

# CIBO E&E MEETING

REGULATORY & LITIGATION UPDATE

LISA JAEGER DECEMBER 10-11, 2019



# ADMINISTRATION APPOINTEES

Principal	Position	Agency
Paul Ray	Nominee Administrator Office of Information & Regulatory Affairs	OMB
Anne Idsal Prin Dep Asst Administrator Office of Air and Radiation	Nominee Assistant Administrator Office of Air and Radiation	EPA
Sean O'Donnell Trial Lawyer USDOJ	Nominee Inspector General	EPA
Dan Brouillette	Secretary	DOE



# REG REFORM – NEW ITEMS, KEY ITEMS

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- NEPA  
6.20.18 ANPR. 20 Qs, request for recommendations
- Strengthening transparency in science  
4.30.18 Proposed. Comments closed. 2020 Final
- EPA Environmental Appeals Board Reform





# PM NAAQS WITHIN CAA TIMEFRAME

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## PM NAAQS REVIEW ONGOING

- Draft ISA (Oct 2018)
  - CASAC comments (Apr 2019)
  - Comments due 12.11.18
- **Draft PA (includes REA-related analysis) (Sept 2019)**
  - **CASAC draft report to assist meeting deliberations (Nov 2019)**
  - **Comments filed 11.12.19**
- Final ISA and PA (expected late 2019)
- Proposed PM Rule (expected early 2020)
- Final Rule (expected winter 2020/2021)

# CIBO PARTICIPATION IN OZ & PM NAAQS REVIEWS

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## NR3C (NAAQS Regulatory Review & Rulemaking Coalition)

- [PM ISA comments due 12.11.18]
  - PM PA comments filed 11.12.19
  - Ozone ISA comments filed 12.2.19
  - **CASAC public hearing written comments & testimony by scientists 12.3-6.19**
  - **Oz PA comments next draft out 12.11.19, due 12.16.19**
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- **CASAC mega-meeting 12.3-6.19: Oz ISA, Oz PA, PM PA Draft CASAC Letter  
Public Hearings Oz ISA 12.4.19 Oz PA 12.5.19**
  - Final ISAs and PAs (expected late 2019 - early 2020)
  - Proposed Rules (expected late spring 2020)
  - Final Rules (expected winter 2020/2021)



# PM PA NAAQS – CASAC DRAFT CONCLUSIONS

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[M]ost CASAC members conclude that the Draft PM PA does not establish that new scientific evidence and data reasonably call into question the public health protection afforded by the current 2012 PM<sub>2.5</sub> annual standard. Other members of CASAC conclude that the weight of the evidence, particularly reflecting recent epidemiology studies showing positive associations between PM<sub>2.5</sub> and health effects at estimated annual average PM<sub>2.5</sub> concentrations below the current standard, does reasonably call into question the adequacy of the 2012 annual PM<sub>2.5</sub> [NAAQS] to protect public health with an adequate margin of safety.”



# OTHER CAA REFORM

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## NEW SOURCE REVIEW

ONCE-IN-ALWAYS-IN >>> MM2A (Major MACT to Area)

- *CA Communities Against Toxics v. EPA*
- Proposed Rule Comments due Oct 2019

SSM AFFIRMATIVE DEFENSE IN SIPS: TX & NC



# MACT & RTR: MATS SUSL CASE

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## *Chesapeake Climate Action Network v. EPA*

- Oral arg 10.21.19 Judges Tatel, Pillard, Wilkins
- ENVS: Arbitrary to treat power plant startup emissions differently under 2 CAA programs
  - Acid Rain Program, must measure startup emissions and count them toward compliance
  - NESHAPS, startup emissions not measurable and justify a work practice standards

# MACT & RTR: PULP MILL RTR

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## *LA Environmental Action Network v. EPA*

- Risk & Technology Review for Pulp & Paper mftg
- Oral Argument 12.4.19
- DC Cir Judges Henderson, Pillard, Sentelle
  
- Jim Pew for ENVs
- Andrew Doyle for DOJ EPA
- Russ Frye for AFPA Intervenor for EPA

# MACT & RTR: PULP MILL RTR

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**ISSUE** When doing an RTR of emission *standards* can and must EPA set emission *limits* for HAP not regulated by the MACT for that source category?

## FACTS

- 2001 MACT no limits for Hg, dioxin, other HAP
- 2009 ENV Petition for Rulemaking for non-regulated HAP
- EPA acted on SUSP portion of Petition
- 2019 Non-regulated HAP part of Petition still pending

# MACT & RTR: PULP MILL RTR

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## LAW

### MACT standards under 112(d)(1-3)

EPA “shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants”

### RTR under 112(d)(6)

EPA “shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years”



# MACT & RTR: PULP MILL RTR

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Definition of “emission standard”

CAA 112(k)

“a requirement. . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under [the Act].”

