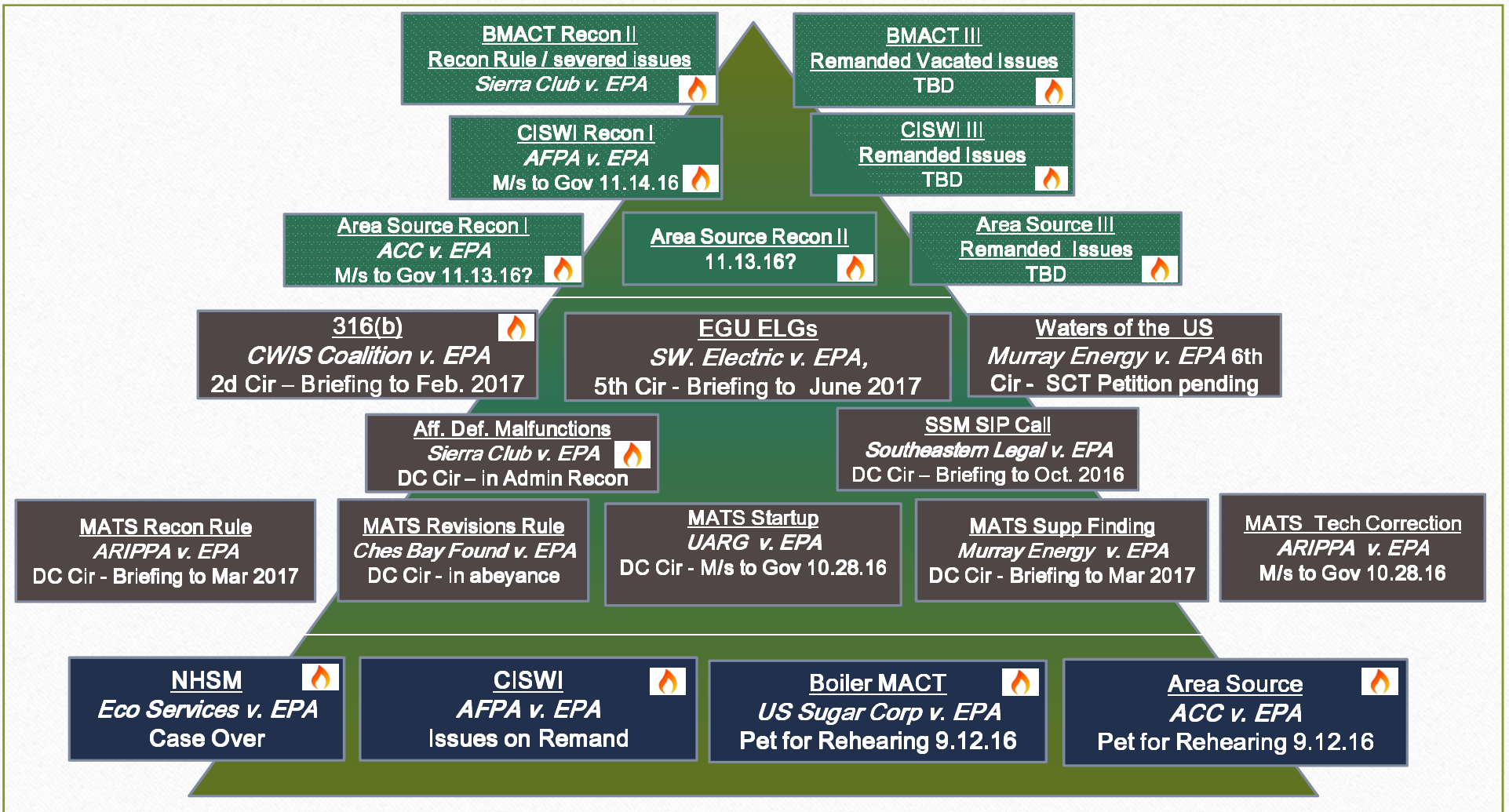


CIBO Annual Meeting Litigation & Regulatory Update

October 21, 2016

Lisa Jaeger

Bracewell LLP





New York

Massachusetts

New Hampshire

©dhayward

BMACT-Area Source-CISWI

Main case

- DC Cir upheld most of 30 issues challenged 7.29.16
 - 4 issues remanded (BMACT, Area, CISWI)
 - 20 standards vacated (BMACT, 11 existing, 9 new)
- 4 Petitions for rehearing / rehearing en banc
 - Filed 9.12.16. No court request for responses yet.
 - Supreme Court petition?
- EPA Petition to remand rather than vacate standards
 - Unopposed, likely to be granted

