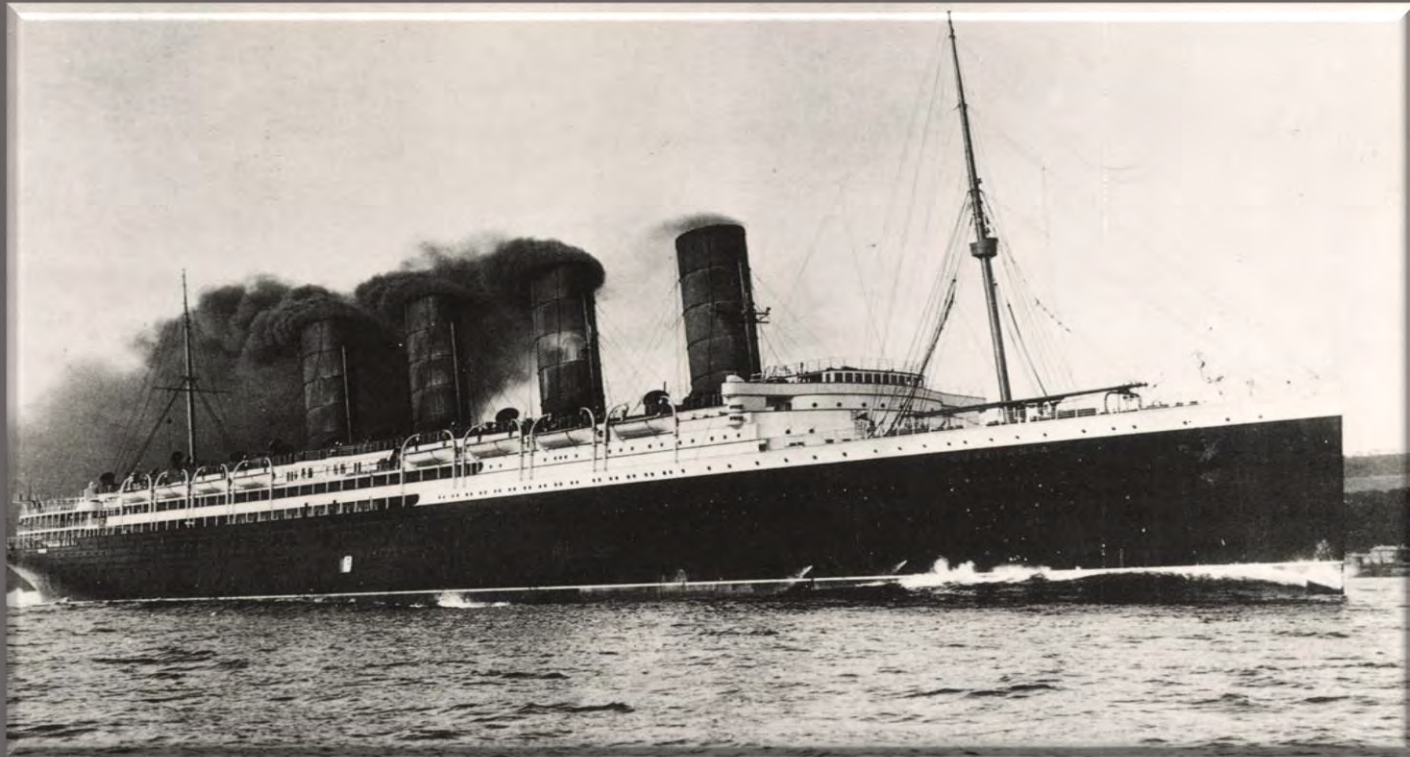
