

The background of the entire slide is a textured American flag. The top left corner features the blue canton with thirteen white stars arranged in a circle. The rest of the image is filled with horizontal stripes of red and white, also with a textured appearance.

# **CIBO E&E MEETING**

**MARCH 13-14, 2018**

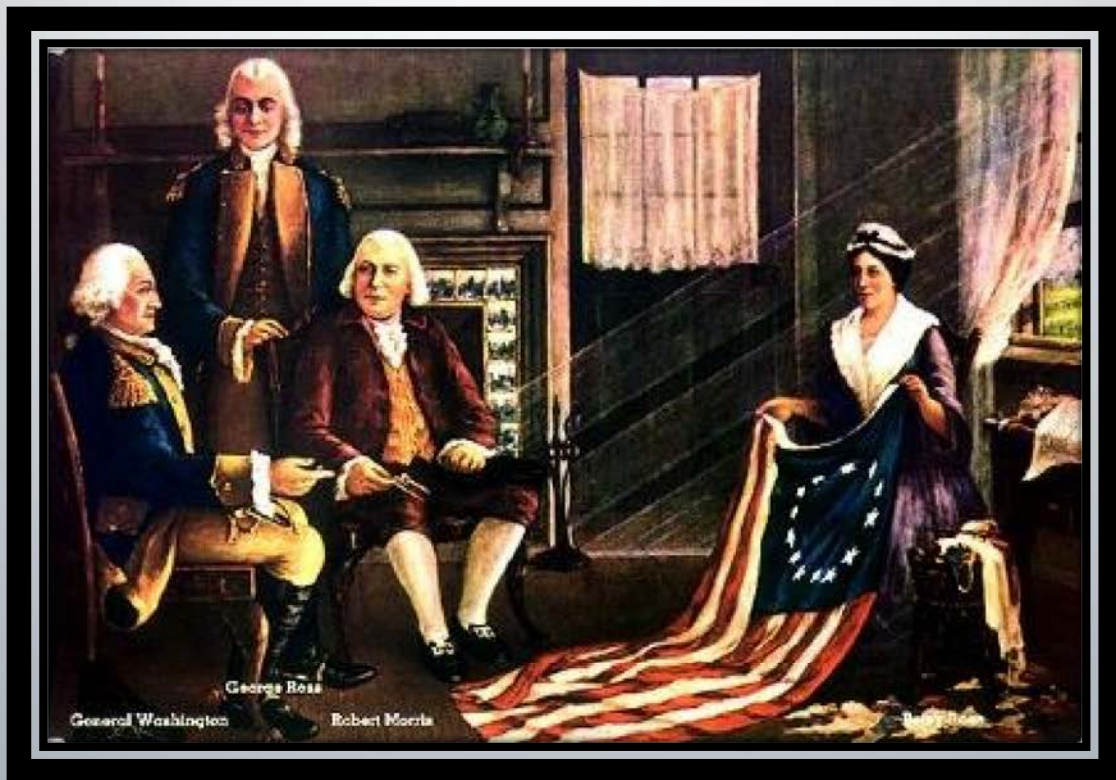
**LISA JAEGER**

**BRACEWELL LLP**


# DON'T TREAD ON ME



# THE BETSY ROSS FLAG







Haz Waste Gen Improvements Rule  
*ACC v. EPA* – Abeyance

Def. Solid Waste  
*API v. EPA*  
Panel Rehearing Granted 3.6.18

Coal Ash Rule  
*USWAG v. EPA*  
Oral Arg  
11.20.17

EGU ELG  
*SW Power v. EPA* (5th Cir) –  
Severed Issue in Abeyance  
Other Issues Briefing Complete  
*CWA v. EPA* (DDC) – Briefing Complete

CWA 316(b)  
*CWIS v. EPA* (2d Cir)  
Oral Arg 9.14.17

Waters of the US  
*NAM v. DOD*  
SCT Dec. 1.22.18

CAARMPs  
*ACC v. EPA* – In Abeyance  
*Air Alliance v. EPA* – Briefing Complete

CPP/NSPS Cases DC Cir  
*WV v. EPA* – In Abeyance  
*ND v. EPA* – In Abeyance

BMACT Recon II  
*Sierra Club v. EPA*  
Oral Arg 9.15.17

SSM SIP Call & Aff. Def. Malfunctions  
*FL Elec Power v. EPA* – In Abeyance  
*Sierra Club v. EPA* – Admin Recon

