



**CIBO ENERGY /
ENVIRONMENT MEETING**

**Regulatory & Litigation Update
March 10-11, 2020
Lisa M. Jaeger**



ADMINISTRATION APPOINTEES

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



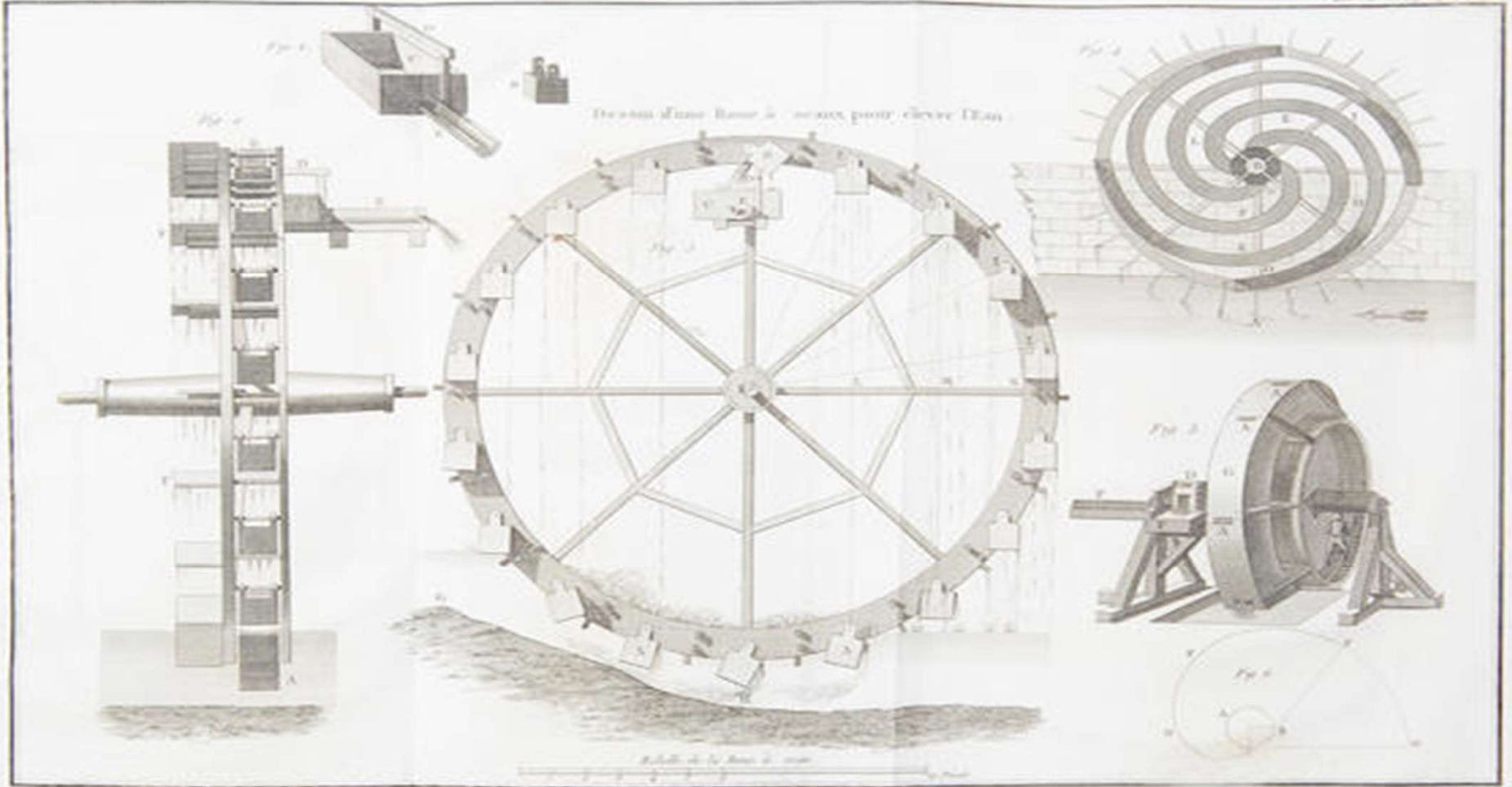
Philo of Byzantium
Or Philo Mechanicus
(ca. 280–220 BC)

Mechanike Suntaxis

Pneumatica – on
devices operated by
air or water pressure

Bernard Forest de Bélidor (1698 – 1761)





REG REFORM – NEW ITEMS, KEY ITEMS

NEPA Update Rule

- Proposed Rule 85 FR 1684 (Jan 10, 2020)
- Hearings Feb 2020: Denver, DC. Comments due 3.10.20.
- Final rule 2020

EPA Strengthening transparency in science

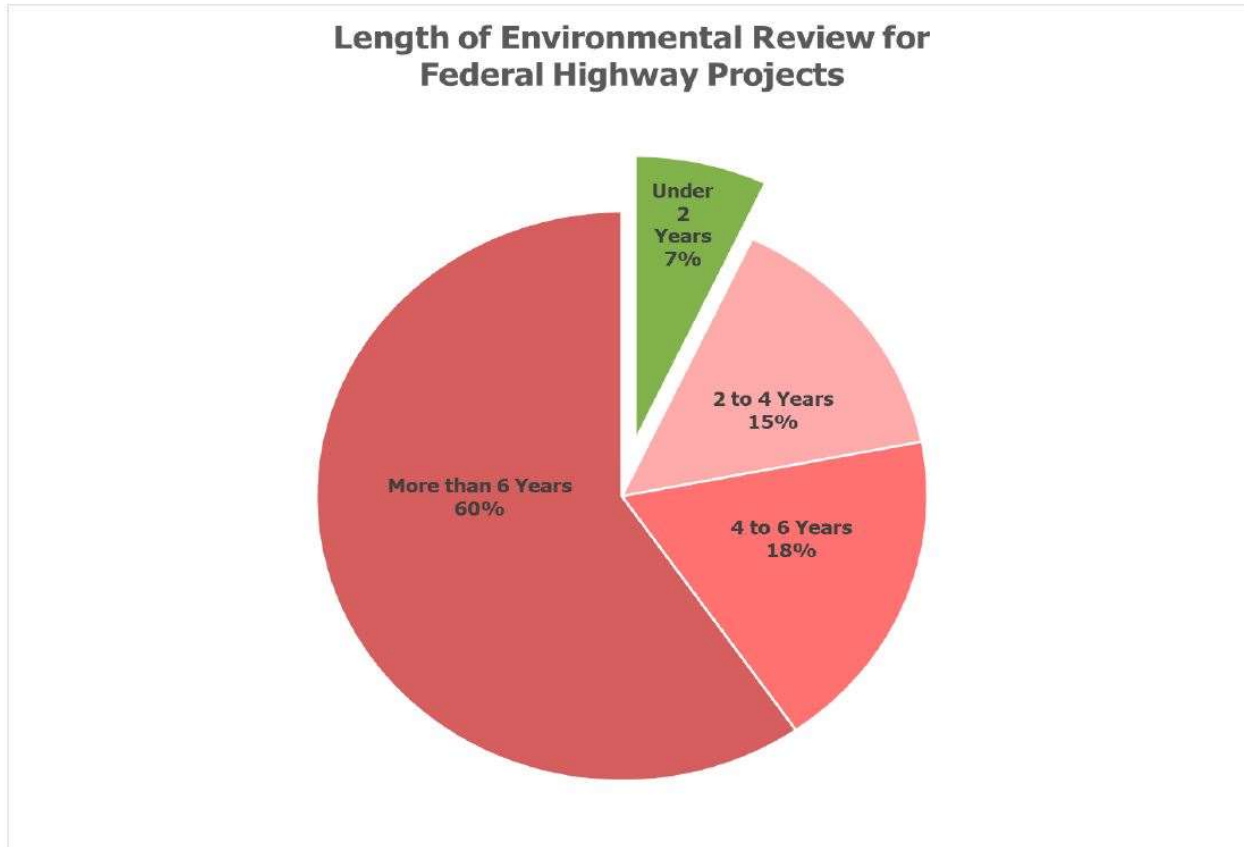
- Proposed 4.30.18. Comments closed. Final 2020.