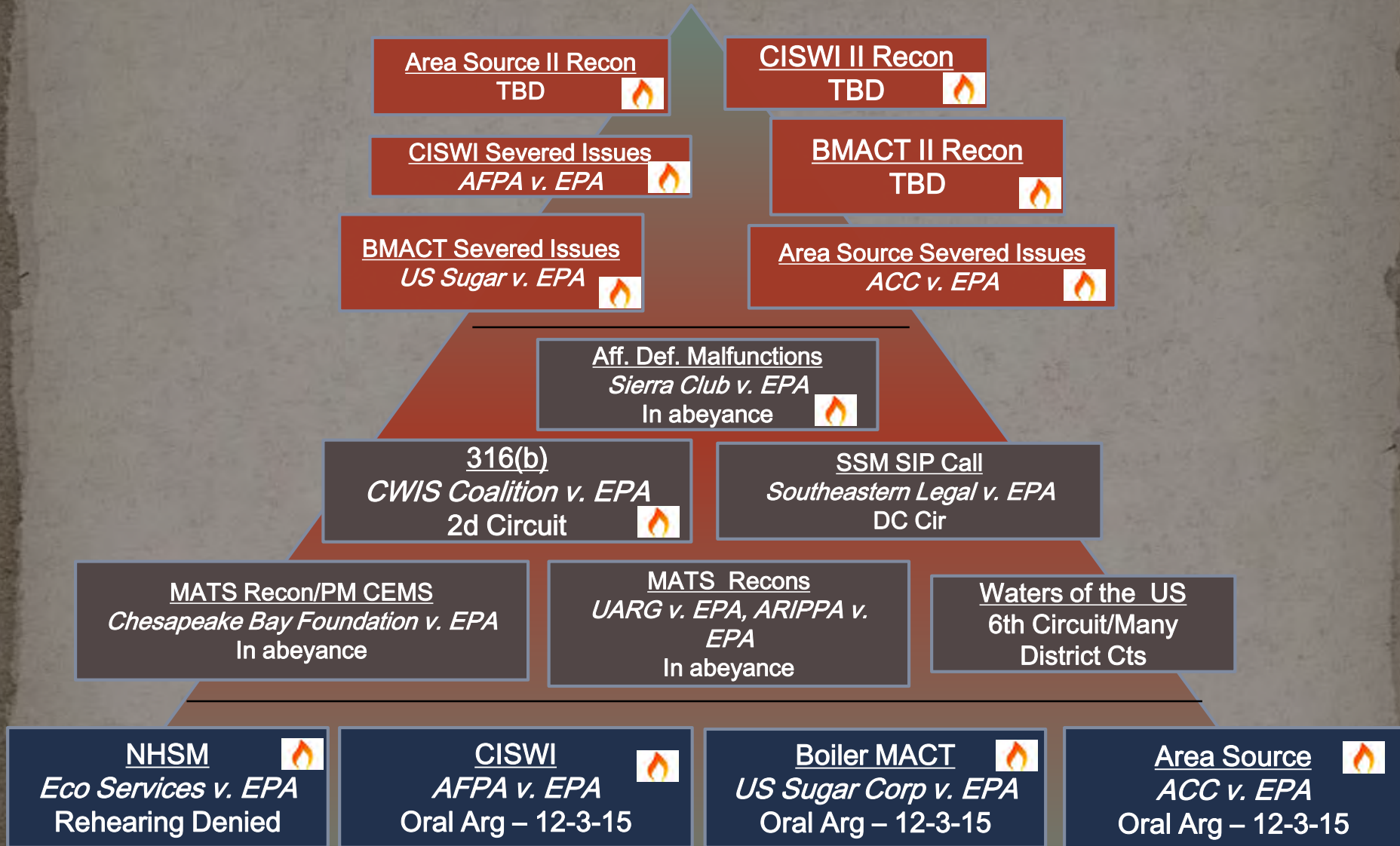