BMACT-Area Source-CISWI

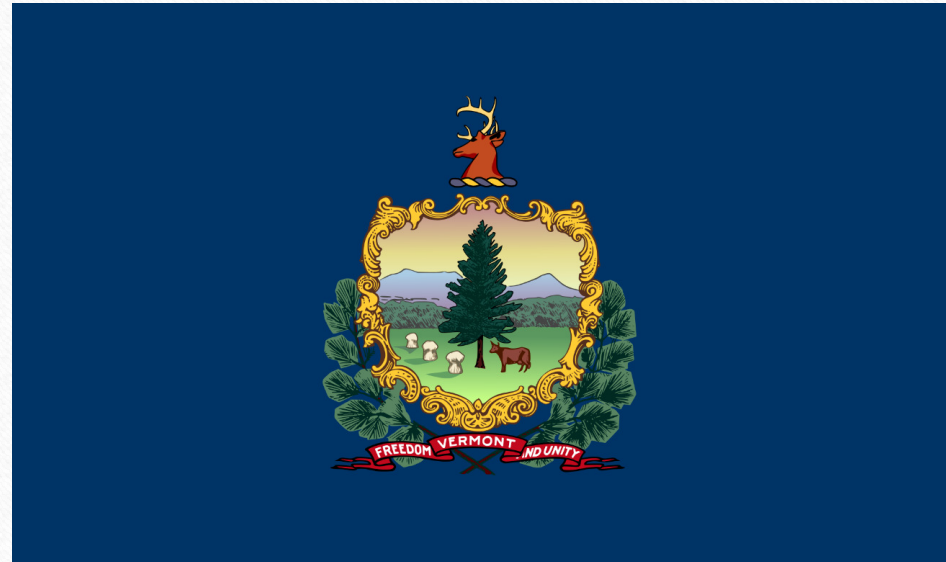
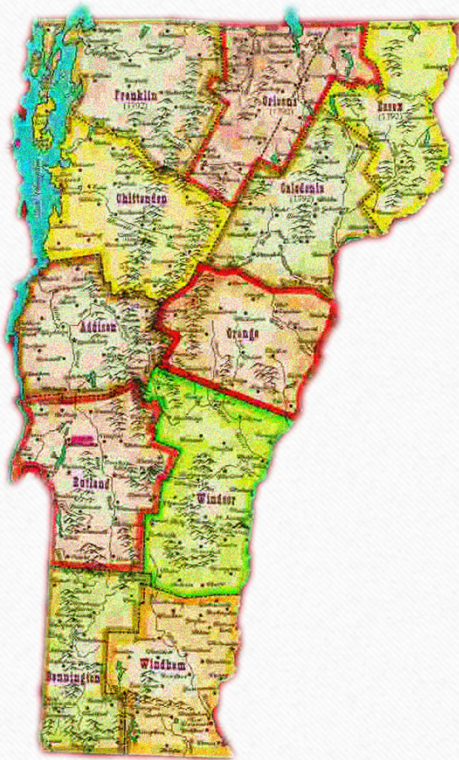
Related rules and cases

- BMACT Reconsideration II/Severed Issues Rule case
 - *Sierra Club v. EPA* (16-1021)
- CISWI Reconsideration II Rule – Motions to govern 11.14.16
- Area Reconsideration I Rule – Motions to govern 11.13.16
- Remanded UPL as applied to subcategories with small data sets
 - EPA took remand after *NACWA v. EPA* (11-1131) remand 8.2013

Utility MATS

- MATS CAA §132(a) Jobs Case *Murray Energy v. EPA* (WVA Dist Ct)
 - HELD: EPA must review jobs impact of rule and do plan by 10.31.16
- MATS Reconsideration Rule *ARIPPA v. EPA* (DC Cir 15-1180)
 - Oral argument same day/panel as MATS Supplemental Finding. Ms 10.28.18
- MATS Supplemental Finding *Murray Energy v. EPA* (DC Cir 16-1127)
 - Remanded from SCT to consider cost of MATS rule
- MATS Startup Case *UARG v. EPA* (DC Cir 15-1013)
 - Startup definition four hour exemption; work practice standards for SU/SD. Ms 10.28.16
- MATS Technical Corrections Rule *ARIPPA v. EPA* (DC Cir 16-1168). Ms 10.28.16

