

CIBO E&E MEETING

June 5-6, 2018

Lisa Jaeger

Bracewell LLP



INHD²
ONLY ON CABLE

Haz Waste Gen Improvements Rule
ACC v. EPA – Abeyance

CSAPR Update
WI v. EPA
Briefing to 4.2018

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

Coal Ash Rule
USWAG v. EPA
Oral Arg
11.20.17

CAA RMPs
ACC v. EPA – In Abeyance
Air Alliance v. EPA – Oral Arg 3.16.18

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

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 Recon II
Sierra Club v. EPA
Decision 3.16.18

BMACT / Area /
CISWI III
Remanded
Issues TBD

TRUMP ADMINISTRATION

Infrastructure / Reg Reform

Pres Memo: permit streamlining and reducing regulatory burdens

- ▶ CKRC comments filed with Commerce, EPA

Pres EO 13807: One Federal Decision policy for major infrastructure projects

- ▶ CEQ Initial List of Actions
- ▶ OMB CEQ Memo for all federal departments, agencies (first action item) 3.20.18
- ▶ EPA and 11 Agencies sign MOU to implement revisions

TRUMP ADMINISTRATION

Infrastructure / Reg Reform

Pres EO: reducing regs and controlling costs
(Two-for-One)

- ▶ *Public Citizen v. Trump* (DC Dist. 1:17-CV-00253)
 - ▶ Dismissed, no standing - 2.26.18
 - ▶ DC Dist Ct, scientists & profs amici
- ▶ Plaintiffs filed amended complaint
- ▶ EPA moved to dismiss

TRUMP ADMINISTRATION

Infrastructure / Reg Reform

CAA New Source Review

- ▶ Legislation: Griffith NSR bill
- ▶ EPA Administrative Action
- ▶ Admin Pruitt NSR Memoranda
- ▶ EPA proposals on aggregation and routine maintenance

CAA NAAQS / Regional Haze decisions and permits

Water, Waste, Other actions with State - EPA Region / HQ roles

- ▶ NPDES permits
- ▶ Wastewater permits and haz waste cleanups

TRUMP ADMINISTRATION

Enforcement

Memoranda re Enforcement

- ▶ U.S. Department of Justice Environment and Natural Resources Division
- ▶ U.S. EPA Office of Enforcement and Compliance Assurance

TRUMP ADMINISTRATION

Position	Principal	Deputy		
Administrator	Scott Pruitt	Andrew Wheeler		
Chief of Staff	Ryan Jackson	Byron Brown (policy)		
AA, Policy		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		Nancy Beck		
AA, OLEM	Peter C. Wright (nom)	Steven Cook		
General Counsel	Matthew Leopold			

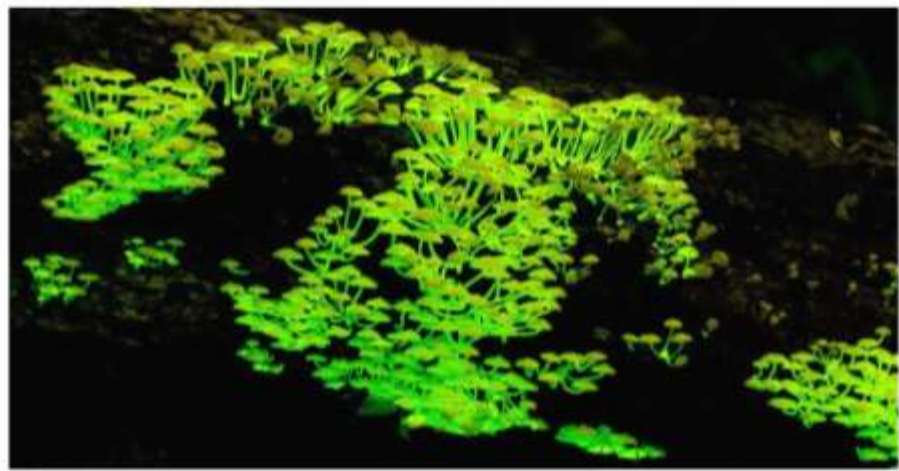
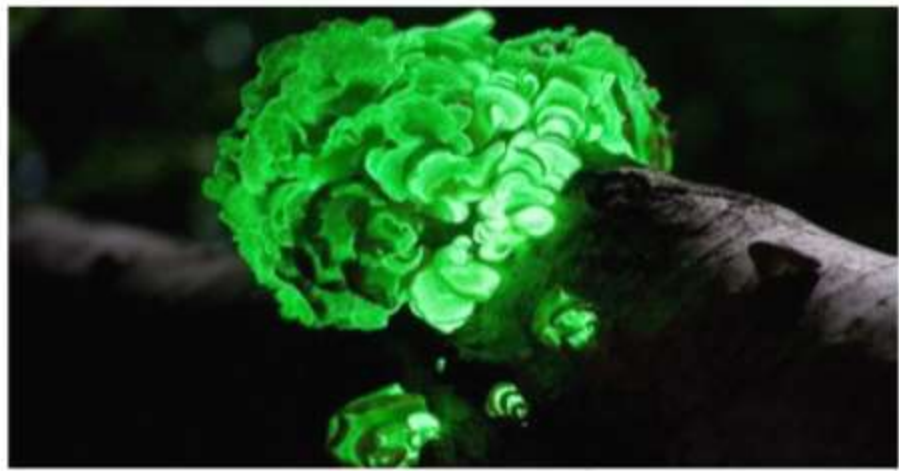