CIBO E&E MEETING



December 8-9, 2015
Lisa M. Jaeger
Bracewell & Giuliani LLP

MAJOR RULES IN COURT



NHSM RULE

Eco Services v. EPA (No. 11-1189)

EPA NHSM RULE UPHELD. 4-page unpublished opinion

OTHER MATERIALS, RULES / CASES PENDING:

- Construction /demolition wood, RR ties, paper recycling residuals
 - EPA proposed to treat as NHSM
 - rule at OMB July 2015, final Nov 2015?
 - *Treated Wood Council v. EPA (14-1201)*
in abeyance
- Other treated wood
 - rulemaking ongoing
 - *Treated Wood Council v. EPA (14-1202)*
in abeyance

PORTIONS OF NHSM BRIEFS CONSIDERED IN Boiler MACT CASES

DC CIRCUIT PANELS

Case	Judge	Judge	Judge
NHSM	Tatel	Wilkins	Sentelle
BMACT Area CISWI	Henderson	Brown	Griffith
General Provisions Decision (exemption invalid)	ROGERS	Tatel	Randolph
PC MACT (poll by poll)	HENDERSON	BROWN	TATEL
NACWA (UPL)	BROWN	SENTELLE	GARLAND

BMACT, AREA SOURCE, CISWI

ORAL ARGUMENT 12-3-15

Part A: Industry

- Industry Petitioners 40 min
- EPA Response 45 min
- ENV Intervenors for EPA 10 min
- Industry Petitioner rebuttal 5 min

Part B: Environmental

- ENV Petitioners 40 min
- EPA Response 45 min
- Industry Intervenors for EPA 10 min
- ENV rebuttal 5 min

BMACT AREA CISWI

Oral Argument Part A: Industry

Malfunctions Must be Accounted for in Standards

IND CAA “achievable” = achieved in practice Precedent:
must accommodate malfunctions
Boilers & malfunctions are known, too difficult is no excuse
EPA can do §129 work practice -- §129 is a §111 standard

- ? Why not use enforcement?
- ? Is effect of case by case, enforcement?
- ? Should EPA do numeric or work practice?

EPA no data
malfunctions so diverse, need case-by-case
other attempts failed (exemption, affirm defense)
no work practice under §129; su/sd waived

- ? Why not work practice standard?
- ? Case by case arises only in enforcement?
- ? Why can't you get the data you need?

ENV Intervenor floor based on achieved, not achievable
worst foreseeable circumstances not required

BMACT

Area

CISWI

BMACT AREA CISWI

Oral Argument Part A: Industry

Pollutant-By-pollutant for Best Performers Irrational

IND §§112 & 129 require achieved in practice, real boiler basis
No one heavy oil boiler meets all four HAP limits
best performing SRIs can't meet limits if waste fuel changes

? "Best" is CAA text, where is "best overall"?

? Is the problem mutually incompatible controls?

EPA emission limits must be and are actually achieved
CAA speaks of unitary source, EPA gets deference
industry's approach lets sources off hook

? True that a source can be best but fail for another pollutant?

? Possible for a source failing 1 limit to have to shut down?

? What if there are mutually incompatible controls?

ENV Intervenor CAA requires EPA's interpretation
Court need not decide what CAA requires,
issue not properly framed in this case

BMACT
Oil &
stoker
coal

CISWI
small
remote
inciner-
ators

BMACT AREA CISWI

Oral Argument Part A: Industry

Energy Assessment illegal

IND beyond scope of CAA authority to regulate “boiler” category not beyond-the-floor standard – no cost analysis
illegal work practice standard – no explanation
does not require emission reduction
practical effects – interferes with other MACTs at sources
? Where in CAA is a “boiler” only the boiler?
? Are you arguing for EPA to more regulation?

EPA CAA regulates “sources” – not just the boiler
EA regulates systems directly related to boiler
EA is beyond the floor standard – cost of EA defined
market-based requirement, industry should love this
? What is limit to what EPA can look at under the EA?

ENV Intervenors no argument

BMACT
Area

BMACT AREA CISWI

Oral Argument Part A: Industry

Small Remote Incinerators: Waste Variability Not Used to ID Best Performers

IND SRIs in remote areas, waste highly variable not considered basis for floor included in final rule only, could not comment

other controls – waste segregation – not practical

- ? What do you want EPA to do?
- ? How will this work – should EPA do subcategories?
- ? Did you submit data showing EPA data not representative?
- ? Why wasn't more data available?

EPA SRI category created, stack test data sought several times industry provided no data

other control options: after burners, waste segregation

- ? Is the data EPA used representative?
- ? Your response re waste segregation not practical?

ENV Intervenor no argument

CISWI

BMACT AREA CISWI

Oral Argument Part A: Industry

Recordkeeping Requirement Imposes Illegal Penalty

IND Illegal to penalize sources by changing their category

? Are there non-CISWI units that would be caught up in this?

