

CIBO E&E MEETING

Litigation & Regulatory
Update

March 22-23

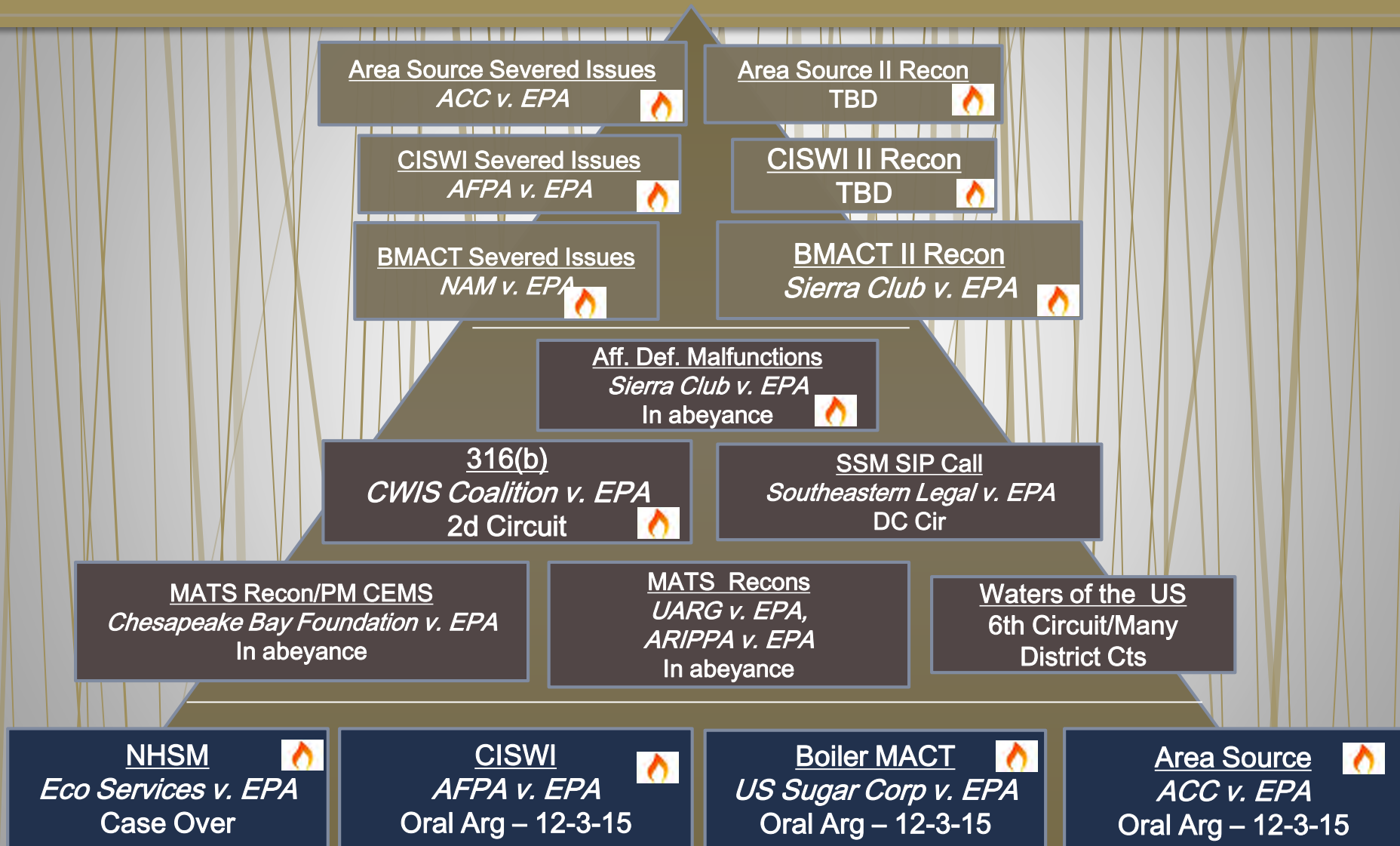
Lisa M. Jaeger

Bracewell LLP





MAJOR RULES IN COURT



NHSM RULE

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

EPA NHSM RULE UPHELD. 4-page unpublished opinion

CASE OVER – REHEARING EN BANC DENIED

- Industry voluntary dismissal 3.8.16

OTHER MATERIALS, RULES / CASES PENDING:

- Construction /demolition wood, RR ties, paper recycling residuals
 - EPA final rule to treat as NHSM 2.8.16
 - *Treated Wood Council v. EPA* (14-1201) in abeyance
- Other treated wood
 - rulemaking ongoing
 - *Treated Wood Council v. EPA* (14-1202) in abeyance

