CIBO Environment & Energy Virtual Meeting Litigation & Regulatory Update June 10, 2020 Lisa M. Jaeger Bracewell LLP

HIGHLIGHTS SINCE WE LAST MET....

- MACT/RTR
 - BMACT remand out (Jay)
 - Pulp/paper RTR DC Circuit decision
- NY 126 Petition Ozone
 - oral argument 5.7.20
 - MD 126 Petition DC Circuit decision 5.19.20
- Water
 - Maui SCT decision NPDES /groundwater
 - WOTUS rule out and back in court
 - Nationwide permit on hold

REG REFORM – PENDING

NEPA Update Rule

Proposed 1.10.20. Comments closed. Final rule OMB 6.2.20.

EPA Rule - Strengthening Transparency in Science

- Proposed 4.30.18. Comments closed. Final 2020
- EPA Directive Diversifying Science Advisory Committees (10.31.17)
- Science Advisors with current EPA grants = conflict of interest Executive Order 13891 /OMB Memo - Transparent Use of Guidance
- All Agencies must post all Guidance documents on web EPA Rule CAA Cost Benefit – Consistency & Transparency
 - Proposed 6.4.20. 45 days comment. Final rule summer 2020.

EPA DIRECTIVE DIVERSIFYING SCIENCE ADVISORY PANELS

Physicians for Social Responsibility v. EPA (DC Cir 19-5104, 4.21.20)

- Rogers Tatel (Opinion) Ginsburg
- DC Distr Ct Dismissed agency discretion
- DC Cir Reverse/Remand
 - 1. Court can review Directive presumption of reviewability & court guided by GSA rules under FACA
 - 2. Arbitrary/capricious no rational explanation for EPA changed position that taking EPA grant = conflict
 - Procedurally flawed EPA needed prior approval by Office of Government Ethics to supplement ethics rules defining taking EPA grant as conflict

REG REFORM: EPA GUIDANCE PORTAL

Exec Order 13891 Transparent Use of Guidance Documents (10.09.19)

- All Agencies:
 - *existing* Guidance: available, indexed, searchable on website
- new significant Guidance: notice/comment transparent process
 OMB Implementing Memorandum M-20-02 (10.31.20)
- Feb 28: portals up and populated
- Jun 27: reinstate any documents not posted, ie rescinded
- Apr 28: process in place for new Guidance
 EPA Guidance Portal Notice of Availability
- 85 Fed Reg 11986 (Feb 28, 2020)
- https://epa.gov/guidance
- PROBLEMS

PM NAAQS WITHIN CAA TIMEFRAME

PM NAAQS REVIEW ONGOING

- Draft ISA (Oct 2018)
- Draft PA (Sept 2019)
- 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 (85 FR 24094, 4.30.20)
- Final Rule (expected winter 2020/2021)

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)
- Draft PA (Nov 2019)
- CASAC letters re Draft ISA and Draft PA (2.19.20)
- Final ISA (4.20.20) and PA (5.29.20)
- Proposed Rule will go to OMB (Fed Reg expected Oct 2020)
- Final Rule (expected winter 2020/2021)

PM NAAQS – OZ NAAQS PROPOSED 2020 RULES

PM NAAQS

Proposed Rule (85 FR 24094, 4.30.20)

- Virtual hearings. Comments due 6.29.20. Final winter 2020/21.
- Retained all existing standards, primary, secondary, pm10, pm2.5
- Staff recommended tighter pm2.5 primary standard

OZ NAAQS

Proposed Rule (Oct 2020). Final (winter 2020/21).

- Staff/CASAC recommendations, predict standards will be retained
- Secondary (70 ppb 8-hr) standard remanded, will not be addressed

MACT & RTR: Boiler MACT & MATS

BMACT Remand Rule

MATS 2020 Rule (Reconsideration of Supplemental Finding & RTR)

- 85 FR 31286 (May 22, 2020)
- final rule reversing finding that it is appropriate and necessary to regulate hazardous air pollution from coal- and oil-fired power plants
- Chesapeake Climate Action v. EPA (DC Cir 15-1192)

MACT & RTR: MATS SU/SD CASE

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

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

ENVS Argue

- 1. No notice/comment on best performers
- 2. 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: MATS SU/SD CASE

3.13.20 Decision Judges Pillard (Opinion) Tatel Wilkins

- Remanded the MATS SU/SD provisions to EPA for failure to do notice/comment on EPA analysis of best performers for su/sd
- EPA used best performers to establish end point of startup in work practice standard.
- Tech Support Document had data EPA used to define end of startup, but did not identify best performers.
- TSD showed only EPA's analysis of the average time for engaging APCDs by the entire source category.