MATS Startup / MATS Supp Finding  
*Ches Bay Found v. EPA* -  
Abeyance  
*Murray Energy v. EPA* – Abeyance

BMACT / Area /  
CISWI III  
Remanded  
Issues TBD

CSAPR Update  
*WI v. EPA*  
Briefing to 4.2018

# BOILER MACT-AREA SOURCE-CISWI

## DC Circuit cases and pending EPA action items

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### **Main case – *US Sugar Corp v. EPA* (11-1108) – decided 7.29.16**

- UPL for small data set subcategories remanded
- 4 issues remanded (BMACT, Area, CISWI)
- 20 BMACT standards (11 existing, 9 new) vacated/remanded

### **Reconsideration Rule II – *Sierra Club v. EPA* (16-1021) – Oral arg 9.15.17**

- Judges Henderson, Millett, Pillard
- CO 130 ppm standard
- Work practice standard for startup/shutdown

# BOILER MACT-AREA SOURCE-CISWI

## DC Circuit cases and pending EPA action items

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- Malfunctions / Affirmative Defense
- SSM SIP Case – Fla. Elec. Power Coord. Grp. v. EPA (15-1239) – in abeyance
  - EPA review of SSM Action, TX Admin Recon Petition
- Nine-Rule Affirm Defense Case. Abeyance. Admin Recon Pending.
- Title V Proposed Rule removing affirmative defense. No final rule 12.5.17
- Surrogates
- CAA § 112(c)(6) Case – Sierra Club v. EPA (15-1246) Decision 7.18.17
  - EPA did not adequately respond to comments concerning use of surrogacy in the rulemaking, remanded to EPA
  - Judges Rogers, Millett, and Sentelle (opinion)

# FRANCIS HOPKINSON & THE AMERICAN FLAG



# CAA - UTILITY MATS CASES

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- **MATS CAA §321(a) Jobs Case**      *Murray Energy v. EPA (WVA Dist Ct)*
  - Case dismissed 10.2.17
  - USSCT denied cert
- **MATS Technical Corrections Rule**      *ARIPPA v. EPA (DC Cir 16-1168)*
  - ARIPPA & UARG: definition of “coal refuse” and removal of affirmative defense for malfunctions
  - ENVs intervened for EPA
  - In abeyance pending review of MATS Tech Corrections Rule as of 3.9.18
- **MATS Startup/Shutdown Revisions Rule**      *Chesapeake Bay v. EPA (15-1015)*
  - ENV: su/sd definition
  - UARG intervened for EPA
  - In abeyance pending decision in BMACT Recon II (16-1021)



# CAA - UTILITY MATS CASES

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- **MATS Reconsideration Rule**      *ARIPPA v. EPA (DC Cir 15-1180)*
  - UARG contaminated emissions data. ARIPPA variability in coal refuse. ENV pm 2.5 standard
  - IND and ENVs intervened for EPA
  - EPA only reviewing supplemental finding; NOT reviewing stringency of standards
  - In abeyance as of 3.9.18
  
- **MATS Supplemental Finding**      *Murray Energy v. EPA (DC Cir 16-1127)*
  - Remanded from SCT to consider cost of MATS rule
  - State, IND petitioners. State, IND, ENVs intervened for EPA
  - In abeyance as of 3.9.18

# BRICK MACT

## DC Circuit cases and pending EPA action items

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### ***Sierra Club v. EPA* (DC Cir. 15-1487)**

- Oral argument 11.9.17. Judges Sentelle, Millet, Rogers
- ISSUES
  - IND: illegal to use emissions data from non-major plants to calculate MACT for major plants; no major source in brick industry
  - EPA: court should consider only env claims, other claims on recon
  - ENV: health-based emission limits illegal because EPA has not shown that acid gases are not carcinogens
  - ENV: UPL

# BRICK MACT

DC Circuit cases and pending EPA action items

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## **Brick MACT**

HR 1917: stay implementation of Brick MACT until end of litigation

- To allow for judicial review of any final rule addressing national emission standards for hazardous air pollutants for brick and structural clay products or for clay ceramics manufacturing before requiring compliance with such rule.