EPA NHSM decision decided this must “qualify” to use NHSM non-waste to qualify, keep records, not much burden
NHSM decision: ok to burden sources for this showing

? Not a presumption, but definition: no records, you are CISWI

ENV Interv this is not sweeping requirement
special allowance for units burning discarded NHSM
burden of proof on operator only for those units

BMACT
Area
CISWI

BMACT AREA CISWI

Oral Argument Part A: Industry

CO Limit Arbitrary, Should Have Work Practice

IND work prac if not feasible to measure or control emissions
Data in MATS showed work practice needed
MATS data & reasoning apply to ICI boilers
EPA gives no explanation for difference, arbitrary
? What about *Sierra Club* precedent, error must be in this rule?
? How is MATS of central relevance of this case?

EPA *Sierra Club* says error must be in this case
EPA properly made no finding of infeasibility here
IND focus on formaldehyde concentrations, we use CO
arg, arg, arg
? Is this in case I am not reading *Sierra Club* the right way?
(arg, arg, arg)

ENV Interv focus shd be regulated HAP, not CO
feasible to control HAP, so work practice wrong

BMACT



BMACT AREA CISWI

Oral Argument Part B: Environmental

UPL / UL Does Not Reflect Actual Emission Limit Achieved

ENV UPL results in an upper limit that all sources will fall below that is not an average
NACWA court couldn't see how this was an average
EPA memo disavowed prior arguments

BMACT

CISWI

EPA UPL = average of best performers, worst foreseeable circumstances
variability in larger data set, will be higher

IND Interv no argument

BMACT AREA CISWI

Oral Argument Part B: Environmental

Best Performers Excluded From Floors

ENV Can't exclude gas co-fired biomass units from floor definition includes units co-firing
floors exclude existing >10% nat gas, new any nat gas subcategory abuse; new source floor only discretionary

EPA heterogeneous sources, fuel types vary
need representative data
EPA has discretion to exclude units where appropriate

IND Interv no argument

BMACT

BMACT AREA CISWI

Oral Argument Part B: Environmental

CO Illegal Surrogate – No Correlation, Other Controls Possible

ENV Surrogate must be reasonable

ACI, SCR reduce PAHs, no effect on CO

source stops burning tires, reduce PAH, no effect on CO

Per EPA formaldehyde goes up/down, CO at 130 ppm

? Does data show technology targeting CO has inverse effect on PAHs? (A: shows opposite: reduce PAH, no CO effect)

BMACT

EPA Chemistry of combustion known, CO reasonable surrogate as amount of organics drops, at point of CO at 130 ppm, only tiny amount of organics left

? Does data show technology targeting CO has inverse effect on PAHs? (A: no. Shows formaldehyde fluctuates, not PAH)

? Correct that at high temps, PAH spikes, but CO drops? (A: no, not correct)

IND Interv re formaldehyde: EPA shows this is measuring error catalyst & carbon injection control CO & HAP

BMACT AREA CISWI

Oral Argument Part B: Environmental

Can't Exempt Some Categories (Eg Burn-off Ovens, Foundry Sand Reclamation Units, Space Heaters, cyclonic burn barrels)

ENV thousands of CISWI, only 106 regulated
Since 1994, EPA should have regulated
EPA excludes most units, final agency action
need remand with instruction to regulate all CISWI
? What remedy do you seek?

EPA no action, no final action taken
proposed rules for some, flood of comments, EPA unaware
of extent of use of these units, need much more info
record says "nothing at this time" not perfect
? Does EPA have plans to regulate these units?
? Record proof that you haven't decided & are considering?
? How long will it take?

IND Interv no argument

CISWI

BMACT AREA CISWI

Oral Argument Part B: Environmental

EPA Should Have Set Beyond the Floor Standards

ENV CAA requires maximum reduction, this is not RACT
EPA requires only “reasonable” reduction
EPA rejected thermal oxidizers as BTF bec require nat gas
EPA did not show why
CO from coal ERUs got tune up only

EPA Cost important element of BTF
ENVs do not consider practicalities, cost/reduction
achievable does not mean under any circumstances

IND Interv no argument

CISWI

BMACT AREA CISWI

Oral Argument Part B: Environmental

112c6 Requires MACT for Oil/Biomass Boilers for Hg, POM

ENV 112c6 list – coal, oil, biomass on first list, now only coal
legislative history shows EPA cannot change the list