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

2-1 Decision (04.21.20)

Pillard (Opinion) Henderson Dissent Sentelle

- ISSUE: In the CAA §112(d)(6) technology review, must EPA set emission limits for pollutants that have no limits in the underlying MACT standard?
- HELD: "EPA's §112(d)(6) review must address all listed air toxics the source category emits."

ARGUMENTS

- ENV mandatory "emission standard" includes every listed HAP
- EPA EPA discretion EPA must regulate all HAP but can determine when
- IND prohibited review standards "promulgated"; challenge in 60 days

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

LAW

"emission standard[s]" multiple references

- MACT 112(d) EPA shall set "emission standards" for each source category
- Tech Review 112(d)(6) EPA shall review/revise "as necessary" (taking into account practices, processes, control technologies) "emission standards" promulgated, every 8 years at least
- Definitions section 112(a) not a defined term

LA Environmental Action Network v. EPA (DC Circuit 17-1257) Pillard (Opinion) Henderson

No dispute, EPA must set standards for all listed pollutants for source category.

CAA clear (Chevron I), EPA must supply missing controls in a 112(d)(6) review. Quoting J.Pillard:

- EPA must "promulgate regulations establishing *emission standards* for each category or subcategory of major sources." § 112(d)(1). (CAA text)
- Each source category's *"emission standard"* (J.Pillard) must specify the source's maximum allowable emission "of hazardous air pollutants listed for regulation." § 112(d)(1).

EPA says court-ordered deadline, could not evaluate these for tech review

- Did ICR in 2011, 100% response, did not do standards
- Sierra deadline suit 2015, deadlines agreed to by EPA, did not seek extension
- Ample time, no excuse

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

References Majority Opinion:

"We read the statutory text to require EPA during its section 112(d)(6) review to establish any missing limits. Because we conclude that the text of the statute unambiguously supports Petitioners' reading, we resolve the case without resort to any deference to EPA under *Chevron...*"

Sentelle:

As EPA explains, "emission standards," despite its susceptibility to being understood as source specific (112(d)(1)), is defined in the Act to refer to toxic-specific, not source-specific, standards.

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

- Remand without vacatur
- Next steps
- Implications for other MACTs / RTRs
- Implications for *Chevron* analysis
- Rehearing Petitions due 06-26-20

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

Pillard (Opinion) Henderson

- "Again, the core demand of section 112 is that EPA promulgate emission standards for every source category *addressing* all listed hazardous air pollutants."
- "We conclude that when EPA reviews an existing standard that *fails to address* many of the listed air toxics the source category emits, adding limits for those overlooked toxics is a "necessary" revision under section 112(d)(6)."
 BUT
- "The obligatory periodic review and revision of "emission standards" thus must ensure that each source category's standard *imposes appropriate limits*—not just on whatever subset of toxics the existing standard addressed, but on all the toxics the source category emits."
- "EPA must conform them to the basic requisites of "emission standards" under section 112, *including by setting controls* on previously unaddressed hazardous air pollutants."

CAA NY 126 PETITION – NY v. EPA

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

NY NJ NYC CAA 126 Petition: NOx 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)

Oral argument 5.07.20

Judges Srinivasan Griffith Millet

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

DC Circuit Decision 5.19.20 – per curiam

Judges Garland, Henderson, Katsas

§126 PETITION – Legal Framework

Good Neighbor provision 110(a)(2)(D)

 SIP must prevent signif contribution to downwind nonattainment §126 State asks EPA to find upwind sources violating Good Neighbor

4-Steps for analyzing 126 Petitions

- 1. downwind areas with nonattainment problems
- 2. links from downwind areas to upwind States
- 3. upwind sources that "significantly contribute" to nonattainment
 - = ones for which cost-effective controls will reduce emissions
- 4. implement emissions reductions in upwind State

NY §126 PETITION – NY v. EPA

ISSUES

- 126 Petitioner burden of proof
- Reliance on CSAPR Update and Close-Out Rules re 2008 rule
- modeling for 2023, 2008 rule compliance date 2021
- timing of nonattainment NY: 126 for current nonattainment
- Reliance on out-of-state monitors to show nonattainment

NY v. EPA: "RELATED CASE" MD v. EPA

ISSUES / DC CIRCUIT OPINION 5.19.20 Who has burden of proof of §126 violation?

Step 1, clearly Petitioner

Can violation be based on out-of –state monitors?

Yes, good neighbor shared responsibility

For what year must EPA assess downwind nonattainment?

- Cannot address current nonattainment only future
- Next downwind nonattainment date

Who has burden of proof Step 3 – cost-effective controls?