BMACT RULE

US Sugar Corp. v. EPA (11-1108)

- Main Case *US Sugar Corp. v EPA (11-1108)*
 - Oral argument 12.3.15
 - DC Circuit decision pending
- Severed Issues Case *NAM v. EPA (13-1256)*
 - CO 130ppm
 - SU/SD definition and work practice standards
 - CPMS for pm and consequences for exceedances
- Still Pending UPL small subcategory issue
 - *NACWA v. EPA (11-1131)* remand 8.2013
 - EPA voluntary remand without vacatur of numeric limits based on 9 data points
 - Remand rule pending
- Reconsideration Rule 2016 *Sierra Club v. EPA (16-1021)*

AREA SOURCE RULE

ACC v. EPA (11-1141)

- Main Case: *ACC v. EPA (11-1141)*
 - Oral argument 12.3.15
 - DC Circuit decision pending
- Severed Issues Case *ACC v. EPA (13-1258)*
 - Definitions of startup and shutdown periods and applicable work practices
 - Revised CO limits based on minimum CO level of 130 ppm
 - continuous parameter monitoring systems (CPMS), including consequences of exceeding the operating parameter
- Still Pending UPL small subcategory issue
 - *NACWA v. EPA (11-1131)* remand 8.2013
 - BMACT EPA voluntary remand without vacatur
 - Remand rule pending, no reportable action
- Reconsideration Case TBD

CISWI RULE

AFPA v. EPA (11-1125)

- Main Case: *AFPA v. EPA (11-1125)*
 - Oral argument 12.3.15
 - DC Circuit decision pending
- Severed Issues Case *AFPA v. EPA (13-1257)*
 - Definition of “CEMS data during startup and shutdown periods”
 - pm limit for waste-burning kiln subcategory
 - Case in abeyance
- Still Pending UPL small subcategory issue
 - *NACWA v. EPA (11-1131)* remand 8.2013
 - BMACT EPA voluntary remand without vacatur
 - Remand rule pending, no reportable action
- Reconsideration Case TBD

BMACT AREA CISWI

Oral Argument 12.3.16

INDUSTRY

- Malfunction work practice
- Energy Assessment
- Pollutant by Pollutant
- CO work practice
- Health-based emission limit
- SRI waste variability
- Recordkeeping
- Emissions averaging CISWI
- Su/sd work practices CISWI

ENVIRONMENTAL

- UPL Methodology
- Best performers not in floor
- CO as Surrogate
- 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

BMACT 2016 RECON

Sierra Club v. EPA (16-1021)

Petitioners	Respondent
Sierra Club Clean Air Council Environmental Integrity Project Chesapeake Climate Action Network	Industry Intervenors UARG, ACC, ACCCI, AFPA, AISI, American Wood Council Biomass Power Association CIBO, CRWI, NAM Southeastern Lumber

Timeline

Final Rule 11.20.15

Briefing	July – Dec 2016
Oral Arg	Mar 2016 ?
Decision	Aug 2016 ?

BMACT 2016 RECON

Sierra Club v. EPA (16-1021)

ENV ISSUES

1. Weakened CO standards illegal and arbitrary
2. Weakened CO standards for new boilers illegal and arbitrary because do not reflect emission control achieved in practice by best performers
3. Weakened CO standards for existing boilers illegal and arbitrary because do not reflect average emission limitation achieved by best performers

BMACT 2016 RECON

Sierra Club v. EPA (16-1021)

ENV ISSUES

4. Work practice standards (rather than numeric) for startup/shutdown illegal and arbitrary
5. EPA claim that it is impracticable to measure emissions during startup/shutdown illegal and arbitrary
6. Work practice standards not “consistent with” § 112(d), as required by § 112(h)
7. Excluding emissions from startup/shutdown from total emissions averaged to determine compliance with standards during normal operation illegally and arbitrarily weakened those standards

SSM CASES

Rule/Case	Description	Status
BMACT, Area, CISWI	Affirmative defense for malfunction severed into reconsideration cases	BMACT 2016 Recon Rule deleted Affermative Defense
<i>Sierra v. EPA</i> (DC Cir. 14-1110)	9-rule Affirm Defense 9 §112 and §129 rules	In abeyance Interventions pending Admin Petition granted
SSM SIP Call <i>Walter Coke Inc v. EPA</i> (DC Cir. 15-1166)	36 States SIPs called	States doing SIPS Briefing Mar-Oct 2016 Oral Arg Jan 2017? DC Circuit Dec Jun 2017?