REGULATORY SCIENCE

- ▶ EPA Science Advisory Board
- ▶ Clean Air Scientific Advisory Committee
- ▶ Board of Scientific Counselors

REGULATORY SCIENCE

- ▶ EPA Proposed Rule: Strengthening Transparency in Regulatory Science (April 30, 2018)
 - ▶ 30 >>> 75 day comment period
 - ▶ Public hearing 7.17.18
 - ▶ Comments due 8.16.18



REGULATORY SCIENCE

ISSUE

should studies that EPA relies on for its regulatory decisions be restricted to those for which the underlying data “are publicly available in a manner sufficient for independent Validation” ?

REGULATORY SCIENCE

EPA PROPOSED RULE

“This proposed rule is in line with the scientific community’s moves toward increased data sharing to address the ‘replication crisis’ - a growing recognition that a significant proportion of published research may not be reproducible. The proposal is consistent with data access requirements for major scientific journals like *Science*, *Nature*, and *Proceedings of the National Academy of Sciences* as well as recommendations from the *Bipartisan Policy Center’s* Science for Policy Project and the Administrative Conference of the United States’ Science in the Administrative Process Project.”

REGULATORY SCIENCE

Comments filed by Bipartisan Policy Center

President Jason Grumet

Science for Policy Project Report supported more transparency and data access but NOT excluding studies if data were not publicly available

In this regard, “we want to be clear that *the proposed rule is not consistent with the BPC report in substance or intent.*”



BOILER MACT-AREA SOURCE-CISWI

DC Circuit cases and pending EPA action items

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

Recon Rule II - *Sierra Club v. EPA* (16-1021) - decided 3.16.18

- ▶ Judges Henderson, Millett, Pillard
- ▶ CO 130 ppm standard: remand w/out vacatur
- ▶ Work practice standard for startup/shutdown: upheld
- ▶ Env petition for panel rehearing 4.30.18

BOILER MACT-AREA SOURCE-CISWI

DC Circuit cases and pending EPA action items

- ▶ Main case - ENV Petition for Panel Rehearing 4.30.18

ENVS argue the Court erred in:

- ▶ I. EVALUATING EPA'S "INFEASIBILITY" DETERMINATION

- ▶ II. ADDRESSING SIERRA CLUB'S ARGUMENTS ON CLEAN FUEL DURING SU or SD

BOILER MACT-AREA SOURCE-CISWI

DC Circuit cases and pending EPA action items

- ▶ 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 5.18.18
- ▶ Surrogates
 - ▶ CAA § 112(c)(6) Case - *Sierra Club v. EPA* (15-1246) Decision 7.18.17
 - ▶ EPA inadequate explanation of use of surrogates in prior rules
 - ▶ Judges Rogers, Millett, and Sentelle (opinion)

CAA - UTILITY MATS CASES

- ▶ MATS Technical Corrections Rule *ARIPPA v. EPA* (DC Cir 16-1168)
- ▶ MATS SU/SD Revisions Rule *Chesapeake Bay v. EPA* (15-1015)
- ▶ MATS Reconsideration Rule *ARIPPA v. EPA* (DC Cir 15-1180)
- ▶ MATS Supplemental Finding *Murray Energy v. EPA* (DC Cir 16-1127)



BRICK MACT

DC Circuit Cases and Pending EPA Action Items

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

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.

MACT / RISK & TECHNOLOGY REVIEW

RTRs issued under new administration

- ▶ Most have minor tech changes, no residual risk change
- ▶ Wool Fiberglass Manufacturing RTR broke the trend
- ▶ PC RTR Proposed 9.21.17. Final by 7.15.18 (consent decree)
- ▶ Leather Finishing Operations (prop 3.13.18)
 - ▶ risk acceptable under the current standard and no new cost-effective controls under tech review
- ▶ Petroleum Refinery RTR tech changes (prop web 4.9.18)



2017 RTRS IN LITIGATION

Pulp Mills RTR

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

- ▶ ENV Petitioners Earthjustice
- ▶ IND Intervenor for EPA: AFPM
- ▶ ENV Issues
 - ▶ 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

