

CIBO E&E MEETING

ENERGY & ENVIRONMENTAL POLICY OUTLOOK

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DECEMBER 4-5, 2018




WOTUS Rule

EGU ELG
Southwestern Elec. Power v EPA
5th Cir - Oral Arg 10.3.18

CSAPR Update
WI v. EPA
Oral Arg 10.3.18

CERCLA 108 FA
Idaho Conservation League v. EPA
Briefing to 1.8.19


316(b) 
CWIS Coalition v. EPA
2d Cir – Amended Decision 11.26.18


CAA RMPs
ACC v. EPA – In Abeyance
Air Alliance v. EPA – Decision 8.17.18

Revised Def. Solid Waste
CCAT v. EPA
Briefing to 1.14.19

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

Coal Ash Rule
USWAG v. EPA
Decision 8.21.18

OIAI 
*CA Communities Against
Toxics v. EPA*
Briefing to 2.22.19

BMACT Recon II 
Sierra Club v. EPA
Decision 3.16.18
Panel Rehearing Denied 7.3.18

BMACT / Area /
CISWI III
Remanded
Issues TBD

US SUPREME COURT

Justice Brett Kavanaugh, sworn in 10.8.18

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)



MACT/RTR RULES

Issues Recently Decided in DC Circuit Court

- Startup/shutdown work practice standards ok (boilers)
- Surrogates - need adequate explanation (multiple)
- UPL for variability
 - for limited datasets generally ok (brick)
 - for ad-hoc adjustments to limits NOT ok (brick)
- Health-based emission limits for HCl NOT ok (brick)
- Alternate MACT floors for sources NOT ok (brick)

MACT/RTR RULES

Issues Pending in DC Circuit Court

- Malfunctions / Affirmative Defense
 - SIPS, Title V, MACTs
- Startup/Shutdown work practice standards (utilities)
- “Appropriate and necessary” to regulate utilities
- Mandatory digital camera opacity technique (DCOT) for compliance, no Method 9 alternative (ferroalloys)



MACT/RTR RULES

Issues Pending in DC Circuit Court / EPA Reconsideration

Portland Cement RTR

Downwinders at Risk v. EPA (in abeyance)

Final Rule

- No change in emissions standards
- Improved monitoring, compliance, implementation

ENV Issues (in comments)

- RTR must reflect technology improvement of SCR systems and HAP reductions achieved in practice
- RTR must reflect stricter State standards and their practices, process & control tech improvements

MACT/RTR RULES

Issues Pending in DC Circuit Court / EPA Reconsideration

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

- Must EPA set emission standard for each emitted HAP – dioxins, hydrogen chloride, hydrogen fluoride, and nondioxin organic HAP, Hg
 - Where EPA considered but did not set MACT standard for a pollutant, may EPA set a standard in RTR rule, on the basis that EPA would not be recalculating a floor?
 - Can a finding of acceptable risk support not setting a MACT standard for a pollutant?
- Can PM be surrogate for gaseous Hg, where pm controls do not control Hg?
- Assessing health risk based on census block centroids v. “individual most exposed to emissions from source category” CAA § 112(f)(2)
- Court deadlines for issuing standards as rationale for not doing more data gathering, analysis

MACT/RTR RULES

Issues Pending in DC Circuit Court / EPA Reconsideration

Nutritional Yeast Manufacturing RTR

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

Admin Recon Petition pending:

- monitoring method changed
- EPA concluded no resid risk and set RTR standards “equivalent” to MACT but are stricter, and no EPA equivalency analysis
- Data deviations = civil penalty violations
- EPA had too little time, no notice/comment on key analysis



CAA CASES

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, CAA 307(d)(7)(B)
- Final delay of effective date to 2.19.19, 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
- Decision 8.17.18

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
- Decision 6.8.18

CAA ONCE IN ALWAYS IN

Bill Wehrum Memo (1.25.18) withdrew 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

CA Communities against Toxics v. EPA (DC Cir 18-1085)

- ENV Petitioner brief 10.1.18

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

California Communities Against Toxics v. EPA
(DC Cir 18-1085)

- IND Intervenors: Air Permitting Forum, NEDA/CAP
Auto Industry Forum, UARG
 - IND Amici: ACC API CIBO NAM Chamber American Wood Council
-
- 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
- Decision 9.27.18 – Amended Opinion 11.26.18
 - Judges in oral argument seemed sympathetic to ENVs

