



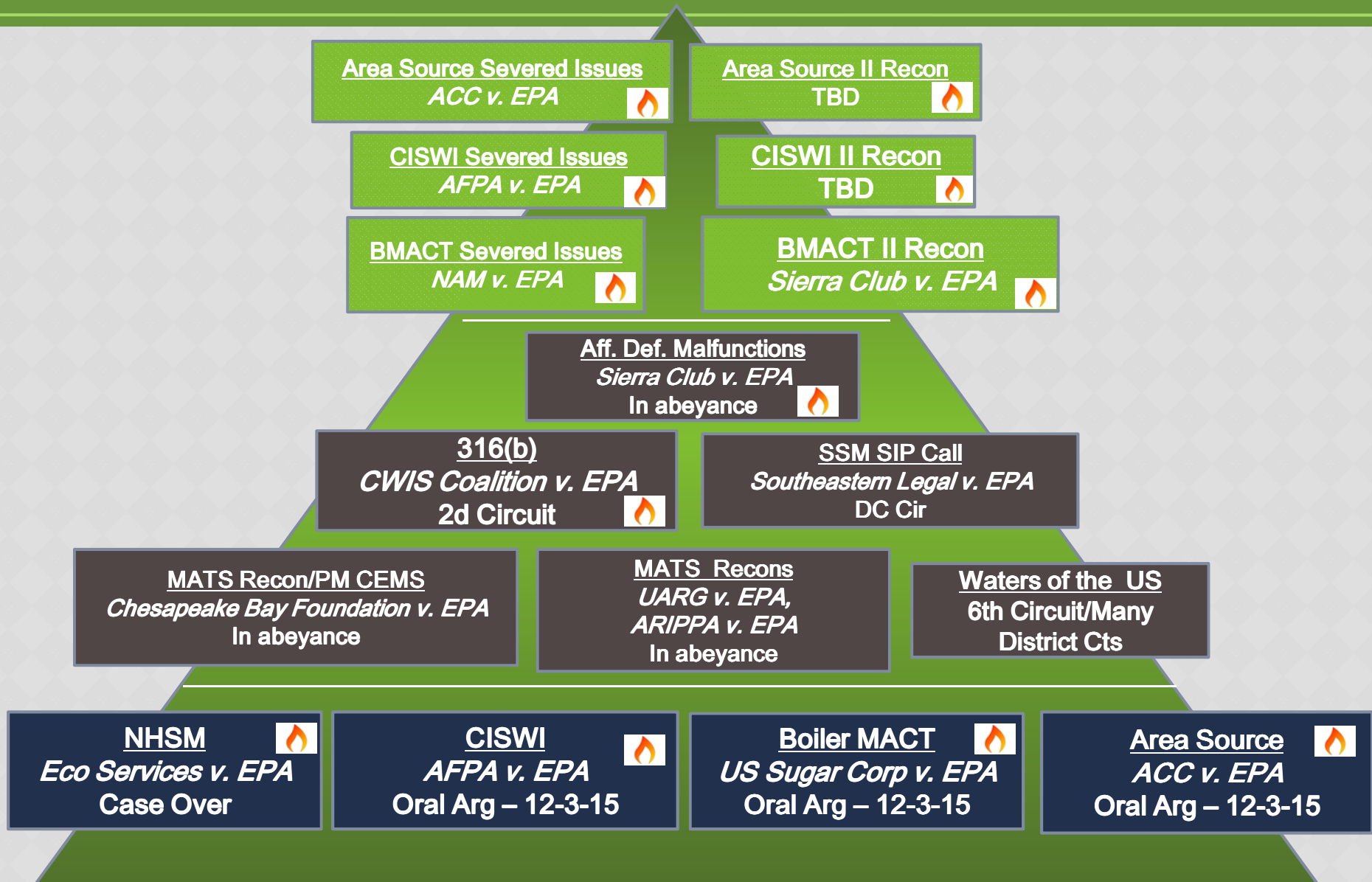
CIBO E&E MEETING

Litigation & Regulatory Update
June 7-8, 2016

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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EPA NHSM RULE UPHELD. 4-page unpublished opinion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
 - *AFPA v. EPA* (14-1201) case dismissed 4.6.16
- ◉ 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 *API v. EPA* (13-1256)
 - CO 130ppm
 - SU/SD definition and work practice standards
 - CPMS for pm and consequences for exceedances
 - Motions to govern 6.20.16
- ◉ 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) in abeyance
 - 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
 - Briefing:
 - Oral Arg:
 - Dec:



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) in abeyance
 - Definition of “CEMS data during startup and shutdown periods”
 - pm limit for waste-burning kiln subcategory

- ◎ 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 Rule 6.2.16 (web)
 - Petitions DC Circuit 8.15.16 ?
 - CIBO Intervention ?

