

# Boiler MACT Plus Other Litigation

CIBO E/E Meeting  
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Lisa M. Jaeger  
Bracewell & Giuliani, LLP



# Boiler MACT Sept 2004 Rule

## Environmental Petitioners Challenge:

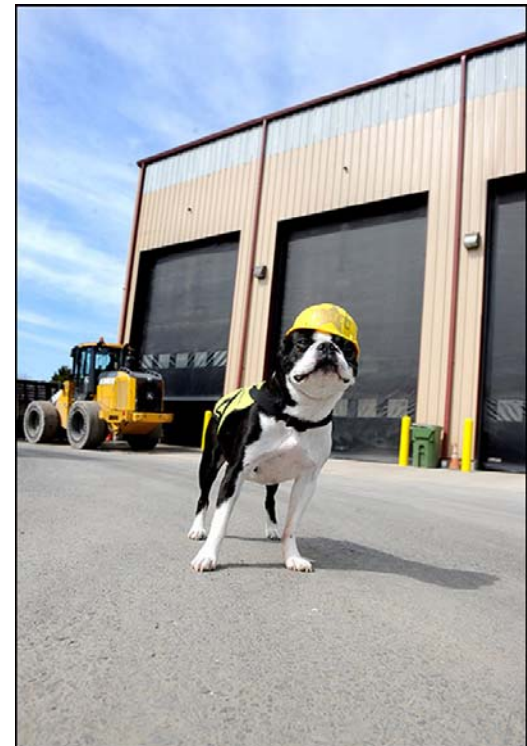
- Exclusion of CISWI units from CAA §129 regulation
- Emissions Standards must reflect Best Performing Source
  - Must set Emissions limits for each HAP that Boilers emit
  - Cannot base emission floors on technological controls
- Health-based compliance alternatives
  - HCl and Mn risk-based exemptions



# Boiler MACT Dec 2011 Rule

## Industry Petitioners Challenge:

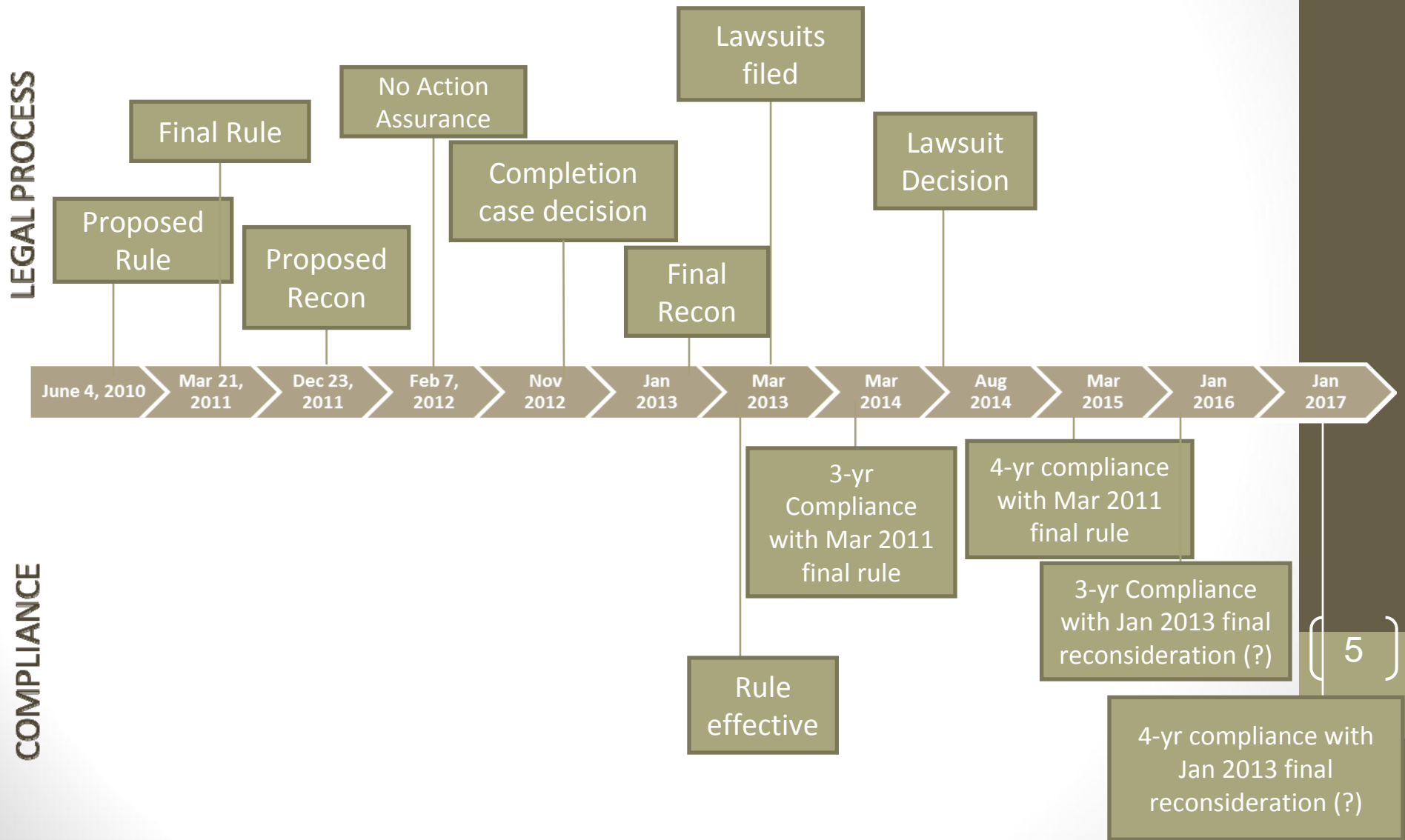
- Failure to provide notice and comment
- SSM – standards apply at all times
- Floor setting, emission limits
- No alternative total hydrocarbon emission standard
- O<sub>2</sub> monitoring
- No health-based emission limits
- No Total Selected Metals compliance option
- Energy assessment provisions
- Fuel switching
- Emissions testing