UTILITY MATS

- ***White Stallion v. EPA* (DC Cir 12-1100)**
- ***Michigan v. EPA* (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
- **Other MATS cases (in abeyance):**
 - *UARG v. EPA* (4-hour startup exemption and SU/SD work practice)
 - EPA Final Rule 3.17.16 (web)
 - *ARIPPA v. EPA* (DC Cir 15-1180) (waste coal)

UTILITY MATS

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

DC Circuit 12.4.15:

- MATS rule remanded, remains in effect while EPA does rulemaking to consider cost
- Remand Rule re cost
 - Proposed 12.2015
 - Final by 4.15.2016

CSAPR RULE UPDATE

Summary

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

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CLEAN POWER PLAN

West VA v. EPA (15-1363)

- SCT stayed effect of rule 2.9.16 (5-4) through any challenge in SCT
 - [denied stay of MATS rule sought by 20 states]
- Justice Scalia 2.13.16
- DC Circuit oral arg 6.2.16

SAN FRANCISCO TO NEW YORK!

6 DAYS AND 20 HOURS!

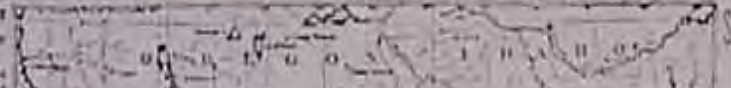
CENTRAL & UNION

PACIFIC RAILROADS

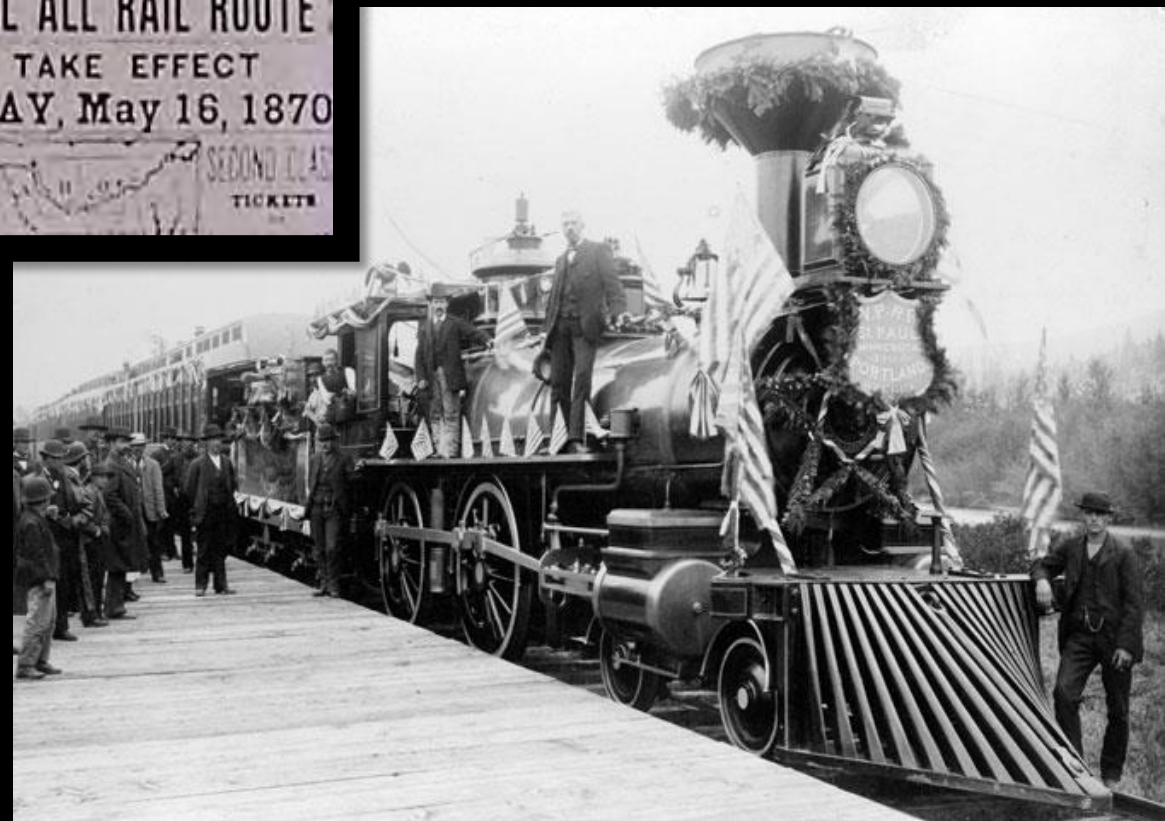
THE GREAT TRANS-CONTINENTAL ALL RAIL ROUTE

CHANGE OF TIME TO TAKE EFFECT
MONDAY, May 16, 1870

FIRST CLASS TICKETS
San Francisco
Chicago
St. Louis
St. Paul
Portland



SECOND CLASS
TICKETS



CAA COST/BENEFIT

Co-Benefits

- **SCT MATS:** “necessary and appropriate” to regulate analysis should include cost annual \$9.6 B cost. \$2-4 M benefit (Hg). \$90 B benefit (total)
- **SCT CSAPR:** states may challenge requirements to reduce emissions greater than contribution
- **CPP concern:** CAA 111(d)

CWA Analogous Concern

EGU ELG Rule challenge

- EPA cost benefit: \$368/TWPE (toxic weighted lb equiv)
- Small Business Admin: \$1000/TWPE
- Cost-effective?