BMACT AREA CISWI

Oral Argument 12.3.16

INDUSTRY	ENVIRONMENTAL
<ul style="list-style-type: none">▪ 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	<ul style="list-style-type: none">▪ 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 Affirmative 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

MATS Michigan v. EPA

◎ MATS II

- 4.15.16 Post-SCT appropriate and necessary finding

◎ REMAND W/O VACATUR

- Post-SCT, DC Cir remanded to EPA w/o vacatur
- Michigan seeks SCT review No. 15-1152
- SCT Conference 6.9.16

◎ RECONSIDERATION RULE LITIGATION

- pending
- startup/shutdown definitions at issue

GHG STANDARDS FOR UTILITIES

CPP 111(d) (existing units)

PETITIONS FOR ADMINISTRATIVE RECONSIDERATION

◎ 5.2.2016 EPA denied 5 petitions

- carbon capture technology not adequately demonstrated
- method to determine baseline emissions

EPA deferred 1 petition

- treatment of biogenic carbon

◎ LAWSUIT CHALLENGING RULE

- *WV v. EPA* (15-1363, DC Cir)
- 157 Petitioners, 28 States challenging, 18 States defending

GHG STANDARDS FOR UTILITIES

CPP 111(d) (existing units)

STAY OF RULE

- ◎ 1.21.16 DC Circuit denied
Srinivasan, Rogers, Henderson
- ◎ 2.9.16 US SCT granted
pending disposition of case in DC Cir and
SCT

GHG STANDARDS FOR UTILITIES

CPP 111(b) Standards (new/modified)

ND v. EPA (15-1381, DC Cir)

In abeyance pending CPP litigation



OZONE 2015 STANDARD

Murray Energy v. EPA (15-1385)

Ind Pet	Env Pet	Respondent
Murray Energy, ACCCI, AFPM, API, Chamber, IPAA, NAM, NOPA, PCA, UARG States: AR, AZ, KY, LA, ND, NM, OK, TX, UT, WI	Appalachian Mountain Club, National Parks Conservation Association, Physicians for Social Responsibility, Sierra Club and West Harlem Environmental Action	INTERVENORS Chamber, NAM, API, UARG, PCA, ACCCI, IPAA, NOPA, AFPM, ACCC, AFPA, AFS, AISI, AWC

TIMELINE

Briefing through Sept 2016

Oral arg Dec 2016?

Decision May 2017?

OZONE 2008 IMPLEMENTATION

South Coast AQMD v. EPA (15-1115)

State Pet	Env Pet	Respondent
South Coast Air Quality Managment	Sierra Club Conservation Law Foundation Downwinders at Risk Physicians for Social Responsibility	INTERVENORS Sierra Club Conservation Law Foundation Downwinders at Risk Physicians for Social Responsibility Nat'l Env. Development Association

TIMELINE

Briefing through Nov 2016

Oral arg Feb 2017?

Decision July 2017?



AMMONIA NAAQS LISTING

- ◉ 2011 Petition to list ammonia as criteria pollutant
 - Environmental Integrity Project, Humane Society, Center for Food Safety, Iowa Citizens for Community Improvement (ICCI), Association of Irrigated Residents (CA)
 - Basis:
 - ambient ammonia emitted by animal feeding operations (AFOs)
 - concentrated animal feeding operations (CAFOs), and other sources
 - cause and contribute to air pollution that endangers public health and welfare
- ◉ 2015 DC District Court case for unreasonable delay under APA
 - Court held no jurisdiction, CAA 180 day notice applies
- ◉ 2.10.16 Notice of Intent to Sue
- ◉ 8.10.16 Anticipated lawsuit in DC Circuit

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

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))
- ◉ District Ct cases not combined
- ◉ Any action on the rule may have to wait until SCT rules on jurisdictional issues among the courts

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 Held:** approved federal waters determination IS final appealable agency action

CWA WATERS OF THE U.S.

US Army Corps v. Hawkes (15-290)

◉ Facts

- peat mining
- 404 permit sought 2010
- Hawkes got approved jurisdictional determination (JD)
- to get permit would take \$100k, several years, no change to JD
- wetlands: significant nexus to Red River of the North 120 miles away

CWA WATERS OF THE U.S.

US Army Corps v. Hawkes (15-290)

ISSUE: does the federal court have jurisdiction over approved JD?

- US Dist Ct MN Court NO jurisdiction
- 8th Cir Court HAS jurisdiction
- USSCT Court HAS jurisdiction



CWA WATERS OF THE U.S.

Law

Administrative Procedure Act

◉ Judicial review of

- final agency action
 - with no other adequate remedy in court
- final agency action
 - marks consummation of agency's decision making
 - determines rights, obligations, has legal consequences



CWA WATERS OF THE U.S.