O say can you see ~~through~~ by the dawn's early light,  
What so proudly we hail'd at the twilight's last gleaming,  
Whose broad stripes & bright stars through the perilous fight,  
O'er the ramparts we watch'd, were so gallantly streaming?  
And the rocket's red glare, the bomb bursting in air,  
gave proof through the night that our flag was still there,  
O say does that star-spangled banner yet wave  
O'er the land of the free & the home of the brave?

On the shore dimly seen through the mists of the deep,  
Where the foe's haughty host in dread silence reposes,  
What is that which the breeze, o'er the towering steep,  
As it fitfully blows, half conceals, half discloses?  
Now it catches the gleam of the morning's first beam,  
In full glory reflected now shines in the stream,  
'Tis the star-spangled banner — O long may it wave  
O'er the land of the free & the home of the brave!

And where is that band who so vauntingly swore,  
That the havoc of war & the battle's confusion  
A home & a Country should leave us no more?  
— Their blood has wash'd out their foul footsteps' pollution.  
No refuge could save the hireling & slave  
From the terror of flight or the gloom of the grave,  
And the star-spangled banner in triumph doth wave  
O'er the land of the free & the home of the brave.

O thus be it ever when freemen shall stand  
Between their lov'd home & the war's desolation,  
Blest with vict'ry & peace may the heav'n rescued land  
Praise the power that hath made & preserved us a nation!  
Then conquer we must, when our cause it is just,  
And this be our motto — "In God is our trust."  
And the star-spangled banner in triumph shall wave  
O'er the land of the free & the home of the brave.

# MACT / RISK & TECHNOLOGY REVIEW

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## **RTRs issued under new administration**

- Most have minor tech changes, no residual risk change
- Wool Fiberglass Manufacturing RTR, broke the trend
  - Revised emission standards for FA lines at wool fiberglass man'f facilities
  - Emission limits for methanol from forming, cooling, collection process on bonded RS lines
  - Other changes



# MACT / RISK & TECHNOLOGY REVIEW

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## **RTRs issued under new administration**

### Leather Finishing Operations Proposed 3.13.18

- risk acceptable under the current standard and no new cost-effective controls under tech review
- amendments to the SSM regulations
  - Revises General Provisions table in TTTT to eliminate SSM exemptions
  - eliminates language that treats SS periods the same as malfunctions
  - revises Deviation Notification Report and related records as they relate to malfunction

## Samuel Reid Flag Designs 1818 Flag



## 2017 EPA RTRS

RTR	Proposed Rule	Final RTR
Phosphoric Acid Manufacturing and Fertilizer Production	12.9.16	9.28.17
Portland Cement	9.21.17	7.15.18 (consent decree)
Pulp and Paper Combustion Sources	12.30.16	10.11.17
Nutritional Yeast Manufacturing	12.28.16	10.16.17
Publicly-Owned Treatment Works	12.27.16	10.26.17
Wool Fiberglass Manufacturing; Rotary Spin Lines	8.29.17	12.26.17

# 2017 RTRS IN LITIGATION

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## **Pulp Mills RTR**

*Crossett Concerned Citizens v. EPA* (DC Cir. 17-1257)

- ENV Petitioners Earthjustice
- Issue Statement filed 1.16.18:
  - EPA should set emission standards for each emitted HAP
  - EPA should evaluate health risks to person most exposed to pulp mills' emissions

# 2017 RTRS IN LITIGATION

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## **Nutritional Yeast RTR**

*American Bakers Association v. EPA* (DC Cir. 17-1264)

- IND Petitioners
- Administrative Recon Petition 12.15.17
- Case in abeyance pending Administrative Recon; status report due 5.16.18