Vermont 1791



BMACT-Area-CISWI

Success

Non hazardous secondary Materials Rule NHSM

- NHSM Rule upheld in 4-page opinion
- Greater clarity in defining materials as fuel or waste
- Some materials defined as fuel, exempt or conditionally defined as fuel
- Self-executing process for categorizing material as fuel or waste
- Process for EPA categorical exemptions and case-by-case determinations

Boiler MACT

- Increased achievability of standards overall (some notable exceptions)
- UPL methodology to account for variability in floors OK (rehearing pending)
- Subcategories based on fuel OK
- Work practice standards for coal-fired boilers OK
- 30-day averaging OK

BMACT-Area-CISWI

Success

Area Source

- EPA may remove source categories from the 112(c)(6) list requiring MACT standards
- Temporary boilers exempt

CISWI

- Modified units may be defined as existing under certain conditions
- No requirement for beyond-the-floor standards



WELCOME
TO
PLYMOUTH

CHARTERED 1791

BIRTHPLACE OF CALVIN COOLIDGE

BMACT-Area-CISWI

Pending Issues

ISSUE	DESCRIPTION / VENUE
Standards do not reflect best performers	<p>BMACT main case: Standards with this defect vacated. Rulemaking necessary</p> <p>BMACT Recon II case. Briefing to 2.2017</p>
Legitimacy of CO as surrogate for organic HAP	<p>BMACT main case: remanded</p> <p>ENV Petition for Rehearing/en banc</p>
130 ppm CO standard	<p>Related to BMACT Recon II case</p> <p>BMACT Recon II case.</p> <p>BMACT main case statements by court.</p>

BMACT-Area-CISWI

Pending Issues

ISSUE	DESCRIPTION / VENUE
Work practice standards generally and for SU/SD	Area Source ENV Petition for Rehearing
Work practice standards for Startup/Shutdown	BMACT Recon Rule II case Briefing complete 2.2017 MATS Recon 4-hr Startup case Motions to govern 10.28.2016 MATS Technical Corrections case Motions to govern 10.28.2016 SSM SIP Case Briefing complete 10.2016 State SIPs due 11.22.16

BMACT-Area-CISWI

Pending Issues

ISSUE	DESCRIPTION / VENUE
Affirmative Defense	<p>Removed from BMACT, Area, MATS rules</p> <p>SSM SIP Case. Briefing complete 10.2016</p> <p>Nine-Rule Affirm Defense Case</p> <ul style="list-style-type: none">- EPA granted Admin Reconsideration <p>Title V Proposed Rule removing affirm defense</p> <ul style="list-style-type: none">- Comments 8.15.2016- Final rule 2016 likely

BMACT-Area-CISWI

Pending Issues

ISSUE	DESCRIPTION / VENUE
UPL as applied to subcategories with 9 or fewer data points	Voluntary remand of numeric limits by EPA. Rulemaking needed IF EPA changes any affected standards in BMACT, Area, MATS main case Petition for Rehearing/en banc.
CISWI: Categories should not be exempted EPA must <ul style="list-style-type: none"> a. Set standards for cyclonic burn barrels b. Decide whether burn off ovens, soil treaters and space heaters are incinerators & set standards if so 	Remanded Rulemaking necessary

BMACT-Area-CISWI

Pending Issues

ISSUE	DESCRIPTION / VENUE
EPA use of GACT rather than MACT, needs justification	Area Source remanded. Rule possible Area Source ENV Petition for Rehearing
New Coal boiler standard based on uncontrolled source	Area Source ENV Petition for Rehearing
Synthetic Minors exempt from Title V, needs justification	Area Source remanded. Rule possible

Ozone Challenges

- 2008 Ozone NAAQS Implementation Rule
 - *South Coast AQMD v. EPA* (15-1115)
 - Partial remand w/ vacatur 8.29.16 – anti-backsliding 1-hr NAAQS
 - Briefing through Dec 2016
 - Oral arg March 2017
 - Decision Aug 2017?
- 2015 Ozone NAAQS Standards (70 ppb)
 - *Murray Energy v. EPA* (DC Cir. 15-1385)
 - Briefing through Sept 2016
 - Oral arg Dec 2016?
 - Decision May 2017?