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

2017 RTRS IN LITIGATION

- ▶ **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



MACT / RISK & TECHNOLOGY REVIEW

Issues pending in litigation or on remand to EPA

- ▶ Every HAP must have an emission limit
- ▶ Use of surrogates - legitimate?
- ▶ Health-based emission limits
- ▶ Evaluate health risk based on most sensitive exposed person
- ▶ UPL for variability
- ▶ Use of data from small sources for major source limits

CAA RISK MANAGEMENT PLAN

- ▶ **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
 - ▶ 90-day stay of effective date under CAA 307(d)(7)(B)
 - ▶ Final delay of effective date to 2.19.19 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
- ▶ Oral Arg 3.16.18 - live streamed
- ▶ EPA letter to court: proposed rule posted (and ENVs respond)

CAA RISK MANAGEMENT PLAN

- ▶ Applies to stationary sources subject to chemical accident prevention requirements (40 CFR part 68)
- ▶ Includes stationary sources holding > threshold quantity of regulated substance in a process
- ▶ 2017 Final rule >> Reconsideration granted >> 2018 Proposed rule
- ▶ Streamlines requirements, eliminates duplication
- ▶ Modifies, rescinds, retains provisions
- ▶ Comments due June 29, 2018

CAA RISK MANAGEMENT PLAN

2017 ELEMENTS >> 2018 CHANGES PROPOSED MAY 2018

▶ PREVENTION PROGRAM REQUIREMENTS

- ▶ Incident investigation
- ▶ Compliance Audits
- ▶ Accident Prevention

▶ EMERGENCY RESPONSE PREPAREDNESS

- ▶ Notification
- ▶ Field drills
- ▶ Tabletop

▶ PUBLIC AVAILABILITY OF INFORMATION



Photo by Thomas Shahan



Oregon
Department
of Agriculture

CAA CASES

Regional Consistency Rule

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

- ▶ IND challenged amended Regional Consistency Rule
- ▶ IND challengers NEDACAP, API, Air Permitting Forum
- ▶ Oral Arg 4.2.18

CAA - ONCE IN ALWAYS IN

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

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

ENVs, CA oppose withdrawal of the policy - sued

Downwinders at Risk v. EPA (DC Cir)

▶ Motions to Intervene: APF AIF UARG NEDA/CAP

▶ Hurdle: is this final agency action?

▶ Assuming final action, will it be overturned?



CWA § 316(B) RULE

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

- ▶ 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 5.30.18
 - ▶ Judges in oral argument seemed sympathetic to ENVs

CWA EGU EFFLUENT LIMITATIONS GUIDELINES

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

- ▶ Utility & ENV Petitioners & Respondent-Intervenors
- ▶ 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
- ▶ 6.1.18 Status - EPA still working toward a proposed rule
- ▶ EPA working to finalize a decision on Duke Energy's FDF variance request

CWA - EGU EFFLUENT LIMITATIONS GUIDELINES

- ▶ Final ELG Rule - 80 FR 67838 (Nov. 3, 2015)
 - ▶ 9.18.17 EPA issued 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 bottom ash, FGD wastewater, gasification wastewater
 - ▶ Other issues should go forward in litigation
- ▶ CWA v. EPA (DDC) - 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
 - ▶ 12.4.17 Case reassigned to different judge