EPA Diversifying Science Advisory Committees – Pruitt 10.31.17

- Multiple lawsuits

EPA SAB Engagement Wheeler Memo 2.25.20

NEPA UPDATE RULE 2020



Source – CEQ 2018

NEPA UPDATE RULE 2020

“Scope” current & proposed

- = “the range of actions, alternatives, and impacts to be considered in an environmental impact statement”

What “effects” should be considered?

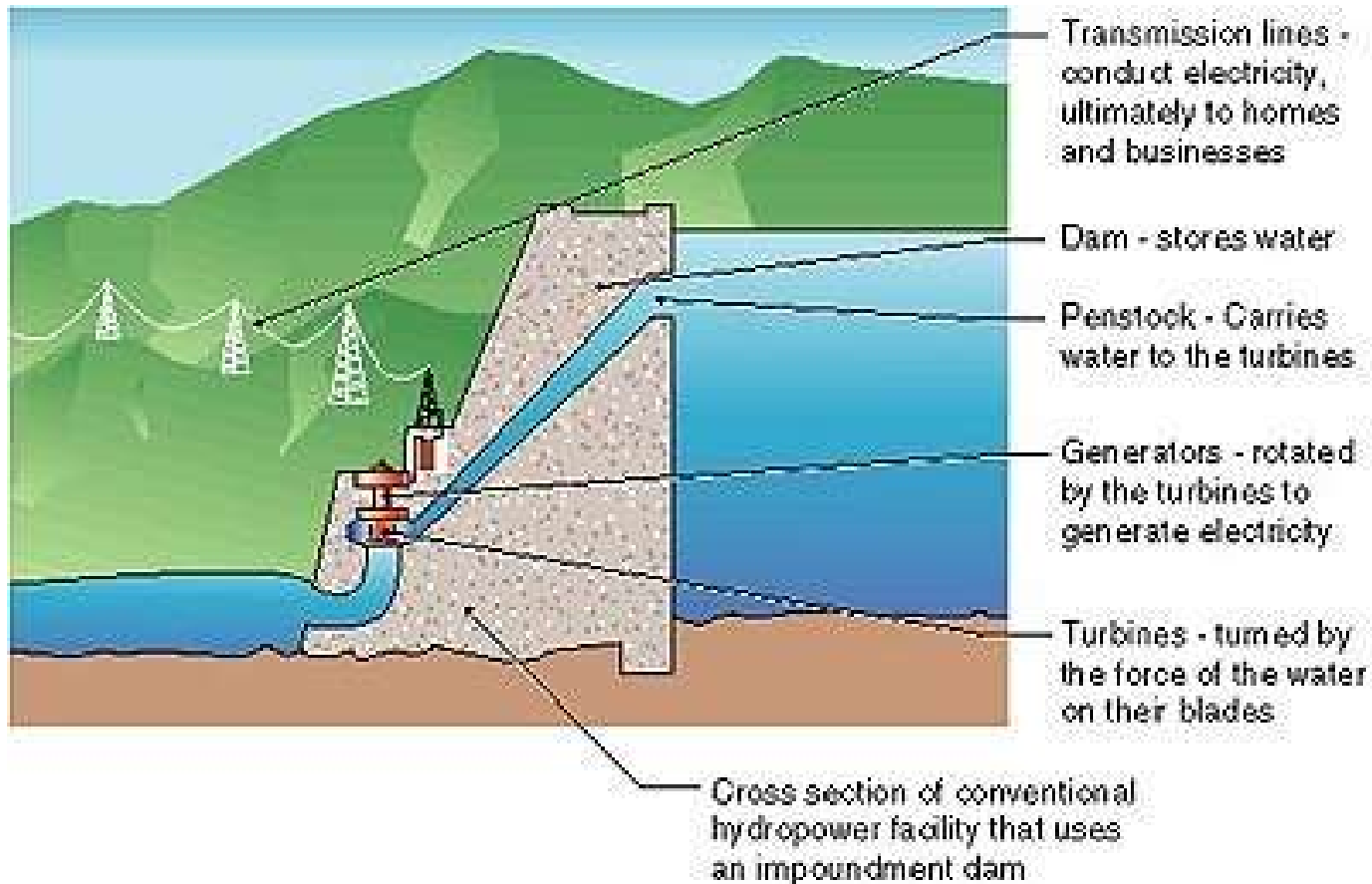
- Deletes distinction between direct/indirect effects
- USSCT: action/impacts “reasonably close causal relationship”
 - Not effects the agency cannot prevent under its authority
- Proposed: effects that are “reasonably foreseeable and have a reasonably close causal relationship to the proposed action” and that would not occur anyway

NEPA UPDATE RULE 2020

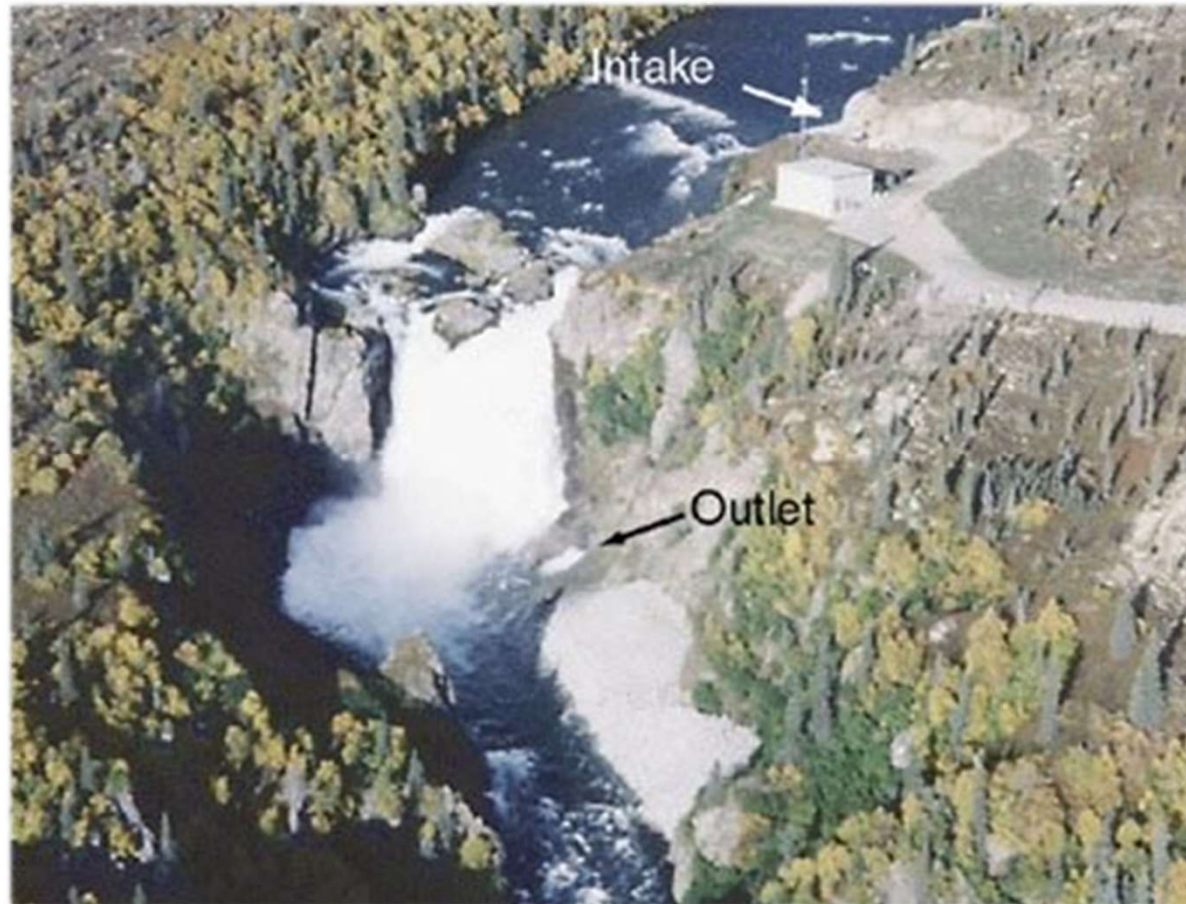
Cumulative Effects / env proxy for climate change impacts