42 U.S.C. § 7602(k)

40 C.F.R. § 63.2

“a national standard, limitation, prohibition, or other regulation promulgated in a subpart of this part pursuant to sections 112(d), 112(h), or 112(f)”

# MACT & RTR: PULP MILL RTR

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MACT 112(d) EPA shall set emission standards for each source category

RTR 112(d)(6) EPA shall review/revise as necessary (taking into account practices, processes, control technologies) emission standards promulgated

## ARGUMENTS

- ENV 112(d)(6) requires EPA to regulate MACT-unregulated HAP
- EPA 112(d)(6) gives EPA discretion
- IND
  - 60-day repose critical
  - HAP unaddressed ≠ uncontrolled
  - “emission standard”
  - CAA remedies available, laches



# CAA NY 126 PETITION

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- CAA 126 Petition filed by NY NJ NYC
- NY Metro Area & Chautauqua County nonattainment 2008 & 2015 Oz NAAQS
- CLAIM: NO<sub>x</sub> emissions from 357 sources in 9 States

<b>IL</b>	<b>IN</b>	<b>KY</b>
<b>OH</b>	<b>MI</b>	<b>WV</b>
<b>PA</b>	<b>VA</b>	<b>MD</b>

- NY seeks RACT or NY RACT for sources
- EPA denied Petition 84 FR 56,058 (Oct 18 2019)

# NY 126 PETITION – NOW *NY V. EPA*

<b>Petitioners</b>	NY NJ NYC	
<b>Intervenors for Petitioners</b>	Adirondack Council EDF Sierra Club	
<b>Respondent</b>	EPA	
<b>Intervenor for EPA</b>	<p>Air Stewardship Coalition</p> <p>ACC AF&amp;PM API PCA Kinder Morgan Holcim</p> <p>Lima Refining Marathon NRECA SABIC TC Energy</p>	<p>US Chamber Midwest Ozone Group NAM Big Rivers Electric GenOn Peoples Gas Dominion Energy</p>



# NY 126 PETITION – *NY V. EPA*

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## NY Motion to Expedite

- short briefing schedule

oral argument by May 2020

- to ensure meaningful judicial relief & avoid irreparable harm to health from emissions

EPA / Intervenors oppose

# NY 126 PETITION – *NY V. EPA*

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## ISSUES

EPA's Denial of the NY 126 Petition is illegal because:

- Relies on CSAPR Update and Close-Out Rules, found by DC Cir to be inadequate
- uses 2023 for assessing attainment, but 2021 is NY's next attainment deadline for 2008 oz standard & EPA ignores monitoring data showing attainment problem by that date
- says can't rely data from monitors outside petitioning State, but within a multi-state nonattainment area
- invents requirement that NY do comparative analysis of all possible upwind emission reductions to show significant contribution by named upwind sources



# NY 126 PETITION – NY V. EPA

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## Issues Cont'd

- ignores NY's cost & air quality factors showing emission reductions available from named upwind sources, including with existing controls, costing \$5,000/ ton of NOX removed, the cost of RACT in NY
- shifts from the US to NY, the burden to develop remedy under section 126(c)
- uses flawed 2023 modeling with unenforceable assumptions about facility behavior, ignores EPA's regulatory rollbacks, and fails to follow EPA's modeling guidance

# NY V. EPA “RELATED CASE”

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## DE MD 126 Petition Case

*MD v. EPA*, DC Cir 18-1285 (Oct. 15, 2018)

- Nonattainment with 2008 & 2015 Oz NAAQS
- due to 36 sources in 5 states

<b>IN</b>	<b>KY</b>	<b>OH</b>
<b>PA</b>		<b>WV</b>

- Oral arg 1.16.20



# WHO'S LIABLE FOR THE CLIMATE?

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Right to stable climate, nuisance, fossil fuel use

- *Juliana v. US*            9th Cir, US DCt OR            oral arg 6.6.19
- *Baltimore v. BP*            USSCT, 4<sup>th</sup> Cir                    stay request pending
- *Sinnok v. Alaska*        Alaska SCT                        oral arg 10.09.19

NY v. Exxon climate fraud case

Shareholder derivative cases: misleading public re climate liabilities

Rulemaking opposition or petition

Valve turners, constitutional right to offer necessity defense



# US SUPREME COURT

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## *County of Maui v. HI Wildlife Fund* (USSCT 18-260)

- ISSUE: Whether CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.
- Oral Arg November 6, 2019

## *ARCO v. Christian* (USSCT 17-1498)

- ISSUE: Whether common law damages may be sought where EPA has implemented a CERCLA cleanup
- Oral Arg December 3, 2019





May Christmas bring you everything that  
you are wishing for