UTILITY GHG RULES

- STAY OF RULE by USSCT pending DC Circuit and SCT proceedings
- CLEAN POWER PLAN (existing units) (111(d))
 - *WV v. EPA* (15-1363, DC Cir)
 - En banc oral argument 9.27.16
 - 157 Petitioners, 28 States challenging, 18 States defending
- NEW/MODIFIED UNITS RULE (111(b))
 - *ND v. EPA* (15-1381, DC Cir)
 - In abeyance pending CPP litigation
- Implementation ongoing
 - Clean Energy Incentive Program. Coalition (CIBO) comments 9.2.16

Lake Willoughby from Mt. Pisgah



CWA § 316(b) Rule

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

- IND Petitioners: CWIS Coalition (CIBO), UWAG, Entergy, API
 - USFWS and NMFS roles in NPDES permits illegal
 - Biological Opinion has wrong baseline for measuring species effects
- ENV Petitioners
 - “best available technology” should be closed loop for existing sources
 - “new” units should include replacement units
- Briefing through 2.2017

CWA EGU Effluent Limitations Guidelines

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

- Utility & ENV Pets
- Utility & ENV Resp-Int
- Briefing 12.2016 through 6.2017
- CIBO comments not resolved in final rule:
 - Applicability
 - Isolating wastewater streams
 - Reclassifying low-volume waste sources
 - Zero discharge in ash transport water
 - Daily loads as permit conditions

CWA Waters of the U.S.

- 1. Court jurisdiction? 2. Merits
- All Circuit Ct cases in 6th Circuit *Murray Energy v. EPA* (15-3751)
 - Nationwide injunction. Circuit Courts have jsd.
 - Brief **merits 11.2016** to 3.2017
- District Ct cases not combined but dismissed or stayed
 - Dismissal appealed to 10th Cir *US Chamber v. EPA* (10th Cir. 16-5038)
 - Oral arg on **jsd 11.17.16**
- Natl Assoc of Manufacturers to USSCT on jurisdiction 9.2.16
 - Cert responses on **jsd to 11.7.16**. SCt decision **on cert on jsd** late 2016?
 - 30 states oppose cert

Captai

n



John
Smith

A *Am. V. 1. R.*
DESCRIPTION *15.*
of *New England:*

OR

THE OBSERVATIONS, AND
discoveries, of Captain *John Smith* (Admirall
of that Country) in the North of *America*, in the year
of our Lord 1614: with the successe of *sixe Ships,*
that went the next year 1615; and the
accidents befell him among the
French men of warres.

With the prooffe of the present benefit this
Countrey affoordes: whither this present yeare,
1616, *eight voluntary Ships* are gone
so make further tryall.



At LONDON
Printed by *Humphrey Lownes*, for *Robert Clerke*; and
are to be sold at his house called the Lodge,
in Chancery lane, ouer against Lin-
colnes Inne. 1616.

John Smith
A Description of New England

"Here every man may be master and owner
of his owne labour and land...

If he have nothing but his hands, he
may...by industries quickly grow rich."

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 9.2016

Oral Arg. 12.2016?

Order Granting Voluntary Remand 6.14.16

Remand Issues Severed into *USWAG v. EPA* (DC Cir. 16-1183)

Other Issues

- Regional Haze – final rule 10.2016?
 - Addresses requirements for the second planning period (2019 to 2028)
- Petition to list ammonia as criteria pollutant
 - Targets CAFOs/AFOs but regs not limited to those sources
 - Notice of Intent to Sue 2.10.16
 - No suit as of 10.17.16
- NO_x Control Cost Manual Chapters – comments due 12.21.16
 - Cost Estimation: Concepts and Methodology
 - Refrigerated Condensers
 - Incinerators and Oxidizers



Other Issues

- DC Cir Regional Consistency Rule Amendments
 - *NEDACAP v. EPA* (16-1344)
 - CIBO commented with NAM Coalition
 - Challengers include API, NEDACAP, Air Permitting Forum
 - Intervenor brief due 11.2.16
- Lead NAAQS
 - Fed Reg notice 10.18.16
 - EPA retaining current standards (set in 2008)
 - Primary and secondary = $0.15 \mu\text{g}/\text{m}^3$

Projected timing of decisions