- ENVs: update eliminates cumulative impacts, ergo no climate consideration in NEPA reviews
- Carper, ranking D EPW: climate must be included
- Jason Grumet, BPC Pres: climate won't be solved one permit at a time; need renewable infrastructure faster
- NAM: will enhance environmental protection, eg, DC Metro purple line in litigation for years
- CO: undermines state/local policy goals, eg, CO ski industry and CO climate change plan
- CO IND: NEPA needs update; has delayed important projects like ski lifts, hiking trails, grazing permits

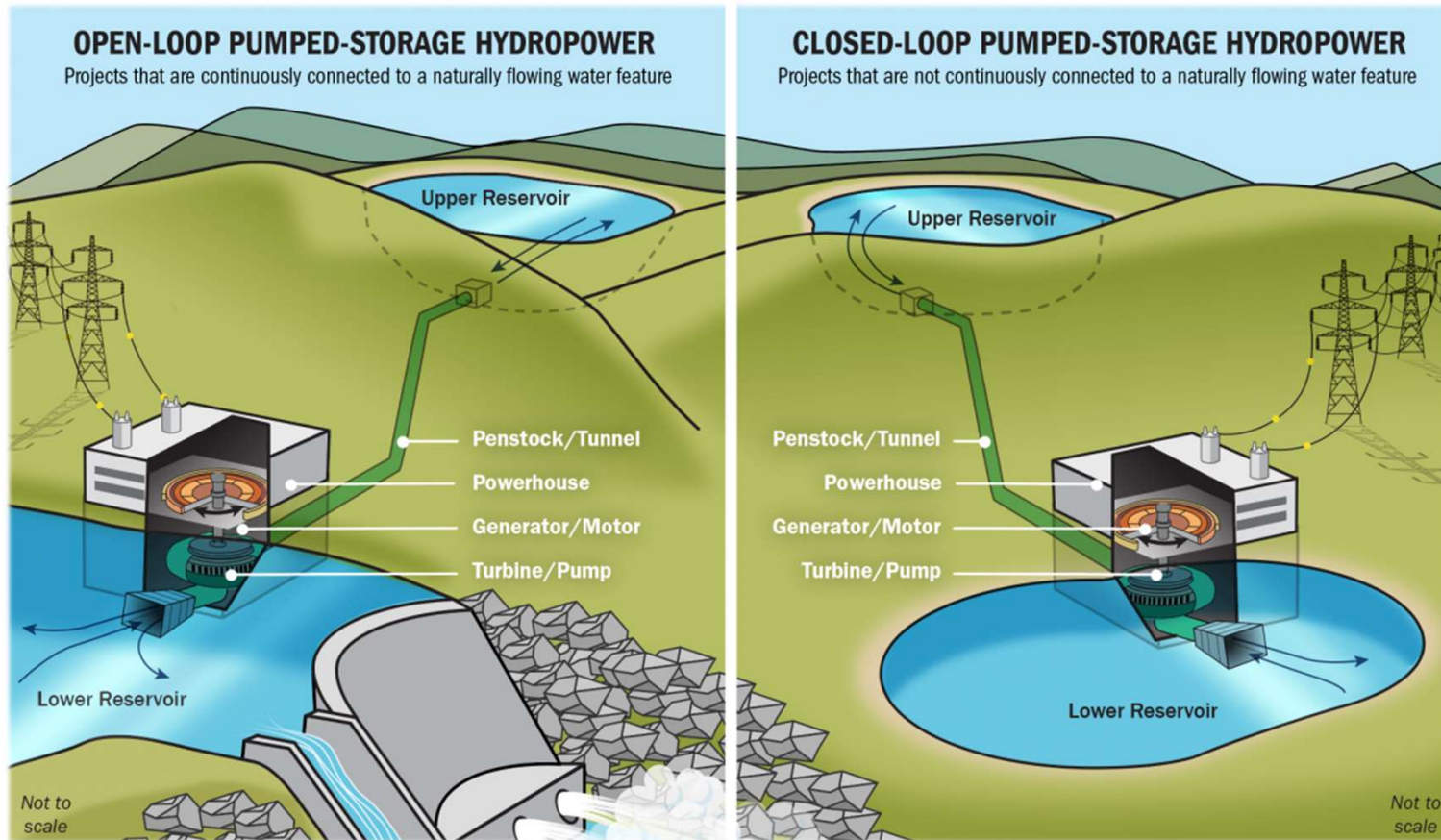
HYDROPOWER - IMPOUNDMENT



HYDROPOWER – DIVERSION / RUN-OF-RIVER



HYDROPOWER – PUMPED STORAGE



EPA DIVERSIFYING SCIENCE ADVISORY PANELS

Pruitt Memo: Strengthening Membership on Federal Advisory Committees 10.31.17

- For Advisors, EPA current grant money = conflict of interest
- Purposes: increase state local tribal govt perspectives; rotate advisors off/on committees; geographic diversity

EPA DIVERSIFYING SCIENCE ADVISORY PANELS

NRDC v. EPA

- Southern Dist NY H: arbitrary, capricious.
- EPA appeal to 1st Circuit.

Physicians for Social Responsibility v. EPA

- Dist DC H: dismiss.
- Physicians appeal to DC Cir. Oral arg 2.19.20, Rogers Tatel Ginsburg

Union of Concerned Scientists

- Dist MA H: dismiss, agency discretion.
- Scientists appeal to 1st Cir. Oral arg Dec 2019

EPA SCIENCE ADVISORY BOARD ENGAGEMENT

Administrator Wheeler Memo:

SAB Engagement Process for Review of Regulatory Actions 2.25.20

- New principles for engaging with SAB once EPA has proposed criteria document, standard, limitation or regulation
- Key goals: timeliness & early notice, transparency & consistency, inter-committee coordination
- Principles announced 4.2019, 6.2019
- Draft Memo 11.2019



OZONE NAAQS WITHIN CAA TIMEFRAME

OZONE NAAQS REVIEW ONGOING

- Draft IRP (Oct 2018)
- Workshops by webinar on initial ISA materials (Oct – Nov 2018)
- Final IRP (Aug 2019)
- Draft ISA (Sept 2019) Comments filed 12.02.19
- Draft PA (Nov 2019) Comments due 12.16.19
- CASAC letters re Draft ISA and Draft PA (2.19.20)
- Final ISA and PA (expected early spring 2020)
- Proposed Rule (expected Oct 2020)
- Final Rule (expected winter 2020/2021)

OZONE ISA – CACAC REVIEW

Integrated Science Assessment

“while providing useful reviews of many aspects of ozone exposures and human health effects in selected studies, does not provide a comprehensive, systematic assessment of the available science relevant to understanding the public health impacts of changes in ambient concentrations of ozone.”

OZONE PA – CASAC REVIEW

Secondary standard evidence does not call it into question

Primary standard divided opinion

- Draft ISA lacks “a sufficiently comprehensive, systematic, accurate, and balanced review of the relevant scientific literature” on health effects, needs clearer discussion of causal determinations.
- Given these limitations, the PA does not “reasonably call into question the adequacy” of the current primary standard
- “Other members of the CASAC agree with the previous CASAC’s findings. . . that. . . 70 ppb may not be protective of public health with an adequate margin of safety.”