## UPCOMING RTRS

RTR	Proposed Rule	Final RTR
Friction Materials Manufacturing Facilities	3.18	Anticipated 1.19 (12.31.18 consent decree)
Leather Finishing Operations	Projected 1.18 but not out yet	Anticipated 1.19 (12.31.18 consent decree)
Surface Coating of Wood Building Products	Projected 1.18 but not out yet	Anticipated 1.19 (12.31.18 consent decree)
Surface Coating of Metal Furniture, Large Appliances, Textiles	Projected 2.18 but not out yet	Anticipated 1.19 (consent decree 12.31.18)
Ethylene Production (XX and YY)	8.18	Anticipated 1.20 (consent decree 3.13.20)

## UPCOMING RTRS

RTR	Proposed Rule	Final RTR
Reinforced Plastics and Boat Manufacturing	8.18	8.19 (3.13.20 consent decree)
Asphalt Processing and Asphalt Roofing Manufacturing	9.18	8.19 (3.13.20 consent decree)
Surface Coating of Automobiles and Light-Duty Trucks, Plastics Parts, Miscellaneous Metal	9.18	9.19 (3.13.20 consent decree)
Surface Coating of Metal Cans and Metal Coil	5.18	Anticipated 5.19 (3.13.20 consent decree)
Hydrochloric Acid Production	6.18	Anticipated 6.19 (consent decree 3.13.20)

## MACT/ RISK & TECHNOLOGY REVIEWS

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### **Ferroalloys Production MACT**, 82 FR 5401 (Jan. 18, 2017)

- Mandates digital camera opacity technique (DCOT) for compliance, request for alternative EPA Method 9 denied
- Admin Recon pending
- *Eramet v. EPA* (DC Cir 17-1090) – in abeyance as of 3.6.18

### **Stationary Combustion Turbine RTR** (Subpart YYYY)

- Court-ordered final rule: March 2020
- Proposed Rule 12.2018 (?)

# FLAGS OF THE CONFEDERACY



# CAA – ONCE IN ALWAYS IN

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## **Bill Wehrum Memo 1.25.18**

- Withdraws 1995 memo
- Sources previously subject to a major source MACT that are no longer major sources are not obligated to keep complying with the major source MACT
- Memo based on plain language reading of the CAA
- EPA to pursue rulemaking to codify the change



# CAA – ONCE IN ALWAYS IN

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## Implications for units subject to **MATS, Boiler MACT & RICE MACT**

- Can remove MACT from Title V and eliminate Title V permit
- Can shift to Area Source Boiler and RICE GACT in minor source permits
- Some sources chose not to submit 1.31.18 annual compliance reports
- Operational flexibility

# CAA – ONCE IN ALWAYS IN

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## **Potential legal challenges to the memo**

- ENVs oppose
- Must sue by 3.26.18 (60 days)
- Hurdle: is this final agency action?
- Assuming final action, will it be overturned?

# CAA OZONE NAAQS

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## 2008 Ozone NAAQS Implementation Rule

- *South Coast AQMD v. EPA* (DC Cir. 15-1115)

Decision 2.16.18, Judges Garland, Rogers, Sentelle

- rule illegally revokes 1997 84 ppb standard because allows areas to avoid more stringent controls and has inadequate anti-backsliding provisions
- rule illegally allows States to choose alternate baselines for showing reasonable progress toward 2008 standard
- Rule LEGALLY requires nonattainment areas to demonstrate progress toward ONLY from reductions in nonattainment area

# CAA OZONE NAAQS

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## **2015 Ozone NAAQS (70 ppb)**

*Murray Energy v. EPA* (DC Cir. 15-1385)

- NAAQS in effect
- Removed from oral argument calendar
- EPA delays state designations for 1 year – 6.6.17
- House passed bill (H.R. 806) to delay implementation of 2015 standard until 2025 – 7.18.17
- Petitions for review filed by several states, industrial interests, and ENVs

## **Bipartisan Ozone Compliance Bill S. 1203**

- State/EPA early action compacts to avoid nonattainment status

PRES TAFT EO 1637, OCTOBER 29, 1912





# CSAPR UPDATE RULE FOR 2008 OZ NAAQS

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## **CSAPR Update Rule for 2008 Ozone NAAQS**

*WI v. EPA* (DC Cir. 16-1406)

- 9.6.17 Court denied motion to sever and extend briefing
- Briefing until 4.9.18
- Oral argument June 2018?
- Decision Jan 2019?