CWA – EGU EFFLUENT LIMITATIONS GUIDELINES

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

- *Southwestern Electric v. EPA* (5th Cir 15-60821)
 - Utility & ENV Petitioners & Respondent-Intervenors
 - [Oral argument 10.3.18](#)
- Severed Issues
 - new, more stringent Best Achievable Control Technology (BAT)
 - Pretreatment standards for existing sources (PSES) applicable to bottom ash transport water, FGD wastewater, gasification wastewater
 - [rule at OMB](#)

CWA – EGU EFFLUENT LIMITATIONS GUIDELINES

Indefinite Stay Rule (9.18.17)

- stays compliance with some provisions of 2015 rule pending 5th Cir review of the substance of those provisions

Clean Water Action v. Wheeler (DC Cir 18-5149)

- Case in abeyance pending 5th cir decision

Delay Rule (82 FR 43,494; 9.18.17)

- 2-year delay of BAT & PES deadlines, pending EPA reconsideration
- withdrew Indefinite Stay Rule

Clean Water Action v. EPA (5th Cir 18-60079)

- briefing through November 2018

CWA – WATERS OF THE US

- EPA two-step proposal to repeal Clean Water Rule, reinstate pre-2015 scope of WOTUS
- NAM v. DOJ. USSCT held US District Courts have jurisdiction
- EPA delayed effective date of 2015 WOTUS Rule to 2020, without notice and comment
- ENVs, States challenged Delay Rule
- District Cts in GA, ND, SC enjoined EPA Delay Rule, pre-2015 scope of WOTUS in effect



COAL ASH / CWA NPDES

4th, 6th, 9th Circuit Courts

- Citizen suit claims under CWA: coal ash leachate traveling through groundwater to surface waters = point source discharge subject to NPDES permit
- ISSUE: are groundwater releases “discharged from point sources into navigable waters” that must be covered by a NPDES permit?
- Circuit split
 - 4th & 9th Circuits: Yes, NPDES applies
 - 4th & 6th Circuits: No, NPDES does not apply

COAL ASH / CWA NPDES

4th, 6th, 9th Circuit Courts

CWA text

- CWA regulates amount of pollutants “discharged from point sources into navigable waters”
- Point source = “discernible, confined and discrete conveyance”
- The definition includes, but not limited to “any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft.”

Plaintiff theories

- groundwater is point source that deposits pollutants in surface water
- hydrological connection (or conduit) theory: groundwater is medium through which pollutants pass; coal ash pond is the point source

COAL ASH / CWA NPDES

4th, 6th, 9th Circuit Courts

- EPA proposed rule (Feb 2018) seeking comment on whether covering groundwater releases under NPDES is consistent with the CWA or is better covered by other regulatory authorities.
- 2 Supreme Court petitions for certiorari pending

RCRA – 2008 DEFINITION OF SOLID WASTE

2008 Rule established transfer-based exclusion

- Transfer haz mat to 3d party recycler – not solid waste, not discarded
- Can **sell** haz mat to recycler or **pay recycler** to take haz mat

ENVs sued

- EPA ENVs settled: EPA will redo the rule
- 2011 EPA proposed rule eliminated transfer-based exclusion
Findings, RIA: exclusion lacked Subtitle C protections.

2015 Final rule: no transfer-based exclusion,

- but new verified recycler exclusion –
can pay recycler to take haz mat, not haz waste

ENVS sued

RCRA – 2015 DEFINITION OF SOLID WASTE

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

2015 rule. ENVs and IND sued.

Decision 7.7.17, parts of rule IND challenged, vacated

- Judges Tatel (dissent), Kavanaugh, Williams

Panel rehearing granted, Decision 3.6.18

- Factor 4 fully vacated, Factor 4 v.2008 reinstated
- Revised definition of “contained” remains and applies to generators & third-party recyclers
- Revised containment standard ok for spent catalysts to qualify for transfer-based exclusion, Verified Recycler Exclusion vacated, not needed

RCRA - 2018 REVISED DEFINITION OF SOLID WASTE

CCAT v. EPA (DC Cir. 18-1163)

Rule revised in response to DC Circuit vacatur

- 83 FR 24664 (5.30.18)
- transfer-based exclusion reinstated

ENVs sued

- Under transfer-based exclusion, can pay recycler to take hazardous material, material not solid waste, not discarded
- Briefing 8.20.18 through 1.14.19

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

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

Final Rule: EPA will not issue FA regs for hardrock mining
(2.21.18)

- NAM coalition
- Hardrock mining industry degree and duration of risk does not present a level of risk warranting imposing financial responsibility requirements
- ENV Petitioner brief Sep 2018
- Briefing to Jan 2019