PM NAAQS WITHIN CAA TIMEFRAME

PM NAAQS REVIEW ONGOING

- Draft ISA (Oct 2018) Comments closed 12.11.18
- Draft PA (Sept 2019) Comments filed 11.12.19
- CASAC letter re Draft ISA (4.11.19)
- CASAC letter re Draft PA (12.16.19)
- Final ISA (Dec 2019)
- Final PA (Jan 2020)
- Proposed PM Rule to OMB (3.4.20)
- Final Rule (expected winter 2020/2021)

PM FINAL POLICY ASSESSMENT

Big Picture

- Goal of the PA is “to provide as broad an array of policy options as is supportable by the available science....”
- “the available scientific evidence, air quality analyses, and the risk assessment . . . can reasonably be viewed as calling into question the adequacy of the public health protection afforded by the combination of the current annual and 24-hour primary PM_{2.5} standards.”

PM FINAL POLICY ASSESSMENT

Big Picture

“[A] conclusion that the current primary PM standards do provide adequate public health protection would place little weight on the **broad body of epidemiologic evidence** reporting generally positive and **statistically significant health effects associations**, particularly for PM_{2.5} air quality distributions likely to have been **allowed by the current primary standard**, or on the PM_{2.5} risk assessment.”

PM FINAL POLICY ASSESSMENT

Annual Primary PM_{2.5} 12 µg/m³

- considerations for selecting a level “from 10.0 µg/m³ to < 12.0 µg/m³, and a level “below 10.0 µg/m³, and potentially as low as 8.0 µg/m³
- whether a lower standard will be supported will depend on weight placed on various aspects of the evidence

24-hour Primary PM_{2.5} standard 35 µg/m³

- evidence “does not support the need for” a standard lower than the present one of 35 µg/m³ “in conjunction with a lower annual standard level.”
- a standard “at least as low as 30 µg/m³ could be supported

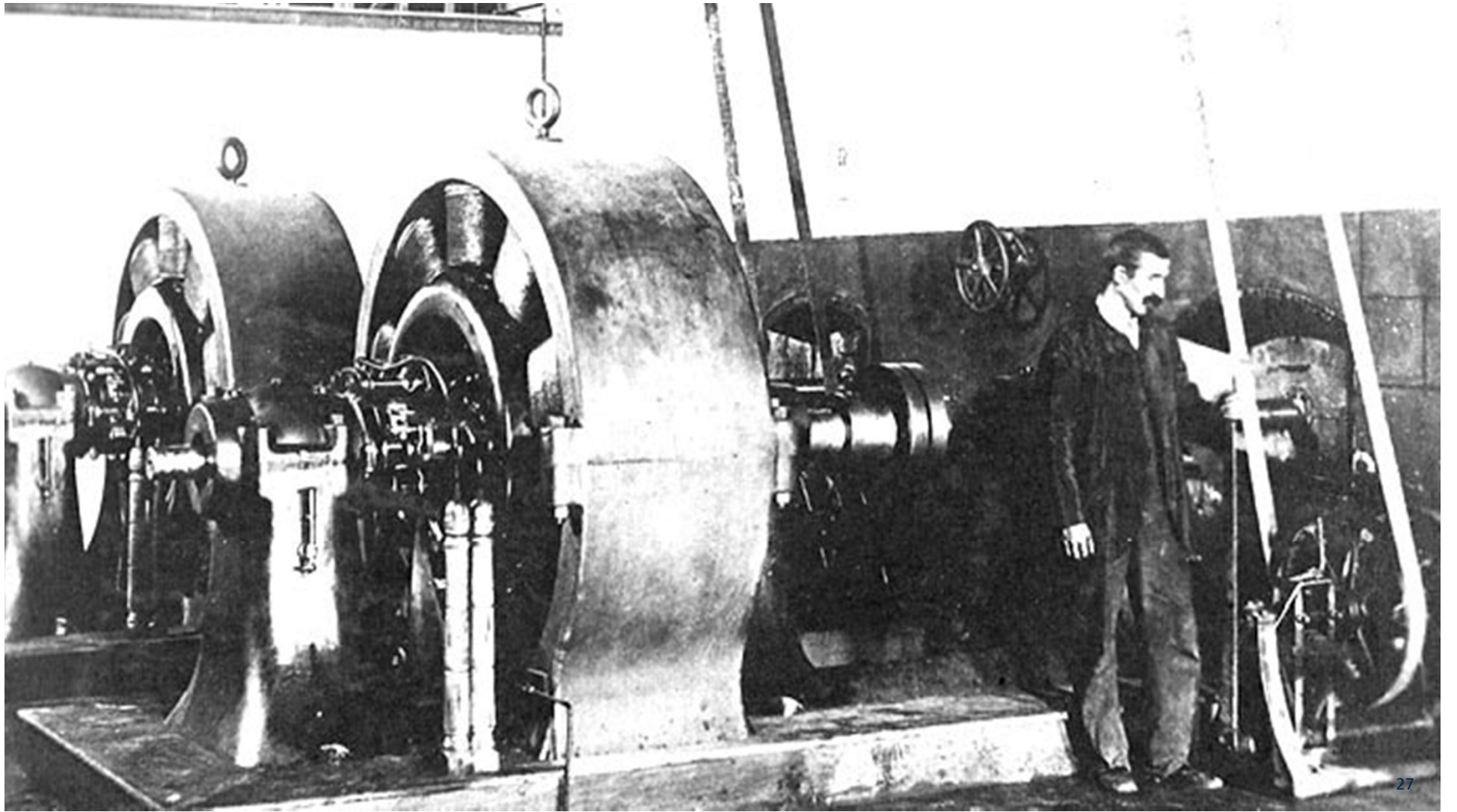
PM FINAL POLICY ASSESSMENT

24-hour Primary PM₁₀ standard

- Scientific evidence does not call into question retaining a 24-hour primary PM₁₀ standard of 150 µg/m³ to protect against exposures to PM_{10-2.5}
- Only reference to CASAC letter
“The Committee does not reach consensus on whether the scientific and technical information support retaining or revising” the primary PM_{2.5} standards.”

Secondary standards

- Evidence “does not call into question the protection afforded by the current secondary PM standards against PM-related welfare effects.”



OTHER CAA REFORM

NEW SOURCE REVIEW: Plantwide Applicability Limit (PAL) Guidance

- EPA draft Guidance re NSR regulations PAL provisions
- Web release 2.13.20. Comments due 3.16.20. Final Guidance 2020.
- CIBO joining coalition comments
- ISSUES covered
 - Permit Reopening
 - Expiration
 - Renewal
 - Termination prior to expiration
 - Monitoring requirements
 - Baseline actual emissions for replacement units

MACT & RTR: MATS SUSD CASE

Chesapeake Climate Action Network v. EPA (15-1015, DC Circuit)

- Oral arg 10.21.19 Judges Tatel, Pillard, Wilkins
- 3.3.20: DC Circuit decision pending

ENVS Argue 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

LA Environmental Action Network v. EPA (17-1257, DC Circuit)

- Oral Arg 12.4.19. Judges Henderson, Pillard, Sentelle
- 3.3.20: DC Cir decision pending