# CSAPR UPDATE RULE FOR 2008 OZONE NAAQS

## Key Issues Briefed

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- EPA failed to account for ozone originating outside the US
- Failed to prohibit significant downwind nonattainment and interference with the 2008 ozone standard
- Failed to consider apportionment of upwind and downwind responsibility
- Failed to require states to fully address transported pollution by promulgating a rule that is only a partial remedy
- EPA's projections of nonattainment are arbitrary, capricious, or unlawful
- Method for choosing states resulted in improper state emissions budget reductions
- Failed to appropriately account for inaccuracies in modeling air quality in areas near water bodies
- Singles out EGUs for emission reductions

# CAA CASES

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## **CAA 608 Refrigerant Management Rule**

*NEDACAP v. EPA* (DC Cir 17-1016)

- In abeyance as of 3.9.18
- ISSUE: no authority in CAA ODS program to regulate non-ODS substitutes for GHG reductions

## **CAA 612 SNAP 2015 Rule**

*Mexichem Fluor, Inc. v. EPA* (DC Cir 15-1328) Decision August 2017

- Judges Kavanaugh, Rogers Brown, Wilkins. 2-1 decision.
- HELD: the 2015 Rule, to the extent it requires manufacturers to replace HFCs with a substitute substance, is vacated and remanded to EPA
- Meaning of “replace” under Chevron One
- Env rehearing request denied 1.26.18

# CAA CASES

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## ***Mexichem Fluor, Inc. v. EPA* (DC Cir 15-1328) Decision August 2017**

COURT HELD: the 2015 Rule, to the extent it requires manufacturers to replace HFCs with a substitute substance, is vacated and remanded to EPA

- EPA **lacked authority** under those facts to require an HFC substitute – therefore **vacate**.
- Meaning of “replace” in CAA unambiguous and EPA’s interpretation did not comply with plain meaning
- Court gave EPA an out: **it was reasonable** for EPA to remove HFCs from the list of safe substitutes – therefore **remand**.
- On remand, EPA may determine whether it has “retroactive disapproval” authority

IMPLICATIONS? TIMING?

# CAA CASES

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## **CAA RMP Rule**    *ACC v. EPA* (DC Cir 17-1085)

- Adds duplicative disclosure and other requirements to CAA RMPs
- Admin recon pending – case in abeyance as of 3.8.18
- 90-day stay of effective date under CAA 307(d)(7)(B)
- Final delay of effective date until 2019 under CAA 307 and 112(r)

## **Delay of effective date**    *Air Alliance Houston v. EPA* (DC Cir 17-1155)

- Challenging Rule delaying effective date to 2.19.19
- Briefing complete 1.31.18
- Oral Arg scheduled for 3.16.18, to be live streamed

## CAA CASES

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### **Regional Consistency Rule**

*NEDACAP v. EPA* (DC Cir. 16-1344)

- IND challenge to amended Regional Consistency Rule
- IND challengers NEDACAP, API, Air Permitting Forum
- Briefing through 12.22.17
- Oral Arg scheduled 4.2.18

# CAA CASES

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## NSR

*DTE Energy Company v. United States* (6th Cir 14-2274, 14-2275)

- Cert petition denied 12.14.17
- Amicus: Electric Reliability Coordinating Council and UARG
  - Argue that NSR cannot be triggered without an actual emissions increase



# CAA –TEST METHODS PROPOSED RULE

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Revisions to Testing Regulations for Air Emission Sources  
83 FR 3636 (1.26.18)

- Technical revisions in Parts 51, 60, and 63
- Proposal to adopt ASTM D6216-12 for continuous opacity monitors in Performance Spec 1
- Comments due 3.27.18



# CWA § 316(B) RULE

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

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- IND Petitioners CWIS Coalition UWAG, API, Entergy
  - USFWS and NMFS roles in NPDES permits illegal
  - Biological Opinion has wrong baseline for measuring species effects
- ENV Petitioners
  - “best available technology” = closed loop for existing sources
  - “new” units should include replacement units
- Oral argument 9.14.17, **no decision as of 3.5.18**
  - Judges in oral argument seemed sympathetic to ENVs