We Say	BMACT Rule 2013	They say
Support	<b>SUBCATEGORIES</b>	Illegal
-Achievability -Fuel variability data for units setting floors	<b>FLOOR SETTING</b>	Illegal Must reflect actual performance of best controlled units
Support	<b>SURROGATES</b>	Illegal
-Support Gas 1/Gas 2, small units; Dioxin/Furan -Support startup/shutdown but allow unit-specific conditions	<b>WORK PRACTICE STANDARDS</b> -Dioxin/Furan -Gas 1/Gas 2 -small units -startup/shutdown	Illegal: -Dioxin/Furan -Gas 1/Gas 2 -small units -startup/shutdown
Work practice standard	<b>MALFUNCTION/ AFFIRMATIVE DEFENSE</b>	Numeric limits
Scope too broad	<b>ENERGY ASSESSMENT</b>	Failure to consider other measures unlawful

# Boiler MACT Timeline



# MACT Decisions DC Circuit Nov 2012

- Completion Case *Sierra Club v EPA* (11-1184)
  - Williams (opinion) Tatel Henderson (concurring)
  - Vacated and remanded EPA 90% determination
- Gold Mine MACT *Desert Citizens Against Pollution v EPA* (11-1113)
  - Williams (opinion) Sentelle Garland



# Other MACTs

- RICE MACT *EnerNOC v EPA* (10-1090)
  - Case in abeyance
  - Comments on proposed rule closed 11.2.12
- PC MACT *PCA v EPA* (10-1358)
  - Case in abeyance pending rulemaking per settlement agreement
  - Proposed rule on remand 7.18.12
  - Final rule anticipated 12.20.12, compliance 9.10.15
- Pulp/Paper Residual Risk/Tech Review *AFPA v EPA* (12-1441)
  - Petition for review 11.13.12
- Brick and Ceramic Kilns *Sierra Club v EPA*, DC Dist Ct (08-424)
  - Consent decree: 8.30.13 proposal; 7.31.14 final



# Ozone NAAQS

## *MS v EPA (08-1200)*



- Judges Tatel, Brown, Griffith
- Oral Argument 11-16-12
- Issues:
  - Is a revision to the standard requisite to protect public health and the environment under CAA?
  - Primary health standard
    - EPA did not rely on numerous health studies
    - Whether those health studies were sufficient
  - Secondary welfare standard
    - Whether EPA should have set a secondary standard that differs from the primary