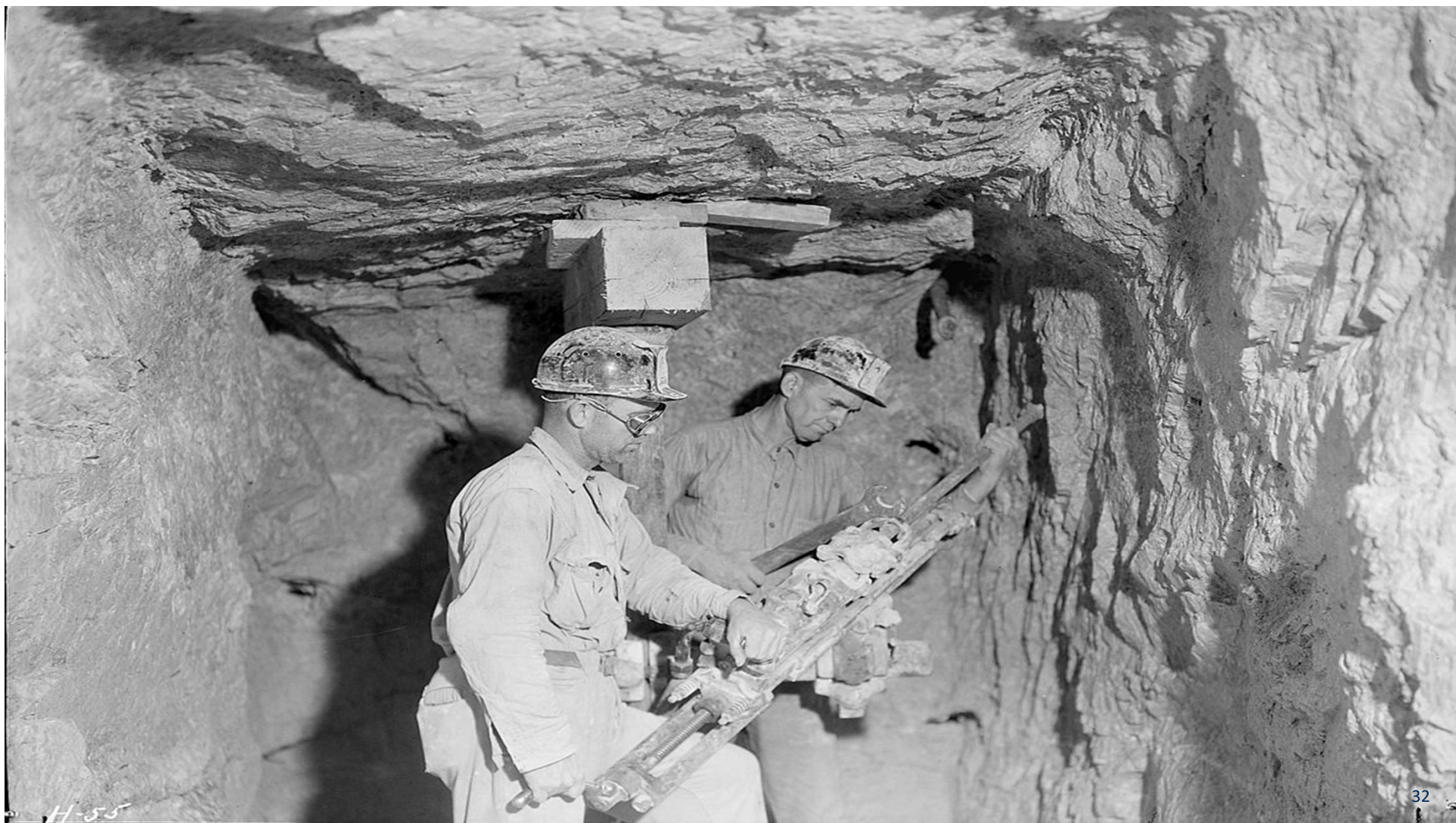
ISSUE: In the RTR, must EPA set emission standards for Hg, dioxin, other HAP without limits?

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

Photo: Bureau of Reclamation.







CAA NY 126 PETITION – *NY v. EPA*

NY v. EPA (19-1231, DC Circuit)

NY NJ NYC CAA 126 Petition: NO_x emissions from 357 sources in 9 States prevent nonattainment of 2008 & 2015 Oz NAAQS

- IL IN MI OH PA KY WV VA MD
- NY seeks RACT or NY RACT for sources, short term reductions
- EPA denied Petition 84 FR 56,058 (Oct 18 2019)

Court granted NY Motion to Expedite (sought oral argument by May)

- NY /ENV Reply Briefs 3.12.20. Final Briefs 4.2.20.
- Oral argument “first appropriate date after briefing”

NY 126 PETITION – *NY v. EPA*

PETITIONERS	INTERVENORS		AMICI
NY NJ NYC	Adirondack Council EDF Sierra Club		
RESPONDENT	INTERVENORS		AMICI
EPA	Air Stewardship Coalition ACC AF&PM API PCA Kinder Morgan Holcim	Lima Refining Marathon NRECA SABIC TC Energy	US Chamber Midwest Ozone Group NAM Big Rivers Electric GenOn Peoples Gas Dominion Energy KY

NY V. EPA: “RELATED CASE” MD v. EPA

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

- DE MD CAA §126 Petition: Nonattainment with 2008 & 2015 Oz NAAQS caused by 36 sources in 5 states
IN PA OH KY WV
- Oral argument 1.16.20
- Judges Garland, Henderson, Katsas

NY §126 PETITION – *NY v. EPA*

LAW

4-Step framework for analyzing 126 Petitions

- identify downwind areas with air-quality problems
- which upwind States “linked” to downwind air-quality problems
- which upwind sources in linked State “significantly contribute”
- implement necessary emissions reductions within upwind State

EPA may grant Petition if EPA finds that upwind source “*emits or would emit* any air pollutant in violation” of Section 126

NY §126 PETITION – *NY v. EPA*

ISSUES

- Reliance on CSAPR Update and Close-Out Rules
 - Update Rule found “inadequate” in *Wisc v. EPA* (DC Cir 2019)
 - Close-Out Rule vacated in *NY v. EPA* (DC Cir 2019)
- modeling for 2023
NY: 2008 rule compliance date 2021, based on 2018-19-20 data
- timing of nonattainment – present or future
NY: 126 addresses current nonattainment, present nonattainment at CT monitors, 2016-18 design value

NY CAA §126 PETITION – *NY v. EPA*

ISSUES

- Nonattainment “area” is multistate
NY: Petition can include data from CT monitors
- Burden of proof and EPA’s obligation under § 126
EPA: NY has burden to show source source-specific significant contribution but gives no new information

REMEDY

NY: vacature & remand with 60-day deadline for EPA to respond

NY CAA §126 PETITION – CHRONOLOGY

2008 ozone stand = 75 ppb

- **Aug 2011 CSAPR**

- 2012 – 2015

- EPA Recon, DC Cir vacate, USSCT reinstate, DC Cir 13 State budgets invalid

- **Oct 2016 CSAPR Update**

- 2017 projection

- Time short, partial assessment, only EGUs w/ controls

- **Dec 2018 Close Out Rule**

- 2023 projection

- Sources not covered in CSAPR Update

NY CAA §126 PETITION – CHRONOLOGY

2008 ozone stand = 75 ppb

- **Aug 2011** CSAPR
- **Oct 2016** CSAPR Update 2017 projection
- **Dec 2018** Close Out Rule 2023 projection

2015 ozone stand = 70 ppb 2020 implementation early stages

- 2017 Area designations due
- Oct 2018 State Good Neighbor Plans due. NJ late.
- Mar 2018 NY §126 Petition -- 2008 & 2015 standards
- Oct 03 2019 CSAPR Update remand (*WI v EPA*)
- Sep 20 2019 Ct deadline for EPA Grant/Deny NY Petition
- Oct 01 2019 CSAPR Close Out Rule vacated (*NY v. EPA II*)

NY CAA §126 PETITION – *NY v. EPA*

NY VIEW OF THE WORLD

NY will not attain the ozone 2008 or 2015 NAAQS

- extensive evidence that sources in 9 States are the cause

EPA denied NY Petition based in large part on a finding that CSAPR Update rule resolved the problem. But

- CSAPR Update declared inadequate and CSAPR Close Out vacated

EPA ignored detailed data from NY and in the record

- puts burden on NY to provide information that only EPA can collect
- that EPA was statutorily obligated to collect years ago

NY CAA §126 PETITION – NY v. EPA

EPA VIEW OF THE WORLD

Good Neighbor Provision CAA 7410(a)(2)(D)(i)(I)

1. SIP showing State will prevent downwind impact
2. §126 Petition EPA if other States not good neighbors

Timing of these shows how supposed to work

1. 3 years to do Good Neighbor SIP
2. EPA 60 days to grant/deny §126 Petition

Regional effects >>> EPA regional rule

§126 Petitions >> State shows specific sources & impacts

- NY Petition generic, incorrect, demands generic remedy
- EPA used best available data, 2023 projection

STAGES OF CONSTRUCTION IN THE BUILDING OF BOULDER DAM
ALL VIEWS TAKEN FROM THE SAME POINT, LOOKING UPSTREAM.