# CWA – EGU EFFLUENT LIMITATIONS GUIDELINES

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## **Final ELG Rule - 80 FR 67838 (Nov. 3, 2015)**

- 9.18.17 final rule staying compliance with 2015 Rule deadlines

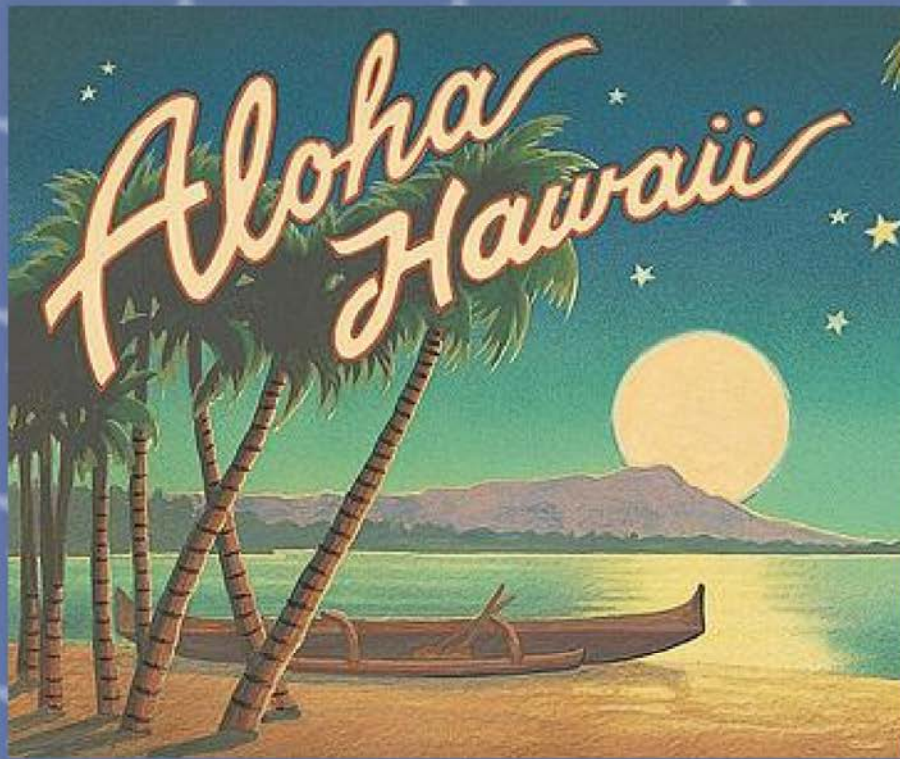
## ***Southwestern Electric v. EPA* (5th Cir 15-60821)**

- Severed & in abeyance (on EPA motion): issues relating to the BAT, PSES applicable to 1) bottom ash, 2) FGD wastewater, 3) gasification wastewater
- EPA working on proposed rule as of 2.20.18
- Briefing on other issues complete 2.28.18
- Oral arg not scheduled as of 3.9.18

## ***CWA v. EPA* (DDC) – Postponement rule**

- Briefing Complete
- ENV challenge to stay of compliance deadlines
- EPA: DDC lacks jurisdiction
- ENVs cite ND CA case vacating delay of compliance date in DOI rule

# HAWAII –FINAL STATE IN THE UNION



# RCRA – COAL ASH RULE

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2015 - Final Rule, coal ash regulated under Subtitle D

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

- Dec 2016 - WIIN Act
- 2017 - EPA grants reconsideration, seeks delay of case, issues Interim Guidance to States
  - Court delays oral argument, orders supplemental briefs & oral argument on effect of WIIN Act on case
  - Oral argument 11.20.17
  - No decision as of 3.5.18