DALE CREEK TRESTLE & BRIDGE



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 through 8.2016
- Riverkeeper: motion to compel granted

CWA WATERS OF THE U.S.

- Jurisdictional issues: multiple challenges filed in D Cts and in Cir Cts
- Cir Ct cases combined in 6th Circuit
 - 6th Cir injunction blocks rule nationwide (*Ohio v. USACE* (15-3751))
- 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
 - HELD (1-1-1) Appellate Court – new jsd
- Any action on the rule may have to wait until SCT rules on jurisdictional issues

CWA



CWA WATERS OF THE U.S.

US Army Corps v. Hawkes (15-290)

- **8th Circuit Held:** federal waters determination IS final appealable agency action
- **5th/9th Circuits Held:** federal waters determination is NOT final agency action
- SCT oral arg 3.30.16

CWA EGU ELG CASE

Southwestern Electric v. EPA (5th Cir 15-60821)

- Utility & ENV Pets
- Utility & ENV Resp-Int
- Intervention by 4.16.16
- 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



The Transcontinental Railroad

BRIDGES TUNNELS RAILS RAIL CARS LOCOMOTIVES LANDMARKS MAPS EXPLOSIVES & MORE

TRANSCONTINENTAL RAILROAD



TEMPORARY AND PERMANENT BRIDGE OVER GREEN RIVER



COAL ASH RULE

USWAG v. EPA (DC Cir. 15-1219)



COAL ASH RULE

USWAG v. EPA (DC Cir. 15-1219)

Petitioners

USWAG, EEI, NRECA, APPA
Beneficial Reuse Management
City of Springfield MO
AES Puerto Rico

Respondent

EPA

Intervenors – ENVs

Timeline

Briefing through June 2016
Oral argument likely Fall 2016
Decision likely early 2017

RMP PROPOSED RULE REVISIONS

- Published in Fed. Reg. 3.14.16
- Comments due 5.13.16
- Proposal stems from an Executive Order in response to West Fertilizer plant explosion in 2014
- EPA trying to release final rule before Administration changes
 - Compliance deadlines will 1-5 years from effective date

RMP PROPOSED RULE REVISIONS

Good news

- No changes to applicability
- No new chemicals added to the list
- No changes to threshold limits

RMP PROPOSED RULE REVISIONS

Topics

- Third-party audits
- Incident investigation
 - Root cause analysis
- Safer Technology and Alternatives Analysis/consideration of inherently safety technology or design required for
 - Paper Manufacturers (NAICS 322);
 - Petroleum and Coal Products Manufacturing (NAICS 324); and
 - Chemical Manufacturing (NAICS 325)

RMP PROPOSED RULE REVISIONS

Topics

- Emergency Response
 - Local Coordination
 - Exercises
- Information availability
- Local emergency planning committee
- Public
- Changes to definitions: “feasible”, “catastrophic”, “root cause”

RMP PROPOSED RULE REVISIONS

Potential Issues for Comment

- No significant safety/environmental benefit to changes to incident investigation requirements
 - Would significantly increase number/type of incidents that require investigation
- New definition of “root cause” would mandate identification and correction of management system failures even where no such failures exist
- Third party audits could be required in response to any RMP violation
 - Includes general duty clause
- Requirement to broadly disclose audit findings would fundamentally undermine the audit process

RMP PROPOSED RULE REVISIONS

Potential Issues for Comment

- Third party auditor qualifications would exclude all but the least experienced auditors
- No significant safety/environmental benefit to changes to incident investigation requirements
- Local coordination requirements too much for local responders
 - could lead to enforcement issues for facilities
- Public disclosure requirements too broad
 - Could lead to release of sensitive secure information

SUPREME COURT DEVELOPMENTS

Justice Scalia

SCT Nominee:

DC Cir Chief Judge Merrick Garland

- *NACWA v. EPA*

SSI MACT remanded to EPA on UPL issue

- *MATS White Stallion v. EPA*

- Garland on vacatur v. remand panel, deciding to remand