COMMENCEMENT
OF CONSTRUCTION
1931



FIRST CONCRETE
POURING
1933

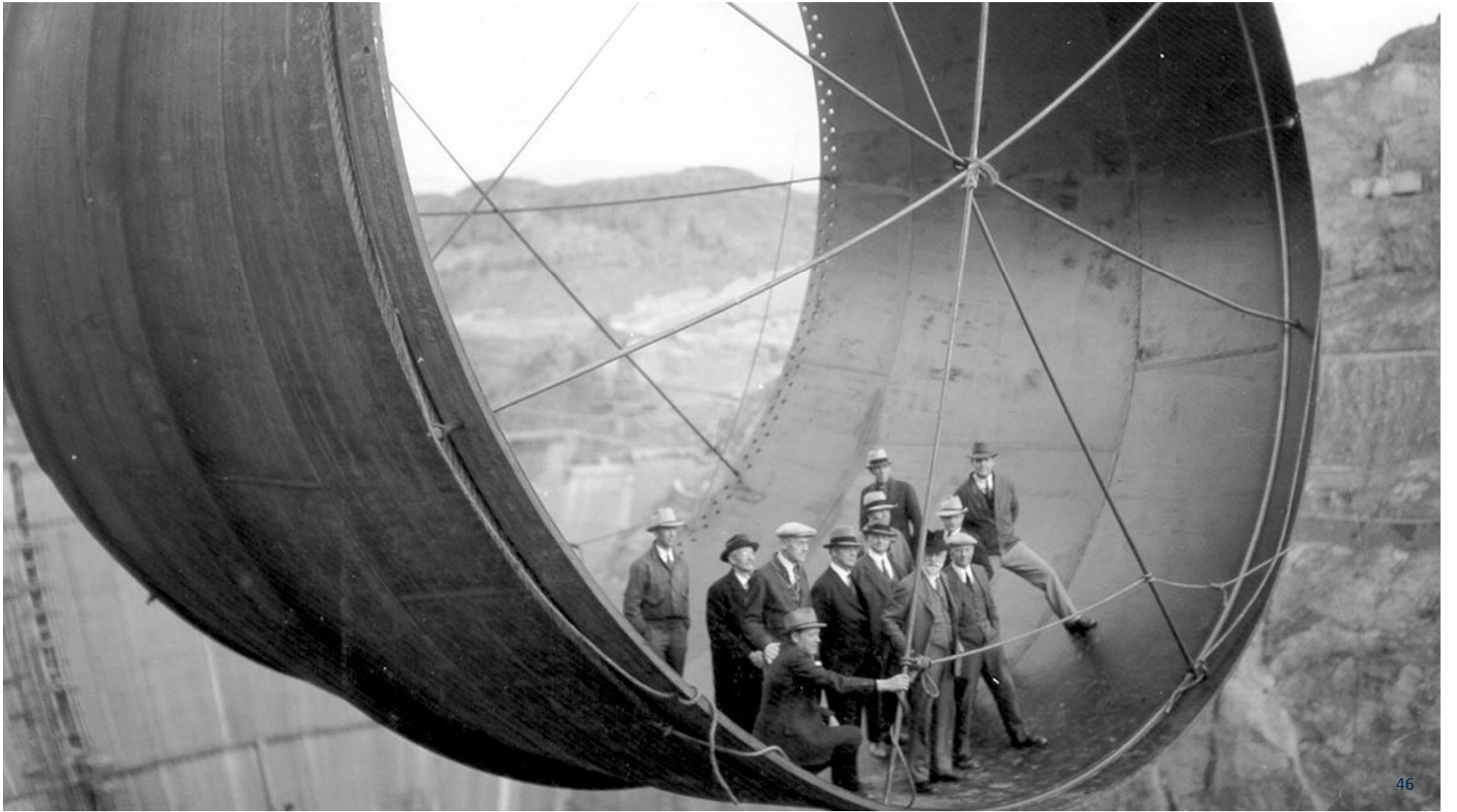


THE DAM HALF
COMPLETED
1934



BOULDER DAM
TODAY
1935





CAA RISK MANAGEMENT PLAN RULE

Accidental Release Prevention Requirements under the Clean Air Act
Risk Management Program (RMP) 40 CFR Part 68

- Jan 2017 Final RMP Amendments in Fed Reg
- Jan 2017 Proposed Revision to Jan 2017 / codified Rule
- Dec 2019 Final Revisions in Fed Reg

CAA RISK MANAGEMENT PLAN RULE

RESCINDED

- third-party to conduct the compliance audit after an RMP reportable accident
- assess theoretically safer technology and alternative risk management measures for reducing risk from process hazards
- root cause analysis after RMP reportable accident or near miss
- Make Facility Chemical Hazard Information (broadly defined) available to public on request

CAA RISK MANAGEMENT PLAN RULE

RETAINED or RETAINED WITH MODIFICATIONS

- Facilities must coordinate annually with local response organizations and document coordination activities
- annual notification drills
 - Compliance date: do first exercise within 5 years
- field and tabletop exercises
 - Compliance date: develop plan within 4 years
- public meeting within 90 days of accident with **offsite** impact

CAA RISK MANAGEMENT PLAN RULE

Compliance Dates: [Assuming December 2019 Final Rule Effective Date]	
What	Due Date
Public Meetings	Within 90 days of any qualifying accident that occurs after March 15, 2021
Develop Emergency Response Programs	Within three years of owner or operator determining that facility is subject to the provisions
Develop exercise plans and schedules	December 2023
Conduct first notification drill	December 2024
Conduct first tabletop exercise	December 2026
Conduct first field exercise	According to the exercise schedule established by the owner or operator in coordination with local response agencies
Submit RMP with new information elements	The owner or operator would provide new information elements with any initial RMP or RMP resubmission made after December 2024.
Comply with new emergency coordination requirements	Already in effect as of September 21, 2018
Comply with remaining minor accident prevention provisions	Already in effect as of September 21, 2018

CAA RISK MANAGEMENT PLAN RULE

Petitions for Admin Reconsideration and Stay of “Rollback Rule”

- 17 States + Philly
NY NJ DE MD DC PA, MA RI VT ME, IL MI MN WI, NM, OR WA
- ENVs, Labor Unions
- Claim: issues arose after comment period of central relevance

Air Alliance Houston v. EPA, No. 19-1260 (DC Cir)

Petitioners: ENVs, 16 States, Philly, Harris County TX, labor unions

- United Steel Workers: “Eliminating these requirements will allow a profit-hungry industry to police itself while putting workers, first responders and the public at risk.”

CERCLA 108(b) FINANCIAL ASSURANCE

CERCLA 108(b): EPA, do FA rules reflecting degree & duration of risk

- ENV deadline suit settled: cover these industries by 2024

1. Hardrock mining

- *Idaho Conservation League v. EPA* (DC Cir 18-1141)
- Court upheld EPA rule not to do FA requirements