Area

EPA list subject to modification
has been changed over time
sources not delisted from regulation, just from MACT
standards required by 112c6

IND Interv no argument

BMACT AREA CISWI

Oral Argument Part B: Environmental

GACT Standards Illegal

ENV

1. GACT standards must be “generally available” controls
Subcategory limit based on uncontrolled coal unit, even though baghouse common control
2. Work practices for coal not consistent with 112d
EPA didn't show meet stringency under 112d
EPA made no determination

Area

EPA no argument

BMACT AREA CISWI

Oral Argument Part B: Environmental

Title V Exemption For Synthetic Minors Illegal

ENV 92,000 sources with area boilers
48 large enough to be major but are synthetic minors
Record lacks information about these & EPA decision
Data from ENVs rejected because EPA not sure these
are area sources

Area

EPA Size of boiler not key issue, but type of facility
EPA initially included but realized these like other sources
EPA made assumptions and explained

- ? These have history with EPA, why no information?
- ? Why is size of unit unimportant?
- ? Where in record shows EPA explained changed mind?

BMACT AREA CISWI

Issues Resting on Briefs

Issue	Case Party	Oral Arg
Need emissions averaging across CISWI units	CISWI ind	X
Su/sd periods must be accounted for in standards (except for DOJ claim that this issue was waived)	CISWI Ind	X
Rule treats modified CISWI as existing CISWI	CISWI Env	X
30-day averaging for units with CEMS means lower standards	CISWI Env	X
Temporary boiler exemption illegal	Area Env	X

BMACT AREA CISWI

Oral Argument Observations Predictions

INDUSTRY

- Malfunction work practice
(ENV #1. EPA #2)
- Energy Assessment
- Pollutant by Pollutant
(EPA #1. ENV #2)
- CO work practice
(ENV #3)
- SRI waste variability
- Recordkeeping
- Emissions averaging CISWI
- Su/sd work practices CISWI

ENVIRONMENTAL

- UPL
(EPA #3)
- Best performers not in floor
- CO as Surrogate
(EPA #1)
- Exempt categories CISWI
- BTF standards CISWI
- 112c6 list Area
- GACT standards illegal Area
- Title V synthetic minors Area
- Modified as existing CISWI
- 30 day averaging CISWI
- Temporary boilers exempt Area

LITIGATION & REGULATORY UPDATE







MATS RULE / CASE

- **White Stallion v. EPA (DC Cir 12-1100; USSCT)**
 - SCT: EPA must consider cost when determining whether regulation of HAP emissions from utilities is necessary and appropriate
 - case sent back to DC Cir, rule sent back to EPA
- **DC Circuit Oral Argument 12-4-15**
 - Should MATS rule be vacated while EPA does rulemaking to consider cost?
- **EPA Notice to court:**
 - Proposed Reissue rule by April 2016
 - Will seek remand w/o vacatur from DC Cir (leaving MATS Rule in place)
- **Other MATS cases (in abeyance):**
 - *UARG v. EPA* (DC Cir 15-1013, 1015, 1016) (4-hour startup exemption and SU/SD work practice)
 - *ARIPPA v. EPA* (DC Cir 15-1180) (waste coal)

MATS RULE / CASE

***White Stallion v. EPA* (DC Cir 12-1100; USSCT)**

DC Circuit Oral Argument 12.4.15

- Should MATS rule be vacated while EPA does rulemaking to consider cost?
- **EPA:** remand during cost rulemaking
 - Proposed Dec 2015; Final by April 2016
- **SOME IND:** remand (units switching fuels)
- **SOME IND:** vacate (coal units)
- ENV: remand
- States: remand

SSM CASES

Rule/Case	Description	Status
BMACT, Area, CISWI	Affirmative defense severed and put into reconsideration cases Proposal: delete aff defense	Recon rule proposed Final Fall 2015
Sierra v. EPA (DC Cir. 14-1110)	9-rule Affirm Defense 9 §112 and §129 rules	In abeyance Interventions pending Admin Petition granted
SSM SIP Call Southeastern Legal Foundation v. EPA (DC Cir. 15-1166)	36 States SIPs called	Deadline for corrective SIP 11-22-15 Motions to consolidate pending