# RCRA – COAL ASH

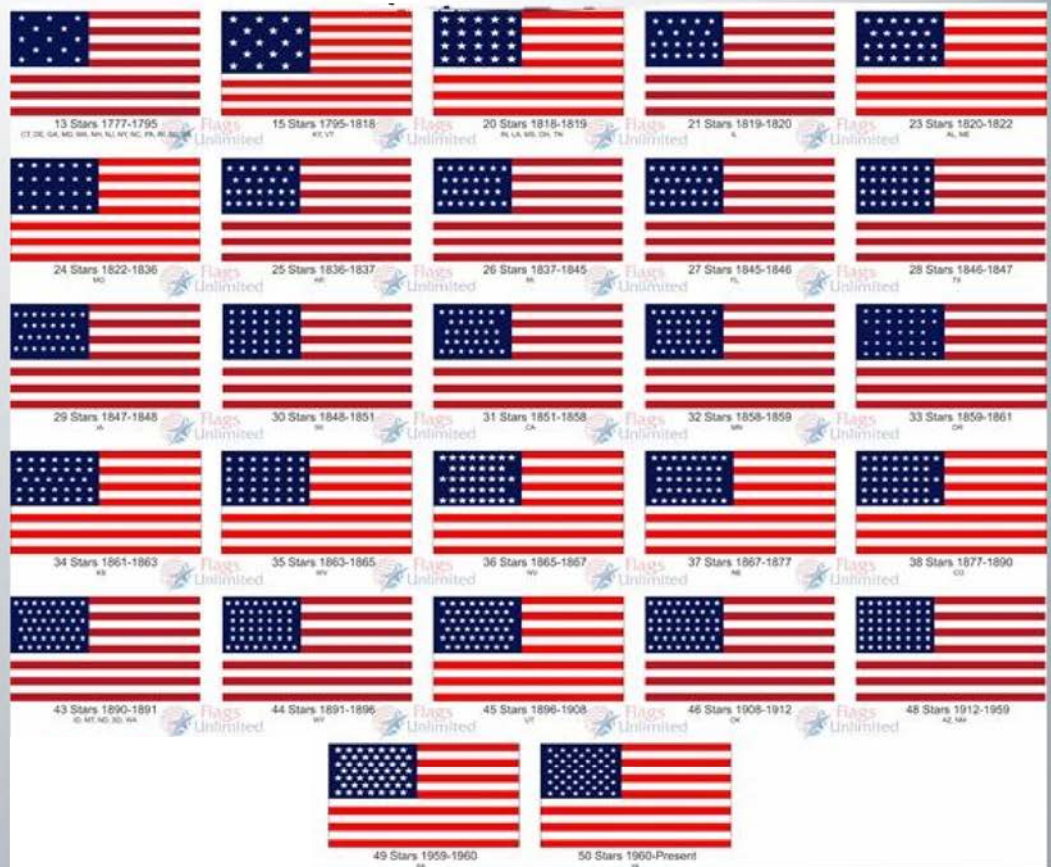
## *TN Clean Water Network v. TN Valley Authority*

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- Dist Ct rules for ENVs
- Citizen suit under CWA
- NPDES permit shield does not cover leaks in Ash Pond Complex
- TVA must move coal ash waste in Ash Pond Complex and Non-Registered Site to lined site
- TVA liable for leaks of pollutants into Cumberland River
- TVA appealed to 6th Circuit 10.2.17
- No 6th Cir. decision as of 3.13.18



# EVOLUTION OF OLD GLORY



# RCRA DEADLINE SUITS

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RCRA Rules 3-year revision

*Environmental Integrity Project v. EPA* (DC Cir. 17-5010)

- Deadline suit >> set dates for proposed / final rules
  - Decision 11.28.17
- Administrator Pruitt Directive on Sue/Settle

# RCRA – DEFINITION OF SOLID WASTE

## *API v. EPA* (DC Cir. 09-1038)

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- Judges Tatel, Kavanaugh, Williams
- Decision 7.7.17, parts of rule vacated
- 2-1 decision, granted much of IND's challenges