2. Electric Power Generation Transmission Distribution

- Proposed no FA, comment closed 9.27.19

3. Petroleum /coal products

- Proposed no FA, comment closed 2.21.20

4. Chemicals

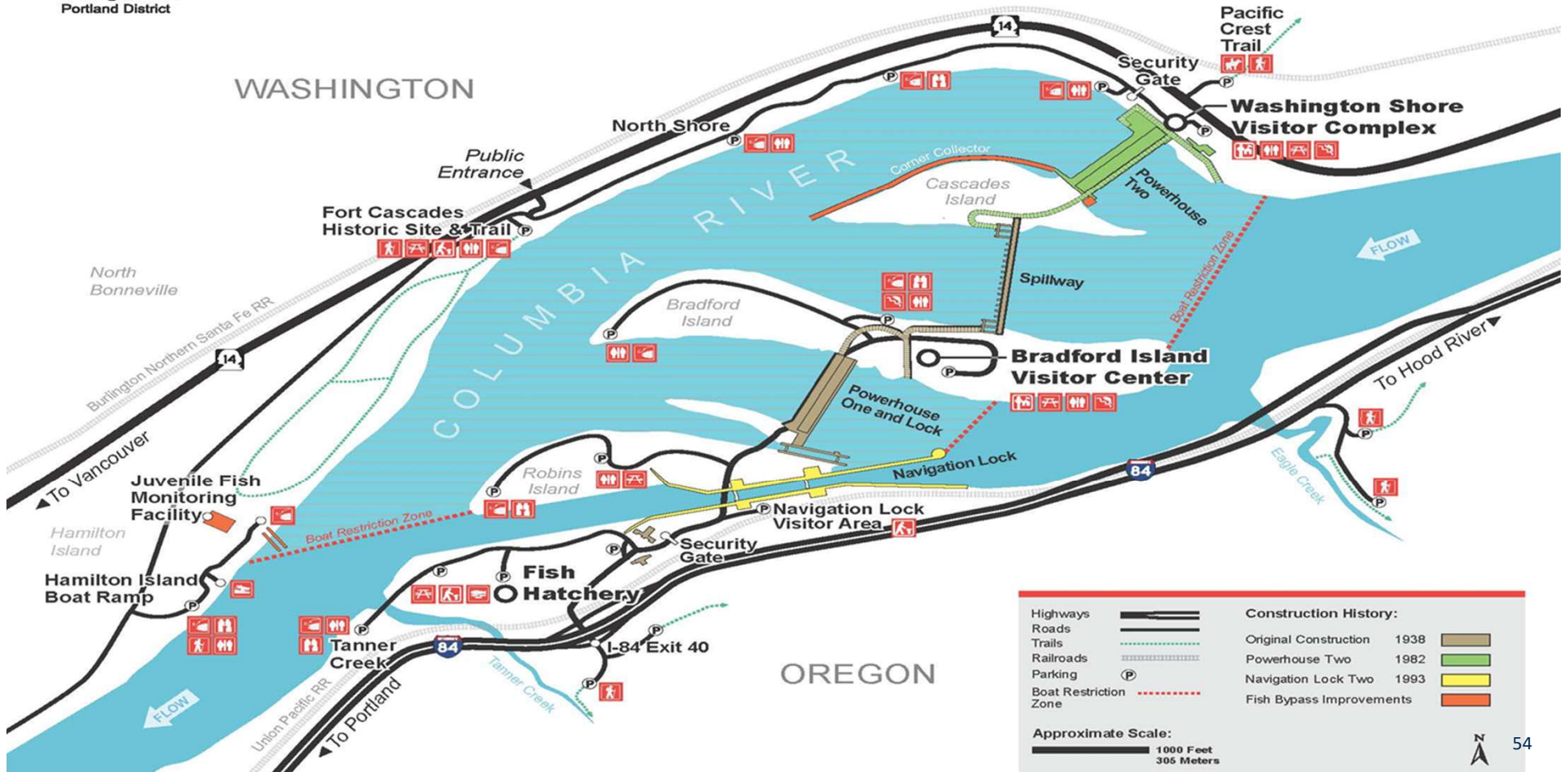
- Proposed no FA, comment closes 4.21.20





US Army Corps
of Engineers
Portland District

Bonneville Lock and Dam





US SUPREME COURT

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 Argument 11.6.19

ARCO v. Christian (USSCT 17-1498)

- ISSUE: Whether common law damages may be sought where EPA has implemented a CERCLA cleanup
- Oral Argument 12.3.19

US SUPREME COURT

Atlantic pipeline case

US Forest Service v. Cowpasture River Preservation Assoc (18-1587)

ISSUE: Whether a gas pipeline can cross (600 feet beneath) the Appalachian Trail

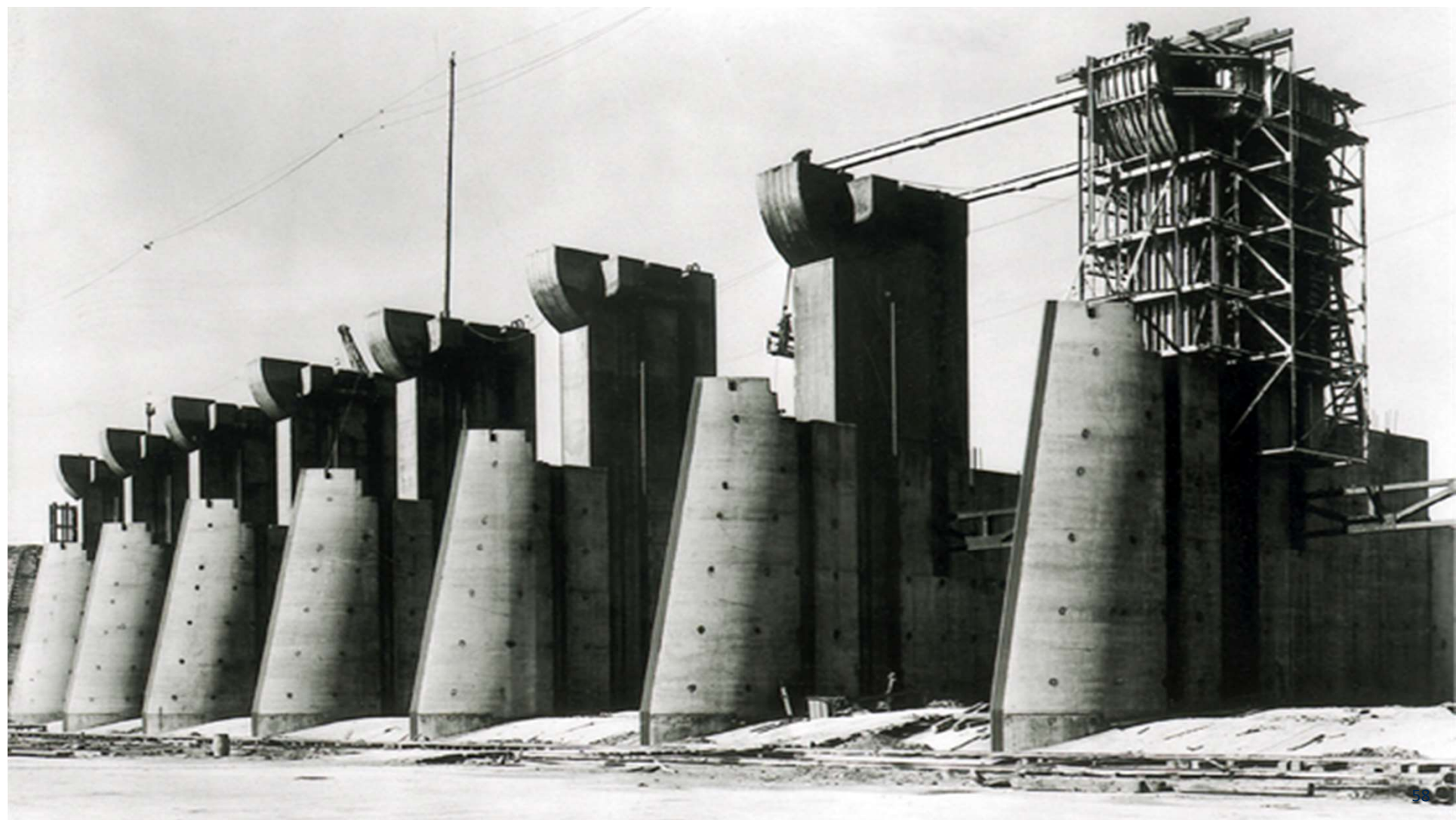
- Oral Argument 11.6.19

Cooling Water Intake FOIA case

US Fish & Wildlife Svce & NMFS v. Sierra Club, (19-547)

ISSUE: whether FOIA deliberative process exemption covers draft opinions from the consultation process