CWA § 316(B) RULE

Cooling Water Intake Structure Coalition v. EPA (2d Cir. 14-4645)

- IND petitioners: CWIS Coalition (includes CIBO), UWAG, Entergy, API
- ENVs are intervenors for EPA
- IND Issues
 1. Applicability threshold too low
 2. Intake structure requirements lack authority
 3. “New units” at existing facilities unlawful
 4. USFWS and NMFS roles in NPDES permits unlawful
 5. Facilities below 125 mgd threshold data collection
- Briefing scheduled to start Nov. 2015
- Riverkeeper: motion to stay briefing schedule

CWA WATERS OF THE U.S.

- Jurisdictional issues: multiple challenges filed in D Cts and in Cir Cts
- Cir Ct cases combined
 - 6th Cir injunction blocks rule nationwide (Ohio v. USACE (15-3799))
- D Ct cases not combined
 - ND Dist Ct blocks rule in 13 states: ND, AK, AZ, AR, CO, ID, MO, MT, NE, NV, SD, WY, NM
 - SD Ga Held appellate court has jurisdiction. On appeal to 11th Cir.
- Dec 8 2015 oral argument 6th Cir does 6th Cir have jsd?
 - IND + 18 states: dismiss for lack of jsd
 - US + 7 states + ENVs: 6th has jsd
- Any action on the rule may have to wait until SCT rules on jurisdictional issues