# Coal Ash RCRA Mandatory Duty

- *Appalachian Voices v Jackson* (DC District Ct 12-0523) Petitioners and Industry Intervenor claim EPA violated RCRA 2024(v) mandatory duty to review/revise if necessary
- Appalachian Voices remedy sought
  - Declare violation/Order EPA to review, make determination and revise if necessary
    - 40 CFR 261.4(b) CCR exemption from hazardous waste
    - Subtitle D CCB disposal regs at 40 CFR 257.3-3, 3-4, 3-7
    - 40 CFR 261.24 & Toxicity Characteristic Leaching Procedure (TCLP)
- Headwaters Resources & Boral Material technologies remedy sought
  - Declare violation/Order EPA to determine whether to revise regs for disposed CCR under C, D or not at all and state authority
- Motions for Summary Judgment
  - Briefing on-going
  - Oral arg not scheduled; status conference on 1.25.13



# Coal Ash RCRA Mandatory

## Duty

Issue: 40 CFR 261.4(b)(4) EPA Bevill

### Implementation

- Exempts CCR until EPA does Report & Reg Determination
- EPA CCR Reports/Determinations 1988/1993 & 1999/2000

App Voices    2002(b) mandatory 3-years  
6 months decide & revise

Headwaters    No claim

EPA              Not 2002(b) – inseparable from Determination

USWAG         Statute of limitations 2000 – 2003 + 6 = 2009  
Not 2002(b) – inseparable from Determination  
Moot – pending EPA June 2010 proposal  
No jurisdiction for remedy

# Coal Ash RCRA Mandatory

## Duty

Issue: 40 CFR Part 257 Subpart A Coal Ash

Regs Performance standards for solid waste disposal facilities

- EPA issued regs 1979

App Voices 2002(b) mandatory 3-years

6 months decide & revise

Headwaters 2002(b) mandatory 3-years

EPA Admit 2002(b) violation

6 months EPA memo estimating time

USWAG Statute of limitations 2000 – 2003 + 6 = 2009

RCRA 1008 discretionary – time to time

Moot – pending EPA June 2010 proposal

No jurisdiction for remedy

# Coal Ash RCRA Mandatory Duty

## Issue: 40 CFR 261.24 and TCLP

- Defines “toxicity characteristic” – is waste toxic (hazardous)
- TCLP = lab test, one part of 261.24
- EPA issued regs 1980, 1990

App Voices      2002(b) mandatory 3-yrs

6 months decide & revise

Headwaters      no claim

EPA                  admit 2002(b) violation

1 year review/propose time to revise if needed

USWAG            Stat of limitations 1990 – 1993 + 6 = 1999

RCRA 3001(b)(1) discretionary – time to time

no standing (no injury) – 261.24 excludes CCR

no jurisdiction for remedy

# Coal Ash RCRA Mandatory Duty

## EPA Position in Appalachian Voices v. EPA

**Steps EPA must take to analyze data and reverse/review rule:**

- SUBTITLE C/SUBTITLE D

- NODA and public comment
  - New data from 2010 ICR
- ICR data
- Coordination with CWA rulemaking
- Must conclude other tasks
  - Background docs
  - Preamble language
  - Administrative record
  - OMB review
- Conclusion: “Considerably more” than 6 months needed

Court should not set deadline

EPA should file brief 6 months after decision proposing deadline



# Coal Ash RCRA Mandatory Duty

## EPA Position in *Appalachian Voices v. EPA* **Steps EPA must take to analyze data and reverse/review rule:**

### • Toxicity Characteristic

- Data collection/analysis of 3 interrelated analytic components
  1. Set of “toxicity reference” values for each constituent
  2. Subsurface fate and transport modeling
  3. Toxicity Characteristic Leaching Procedure (TCLP)
- Determine necessity to revise toxicity reference values
  - IRIS
- Revision of dilution and attenuation factors
  - Alternative factors
- TCLP lab tests
- Revisions affecting other RCRA regulations
- Conclusion: Minimum 1 year to complete review of rule

# Other Litigation

- CSAPR
  - *EME Homer City Generation v EPA* (11-1302)
  - EPA Rehearing request pending
- GHG Rule
  - *Coalition for Responsible Regulation v EPA* (09-1322)
  - Industry Rehearing request pending

\*Sentelle takes Senior status as of 2.12.13





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