Arguments

US

- ◎ Not final agency action
 - DOES mark the consummation of Corps thinking
 - does NOT determine rights and obligations
- ◎ Other adequate remedies in court
 - discharge w/o permit, defend enforcement action
 - seek permit, challenge denial in court

CWA WATERS OF THE U.S.

SCT REASONING

◎ Final agency action

- DOES mark consummation of agency decision making
Corps JD Guidebook
- DOES have direct legal consequences
 - negative JD gives 5 year safe harbor
 - Corps/EPA MOU: no civil enforcement
 - citizen suit cannot challenge past action
 - therefore, affirmative JD legal consequences:
 - denial of safe harbor
 - any discharge can bring civil, criminal penalty

CWA WATERS OF THE U.S.

SCT REASONING

- ◉ Other remedies not adequate
 - Discharge and risk enforcement
 - serious civil, criminal penalty
 - seek permit
 - Corps requires far more - studies of watershed, hydrology, etc
 - costly > 100k
 - and can't overcome JD

Corps argues: CWA does not contemplate separate JD process

- Permit proper time to challenge
- SCT: a “count your blessings” argument is not adequate rejoinder

CWA WATERS OF THE U.S.

KENNEDY CONCUR Thomas, Alito

Join decision in full

“reach and systemic consequences of CWA remain a cause for concern”

- ◎ JD gives some predictability, so long as landowner can rely on it
- ◎ BUT US in this case says
 - - JD not binding on Corps enforcement
 - - MOU not binding and can be revoked

“If that were correct, the Acts ominous reach would again be unchecked.”

CWA WATERS OF THE U.S.

KAGAN CONCUR

Join decision in full

- MOU is “central to disposition of this case”
- MOU: JDs are binding on Government and are the Government’s position on any federal action re that final determination



CWA WATERS OF THE U.S.

GINSBURG CONCUR in part and in judgment

- ◎ Join all but reliance on MOU
 - not much briefing re this
 - Government view of MOU: not “current government policy” that MOU has binding effect in litigation
 - JD alone is definitive, with immediate and practical impact

CWA EGU ELG CASE

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

- ◉ Utility & ENV Pets
- ◉ Utility & ENV Resp-Int
- ◉ Administrative Record due 6.8.16
- ◉ 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

COAL ASH RULE

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

Ind Pet	Env Pet	Respondent
USWAG, EEI, NRECA, APPA Beneficial Reuse Management City of Springfield MO AES Puerto Rico	EIP, Hoosier Env. Council, PennEnvironment, Sierra Club, etc.	EPA Intervenors - ENVs

Timeline

Briefing through 6.2016

EPA Motion for Voluntary Remand 4.18.16

Court Order Suspending Briefing Schedule 5.19.16

COAL ASH RULE

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

Industry Petitioner Argument

- ⦿ Open dump prohibition inapplicable
- ⦿ No notice/comment on, inter alia
 - regulation of CCR stored for beneficial use
 - 12,400 ton condition for "beneficial use"
 - response to any non-groundwater CCR "release"
 - 6" vegetation requirement
- ⦿ 12,400 ton condition for "beneficial use"
- ⦿ Alternative Closure option too narrow
- ⦿ Two year operating deadline too short

COAL ASH RULE

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

Environment Petitioner Argument

- ⦿ Illegal to allow unlined impoundments to operate
- ⦿ Legacy impoundments should be under Subtitle D
- ⦿ Early closure loophole
- ⦿ Must list Boron on Appendix IV, require corrective action



COAL ASH RULE

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

EPA Motion for Remand/Vacatur

The requirements of this rule are severable. Portions not vacated will remain in place

- EPA seeks remand with vacatur
 - Vegetated slope of surface impoundment dike 6" height restriction
 - 257.100 exemption for inactive surface impoundment from some post-closure requirements if closed by 4.17.18
 - Compliance deadlines will be extended
 - EPA seeks 120 day stay for this provision to do expedited rule to change deadlines

COAL ASH RULE

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

EPA Motion for Remand/Vacatur

- ◎ EPA seeks remand without vacatur
 - “important that environmental protections remain in place.”
 - to clarify the type and magnitude of non-groundwater releases that would require corrective action procedures
 - “While there may be releases that are sufficiently insignificant critical that until the nature and scope of such releases are determined
 - proposing that Boron be added to the list of constituents in Appendix IV that trigger assessment monitoring and corrective action.
 - whether to expand these provisions to situations in which a facility needs to continue to manage waste streams other than CCR in the waste unit

COAL ASH RULE

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

Status/Timeline

SUPREME COURT DEVELOPMENTS

Justice Scalia

SCT Nominee:

DC Cir Chief Judge Merrick Garland