# RCRA – DEFINITION OF SOLID WASTE

## *API v. EPA* (DC Cir. 09-1038)

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- **DC Cir. invalidated two key elements of RCRA's Definition of Solid Waste**
  - Vacated Factor 4 of the four legitimacy factors, except where Factor 4 has been written into specific exclusions (eg, Generator Control Exclusion, non-waste determination regs)
  - Vacated the 2015 Verified Recycler Exclusion, except for (1) emergency preparedness standards and (2) expanded requirement for materials to be properly contained, and reinstated the 2008 "Transfer Based Exclusion"
  - Court leaves the Generator Control Exclusion intact; Factor 4 will continue to apply to this exclusion

# RCRA – DEFINITION OF SOLID WASTE

## *API v. EPA* (DC Cir. 09-1038)

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- EPA deferral of action on proposed addition of containment and notification requirements to the 32 pre-2008 exclusions remains in place
- All factors (including Factor 4) will continue to apply to the Generator Control Exclusion
- Limited deference to EPA's evaluation of technical studies
- Judge Tatel dissented in part
  - Dissented to Legitimacy Factor 4 & Verified Recycler Exclusion holdings
  - Court should defer to EPA's technical and policy decisions

# RCRA – DEFINITION OF SOLID WASTE

## *API v. EPA* (DC Cir. 09-1038)

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### **Petitions for panel rehearing granted 3.6.18**

- ACC: legitimacy factor 4 irrational in all applications
- EPA: pls clarify that where factor 4 vacated, prior version applies
- API: sever and affirm the removal of the catalyst disqualifier (thereby making the catalysts eligible for the reinstated Transfer-Based Exclusion)

### **Petition denied**

- ENV: remedy should be remand not vacatur

## RCRA – HAZ WASTE GENERATOR IMPROVEMENTS RULE *ACC v. EPA* (DC Cir. 17-1064)

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- Final rule to make haz waste rules “user-friendly” 11.28.16
- Petitioners: ACC, AF&PA, AISI, API, American Wood Council, IPC- Assoc Connecting Electronics Industries, Motor & Equipment Mfters Assoc, NOPA, SOCMA
- Key IND issue: noncompliance with condition for exemption  
= facility deemed to be operating as non-permitted TSDF
- 90-day status reports
- In abeyance as of 3.5.18



# CERCLA 108(B) FINANCIAL ASSURANCE

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## **Proposed rule covered hardrock mining industry**

- Duplicative of state/local financial assurance requirements
- EPA contemplated expanding to other industries
- NAM coalition
- 2.21.18 – Final Action, effective 3.23.18, **EPA will not issue final regulations on FA for hardrock mining facilities**
  - Hardrock mining industry degree and duration of risk does not present a level of risk warranting imposing financial responsibility requirements

# 13 FOLDS



# TRUMP ADMIN - FEDERAL STREAMLINING

*Public Citizen v. Trump* (DC Dist. 1:17-CV-00253)

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- EO challenged reducing regs and controlling costs (two-for-one)
  - Dismissed, no standing – 2.26.18
  - DC Dist Ct, scientists & profs amici
- Plaintiffs can file to amend complaint by 4.2.18

# TRUMP ADMINISTRATION – EPA

Position	Principal	Deputy		
Administrator	Scott Pruitt	Andrew Wheeler (nom)		
Chief of Staff	Ryan Jackson	Byron Brown		
AA, Policy	Samantha Dravis	Brittany Bolen		
AA, OECA	Susan Bodine	Patrick Traylor		
AA, Air & Radiation	Bill Wehrum	Dep. Mandy Gunasekara	Counsel David Harlow	Assoc. Clint Woods
AA, Water	David Ross	Dennis Lee Forsgren, Jr.		
AA, OCSPP	Vacant	Vacant		
AA, OLEM	Peter C. Wright (nom)	Steven Cook		
General Counsel	Matthew Leopold	Vacant		

# TRUMP ADMINISTRATION – OMB AND CEQ

Position	Principal	Deputy
Director	Mick Mulvaney	Russel Vought
OIRA Administrator	Neomi Rao	Dominic Mancini
OIRA, Assoc. Admin.	Jeffrey M. Harris	Vacant
OIRA, Chief of Staff	Anthony Campau	Vacant
CEQ, Chairman	Vacant	Vacant
CEQ, Chief of Staff	Mary Neumyar	Vacant