CWA EGU

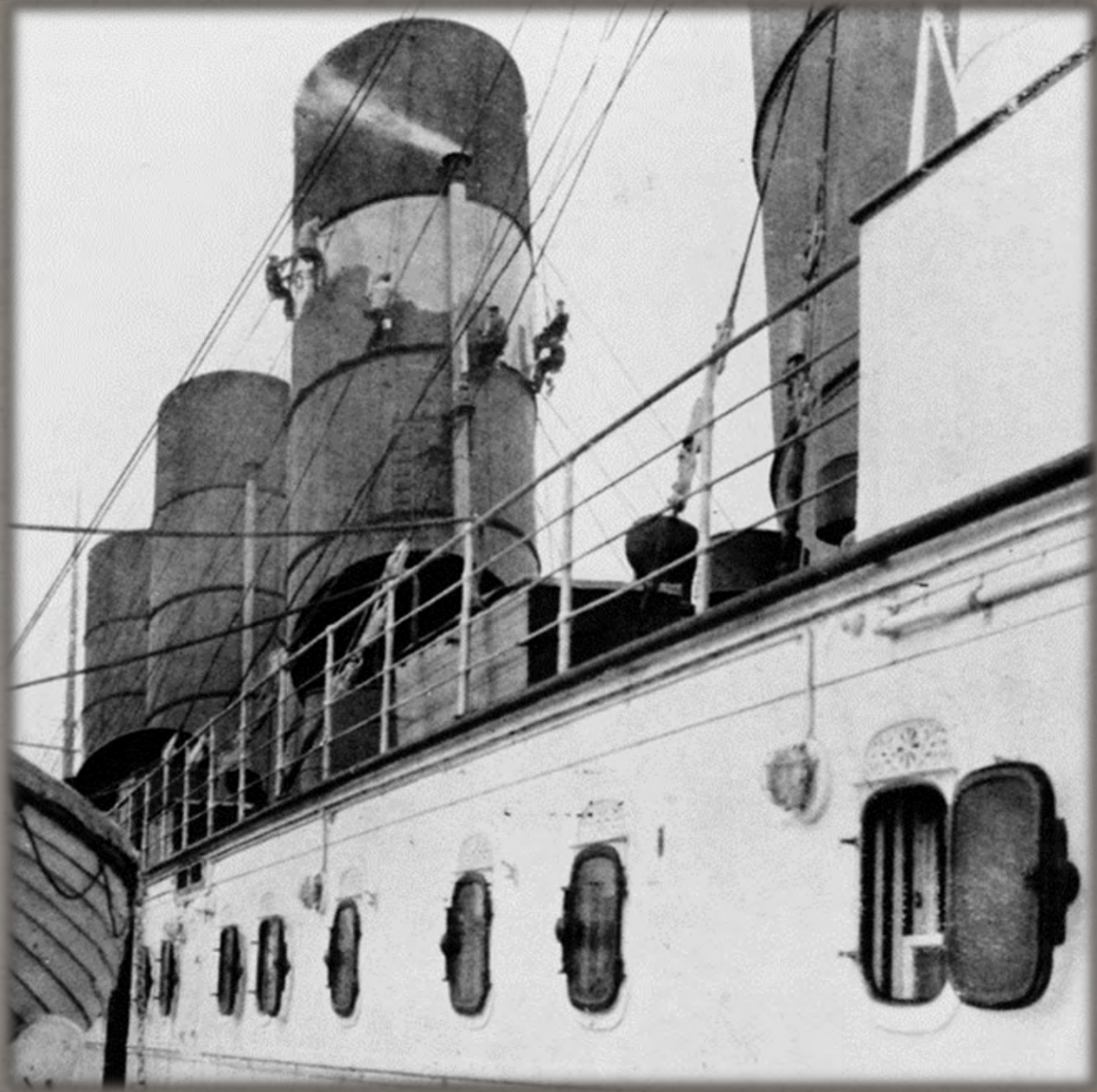
Effluent Limitations Guidelines

- Final Rule 9/30/15 (pre-publication)
- Lawsuits early 2016 (120 days from publication)
- Proposed rule: 4 “preferred” options
 - Final rule adopted a fifth approach
- CIBO comments not resolved in final rule:
 - Applicability
 - Isolating wastewater streams
 - Reclassifying low-volume waste sources
 - Facilitating re-use
 - Daily loads as permit conditions
 - Record deficient

COAL ASH RULE

USWAG v. EPA (D.C. Cir. 15-1219)

- IND petitioners: USWAG, EEI, NRECA, APPA, Beneficial Reuse Management, City of Springfield MO, AES Puerto Rico
- ENVs are intervenors for EPA
- IND issues:
 - inactive surface impoundments; closure of existing unlined surface impoundments; release response; mandatory safety assessments; definitions (“CCR landfill”; “beneficial use”); qualifications for “alternative closure”; consideration of costs
- Schedule:
 - Motions re: briefing schedule due 10/19
 - Briefing late Dec. 2015/early 2016
 - Oral argument Fall 2016
 - Decision likely early 2017



CSAPR RULE UPDATE

Timeline

- EPA-HQ-OAR-2015-0500; RIN: 2060-AS05
- Web version release 11-16-15
- Proposed Rule Issued 12-3-15
- Public hearing 12-17-15
- Comments due 1-19-16



CSAPR RULE UPDATE

Summary

- Proposes to issue FIPs for 23 eastern states to address air transport issues re 2008 O3 NAAQS
 - FIPs will update NOx O3 season emission budgets for all EGUs in those states
 - Focus on power sector only – EPA thinks substantial amount of cost-effective NOx reductions to be achieved here by 2017
 - Non-EGUs not in proposed emission budgets. EPA not sure significant NOx mitigation achievable from non-EGUs for the 2017 O3 season

CSAPR RULE UPDATE

Comment Sought

- EPA seeks comment on other steps needed to resolve any obligations remaining under the CAA “good neighbor” provision for 2008 O₃ NAAQS after accounting for EGUs

CSAPR RULE UPDATE

Non-EGU Issues for Comment

- Methods, analysis and conclusion in “Assessment of Non-EGU NO_x Emission Controls, Cost of Controls, and Time for Compliance” (EPA-HQ-OAR-2015-0500-0083)
 - Contains EPA preliminary evaluation of potential to mitigate interstate NO_x transport from non-EGUs
 - Non-EGUs in four groups – non-EGU point, point oil and gas, nonpoint oil and gas, and other nonpoint
 - does not include mobile sources

CSAPR RULE UPDATE

Non-EGU Issues for Comment

- EPA determination that non-EGU controls are not feasible by 2017 O3 season
- EPA decision not to look at source categories with control options above \$3,300/ ton (including ICI Boilers, estimated at \$3,456/ton)
- EPA's determination that many non-EGU sources with control options below \$3,300/ ton do not have the potential for significant reductions