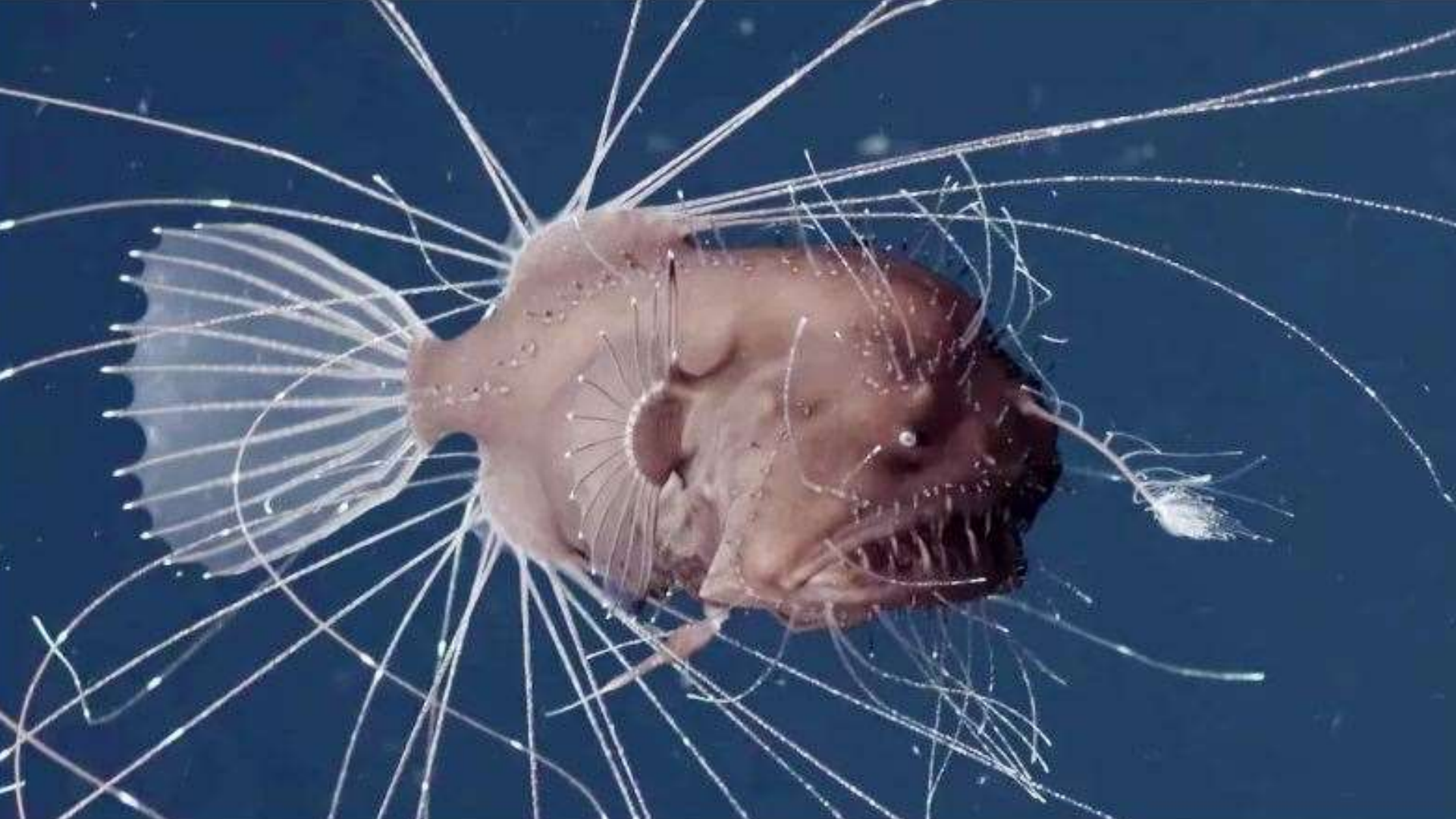
CWA EGU EFFLUENT LIMITATIONS GUIDELINES

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

- ▶ Court grants EPA's motion to sever issues and hold in abeyance
- ▶ 90-day status reports
- ▶ Rule currently at OMB
- ▶ EPA wants case to stay in abeyance for the portion of the 2015 Rule concerning the new, more stringent BAT limitations and PSES applicable to (1) bottom ash transport water, (2) FGD wastewater, and (3) gasification wastewater

CWA - WATERS OF THE US

- ▶ Executive Order 2.28.17
- ▶ EPA two-step proposal to repeal Clean Water Rule, reinstate pre-2015 regulatory text
- ▶ *NAM v. DOJ* (USSCT 16-299) HELD 1.22.18 - district courts have jurisdiction
 - ▶ EPA delayed effective date of 2015 WOTUS to 2020 - being challenged ENVs, states
 - ▶ Status / Next Steps



RCRA - COAL ASH RULE

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 5.18.18

RCRA - COAL ASH

TN Clean Water Network v. TN Valley Authority

- ▶ Citizen suit under CWA
- ▶ Dist Ct rules for ENVs
- ▶ 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
- ▶ **Oral Arg 8.2.18**



RCRA - DEFINITION OF SOLID WASTE

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

- ▶ Judges Tatel (dissent), Kavanaugh, Williams
- ▶ Decision 7.7.17, parts of rule vacated
- ▶ 2-1 decision, granted much of IND's challenges
- ▶ Panel Rehearing GRANTED

RCRA - DEFINITION OF SOLID WASTE

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

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)

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)

- ▶ 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
- ▶ In abeyance



CERCLA 108(B) FINANCIAL ASSURANCE

- ▶ Proposed rule for hardrock mining industry - court ordered deadline obtained by ENVs
- ▶ Duplicates state/local financial assurance requirements
- ▶ Court order for 3 other industries: petroleum refining, utilities,
- ▶ NAM coalition
- ▶ Final Rule 2.21.18: EPA will not issue FA regs for hardrock mining
 - ▶ Hardrock mining industry degree and duration of risk does not present a level of risk warranting imposing financial responsibility requirements

CERCLA 108(B) FINANCIAL ASSURANCE

Idaho Conservation League, et al. v. EPA (DC Cir 18-1141)