- cert granted 2.24.20
- Sierra funded in part by Bloomberg Philanthropies



CLIMATE LITIGATION – GENERAL

Right to stable climate, nuisance, fossil fuel use

- *Juliana v. US* 9th Cir, US DCt OR dismissed 2-1, rehearing petition coming
- *Baltimore v. BP* 4th Cir Case belongs in state court, Affirm DCt
- *Sinnok v. Alaska* Alaska SCT oral arg 10.09.19 decision pending

NY v. Exxon climate fraud case H: for Exxon, NY will not appeal

MA v. Exxon pending

Shareholder derivative cases: misleading public re climate liabilities

Rulemaking opposition or petition

Valve turners, constitutional right to offer necessity defense

CLIMATE LITIGATION: CA – CANADA EMISSIONS TRADING

US v. CA (Eastern District CA, 2:19-cv-02142)

PLAINTIFF	USA
DEFENDANTS	CA CA Governor Gavin Newsom California Air Resources Board (CARB) Western Climate Initiative (WCI) Mary Nichols (CARB Chair, WCI Board) Jared Blumenfeld (CalEPA Secretary, WCI Board) Kip Lipper (WCI Board)
INTERVENORS FOR DEFENDANTS	Environmental Defense Fund Natural Resources Defense Council International Emissions Trading Association
AMICI FOR DEFENDANTS	Professors of Foreign Relations Law Nature Conservancy CT, MA, ME, RI, VT, NJ, NY, DE, MD, MI, IL, MN, OR, WA Former US Diplomats and Govt Officials

CLIMATE CASE: CA-CANADA EMISSIONS TRADING

US v. CA (Eastern District CA, 2:19-cv-02142)

US argues

- CA violates US Constitution by participating in the treaty with Canada and trading emissions credits trading across international border with Canada

CA argues

- US lacks standing to sue

Summary Judgment motions briefed

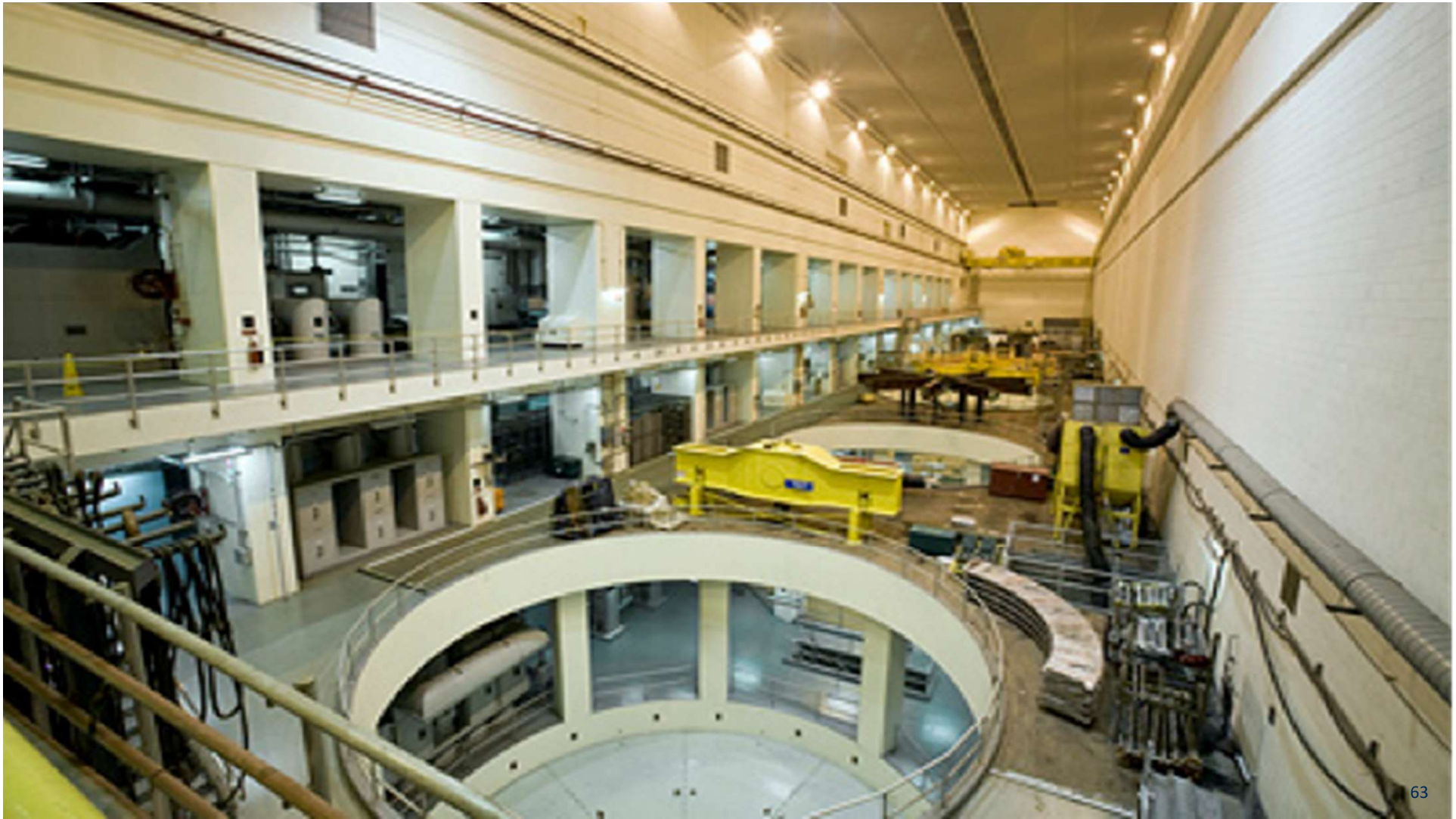
Oral argument 3.9.20, 1:30 pm CT, Judge William B. Shubb

CLIMATE CASE: CA-CANADA EMISSIONS TRADING

US v. CA (Eastern District CA, 2:19-cv-02142)

ISSUES

- Article I US Constitution Treaty Clause
- Article I US Constitution Compact Clause
- Standing of US --- what is the injury?



CLIMATE LITIGATION: CA TAILPIPE EMISSIONS REGULATION
CA v. US DOT NHTSA (DISTRICT DC, 2:19-CV-02826)

<p>PLAINTIFFS</p>	<p>States: CA, CO, CT, DE, DC, HI, IL, ME, MD, MI, MN, NV, NJ, NM, NY, NC, OR, RI, VT, WA, WI, MA, PA, VA</p> <p>Cities: LA, NY, and San Francisco</p> <p>South Coast Air Quality Management District Bay Area Air Quality Management District Sacramento Metropolitan Air Quality Management District</p> <p>ENVS EDF Sierra Club NRDC Center for Biological Diversity Conservation Law Foundation Environment America Public Citizen Union of Concerned Scientists Environmental Law & Policy Center</p>
<p>INTERVENOR PLAINTIFFS</p>	<p>Calpine Consolidated Edison Natl Coalition for Advanced Transportation Natl Grid NY Power Authority Power Companies Climate Coalition</p>

CLIMATE LITIGATION: CA TAILPIPE EMISSIONS REGULATION

CA v. US DOT NHTSA (District DC, 2:19-cv-02826)

DEFENDANTS	US USDOT (US Department of Transportation NHTSA (National Highway Traffic Safety Administration)
INTERVENOR DEFENDANTS	Association of Global Automakers, Inc. Coalition for Sustainable Automotive Regulation

CLIMATE CASE: CA TAILPIPE EMISSIONS REGULATION

CA v. DOT & NHTSA (U.S. District Court of DC, 2:19-cv-02826)

Key procedural disputes

- Timing of proceedings
- US court jurisdiction – District or Circuit Court

ISSUES

- EPA/NHTSA CAFE standards
- EPA withdrawal of CAA CA Waiver for CA GHG and ZEV programs (CAA § 209)
- NHTSA preemption language

CLIMATE CASES: *US v. CA* AND *CA v. US*

BROADER IMPLICATIONS

