving a state's final emission rate target by 2030, through a series of interim emissions rate periods in which a state must meet a specific emissions rate for each period or set their own goals for meeting the average interim emissions rate set by EPA. To encourage states to begin reductions prior to the initial compliance date of 2022, EPA created an optional Clean Energy Incentive Program to award credits for investments during the 2020-2021 time period in energy efficiency projects in low-income communities as well as wind and solar generation projects in states that included these elements in their final plans. States that fail to submit a plan will be subject to a federal plan, proposals for which were published at the same time as the final CPP.

2016

JANUARY 21 Comments due on draft Federal Implementation Plan

SEPTEMBER 6 Deadline for states to submit a final plan or a request for a 2 year extension

NOVEMBER 8 Election Day

2017

SEPTEMBER 6 Progress report due for states granted a 2 year extension for submission of a final plan

JANUARY 20 Inauguration Day

2018

SEPTEMBER 6 Deadline for state plan submittals (if an extension is granted)

2020

NOVEMBER 3 Election Day

2021

JANUARY 20 Inauguration Day

2022

JANUARY 1 Initial compliance start date

2022-2029 8 year glide path; three interim steps. January 1, 2022- December 31, 2024; January 1, 2025- December 31, 2027; January 1, 2028- December 31, 2029 (each has its own interim goal)

2025

JULY 1 1st interim step period report due (2022-2024)

2028

JULY 1 2nd interim step period report due (2025-2027)

2030

JANUARY 1 Final compliance date

JULY 1 3rd interim step period report due (2022-2029)

2032

JULY 1 Biennial report due (includes actual emissions check to demonstrate state continues to meet the final state CO2 goal)

ABOUT BALCH & BINGHAM

BALCH & BINGHAM LLP is a corporate law firm with more than 250 attorneys and lobbyists across offices in Alabama, Florida, Georgia, Mississippi and Washington, D.C. We have more than 50 lawyers exclusively focused on the state and federal environmental and energy issues affecting American industry. Our firm is led by nationally ranked attorneys who combine business intelligence and industry leadership with high-quality legal counsel to anticipate and respond to corporate challenges both creatively and proactively.

Founded in 1922, Balch has a history of client service across highly regulated industries, including energy, financial services and healthcare, along with established practices in business, environmental, government relations, labor and employment, and litigation. We manage our client partnerships efficiently and transparently, resulting in value-driven representation and counsel tailored to each of our client's specific needs.

Balch serves clients in over 65 practice areas that fall under seven firm sections:

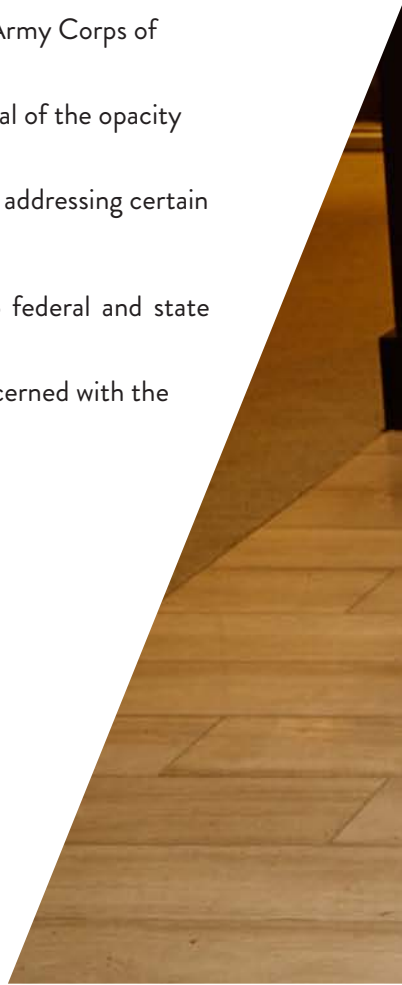
BUSINESS . ENVIRONMENTAL & NATURAL RESOURCES
ENERGY . LITIGATION . GOVERNMENTAL RELATIONS
LABOR & EMPLOYMENT . FINANCIAL INDUSTRIES

Balch routinely works on environmental and energy matters in the federal appellate courts.

- Filed petitions for review with the D.C. Circuit on behalf of client in challenge to the EPA Mercury Air Toxics Standards rule.
- Recently filed petition for review with the D.C. Circuit in challenge to EPA Clean Power Plan.
- Filed Eleventh Circuit brief on behalf of industry intervenors defending the U.S. Army Corps of Engineers' issuance of Nationwide Permit 21.
- Filed petition for review with the Eleventh Circuit in challenge to EPA's disapproval of the opacity provision in State Implementation Plan.
- Recently filed amicus brief with the U.S. Supreme Court in major energy law case addressing certain FERC demand response programs.

Balch is actively engaged in the process of preparing and submitting comments to federal and state agencies in response to significant regulatory proposals.

- Prepared and filed comments with EPA on behalf of a coalition of companies concerned with the nuclear aspects of the EPA Clean Power Plan.
- Prepared and filed comments with EPA regarding EPA's 2014 regional haze rulemaking in Texas and Oklahoma.
- Prepared and filed comments with EPA regarding EPA's coal ash proposals.



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