CSAPR RULE UPDATE

Non-EGU Issues for Comment

EPA determination that significant, cost-effective reductions can come from these non-EGU categories :

- cement kilns
- two types of cement manufacturing (dry and wet)
- gas turbines
- four separate groups of natural gas RICE
- incinerators
- boilers & process heaters
 - Includes these SCC codes (but not ICI Boilers)
 - External Combustion Boilers: 10200203, 10200217, 10300216, 10200204, 10200205, 10300207, 10300209, 10200799; and
 - Industrial Process Heaters: 30190002, 30600103
- by-product coke manufacturing, and
- ammonia production, and flat glass manufacturing

CSAPR RULE UPDATE

Non-EGU Issues for Comment

- Allowing state to include legacy NOx SIP Call non-EGUs in CSAPR trading by adopting SIP revision that EPA would approve as modifying the CSAPR trading program provisions for that state
- Potential to combine EGUs and non-EGUs in trading program to resolve remaining non-attainment and maintenance issues at a later date

GHG REGULATION REAL IMPACTS

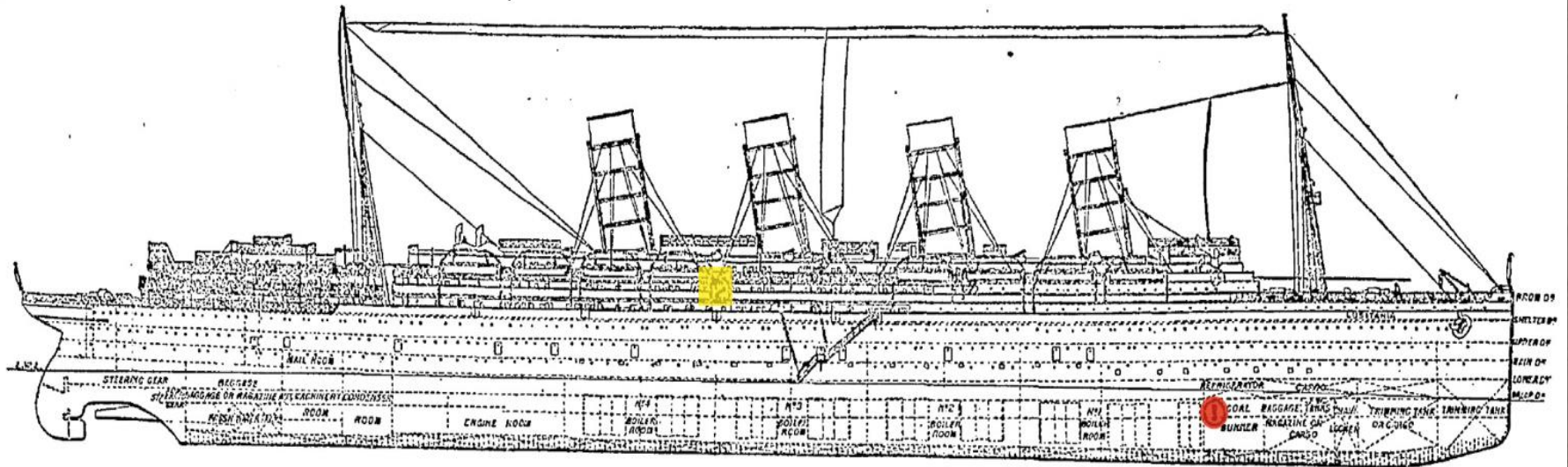
Newhall Ranch Development

- Los Angeles Board of Supervisors approved in 1999
- 12,000 acres mixed use development north of LA
- Illegal “eviction” of endangered unarmored threespine stickleback fish
- incorrect baseline used to measure GHG emissions impact
- CA Supreme Court HELD: 11-30-15

GREAT BRITAIN AND ENVIRONS, 1914



SECTIONAL PLAN OF THE LUSITANIA.



(Reproduced by courtesy of *Engineering*.)

- 1. The point at which, according to survivors, the torpedo struck vessel.
- 2. The position of the first-class dining saloon, in which many of the passengers were lunching at the time of the disaster.

WHISHING YOU A BRIGHT &
HAPPY HOLIDAY SEASON