- Petitioner
- Sources w/ SCR cost effective if optimize controls
- Sources w/o SCR CSAPR said SCR not cost-effective BUT vacated

NY §126 PETITION – NY v. EPA

- Reliance on CSAPR Update and Close-Out Rules re 2008 rule
- modeling for 2023, 2008 rule compliance date 2021
- timing of nonattainment NY: 126 for current nonattainment
- Reliance on out-of-state monitors to show nonattainment
- 126 Petitioner burden of proof Step 3 cost effective controls

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

Petitions for Admin Reconsideration and Stay of Final Revised 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 closed 5.6.20

CLEAN WATER ACT "WATERS OF THE US"

Final 2020 Rule (4.21.20)

4 categories of waters are jurisdictional:

- Territorial seas & traditional navigable waters
- perennial & intermittent tributaries that contribute surface flow
- Lakes ponds impoundments that are standing bodies of water
- Wetlands abutting navigable water
 - Change from 2015 rule, covered adjacent wetlands
- 14 waters not jurisdictional, including:
- Groundwater including if drained through subsurface system
- Ephemeral features

CLEAN WATER ACT "WATERS OF THE US"

Final 2020 Rule (4.21.20)

Lawsuits in multiple US courts – Clean Water Act

- NM Cattlemen
- ENVs -- Baltimore Dist Ct
- ENVs -- Dist Ct SC
- 17 States -- ND CA
- Not yet consolidated

CLEAN WATER ACT NATIONWIDE PERMITS

Rule at OMB

Delayed due to MT case, revising preamble

MT case Northern Plains Resource Council v. US Army Corps

- MT District Ct blocked NW Permit 12 for construction of oil/gas pipelines
- 9th Cir upheld District Ct
- Next stop: rehearing en banc &/or USSCT

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

6-3 Decision (4.23.20) Opinion Breyer. Dissent Thomas, Gorsuch.

Concur Kavanaugh. Dissent Alito.

- 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.
- HELD: CWA requires a NPDES permit where the indirect discharge eventually reaching navigable waters is the "functional equivalent of a direct discharge"

County of Maui v. HI Wildlife Fund (USSCT 18-260) 6-3 Decision (4.23.20) Majority Opinion Breyer

Rejects 9th Circuit, Maui, US interpretations of NPDES provision

Rationale: look to statutory language, structure & purposes

- 9th Circuit discharge "fairly traceable" to surface water-- too broad
- Maui/EPA no NPDES for any groundwater discharge makes "massive loophole" in EPA point source authority, cannot be Congress's intent
- No deference for EPA position, unreasonable and inconsistent
- CWA text "from any point source" and "to navigable waters" = strong evidence Congress was referring to a destination ("navigable waters") and an origin ("any point source")

County of Maui v. HI Wildlife Fund (USSCT 18-260) Majority Opinion Breyer

New test: NPDES permit required for discharge to groundwater is the *"functional equivalent* of a direct discharge" to navigable waters

- "just some of the factors that may prove relevant"
 - time & distance most important, but not necessarily in every case
 - nature of the material through which pollutant travels
 - extent to which pollutant is diluted or chemically changed
 - nature of material through which pollutant travels
 - extent to which pollutant diluted or chemically changed
 - amount of pollutant discharged v. entering navigable waters
 - how and where pollutant enters navigable waters
 - degree to which pollution maintained specific identity

County of Maui v. HI Wildlife Fund (USSCT 18-260) Majority Opinion Breyer

- Courts will provide additional guidance case by case
- Time and distance hypotheticals
 - "Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies."
 - If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.
- Statutory purposes and EPA guidance will also help
- "Judges, too, can mitigate any hardship or injustice when they apply the statute's penalty provision."

County of Maui v. HI Wildlife Fund (USSCT 18-260) 6-3 Decision

Concur: Kavanaugh

• Opinion consistent with J.Scalia reasoning in *Rapanos*

Dissent: Thomas, Gorsuch

- "Our job is to follow the text...."
- "functional equivalent of a direct discharge" departs from the text and is defined through an open-ended inquiry into congressional intent and practical considerations."

Dissent: Alito

"If the Court is going to devise its own legal rules, instead of interpreting those enacted by Congress, it might at least adopt rules that can be applied with a modicum of consistency."

Kinder Morgan Energy v. Upstate Forever (USSCT 18-268)

- Cert granted
- Remanded to 4th Circuit for further consideration in light of *Maui*
- 4th Circuit HELD addition of pollutant *via groundwater* can violate § 1311(a) if the plaintiff can show "a direct hydrological connection between [the] ground water and navigable waters."

Post-Maui NPDES cases

Prairie Rivers Network v. Dynegy Midwest Generation (7th Cir 18-3644)

- Coal ash pond discharge into groundwater
- District Court DISMISSED: no jurisdiction for groundwater discharge
- 7th Circuit appeal stayed pending *Maui*
- Case now moving in 7th Circuit
- Briefing through Aug 2020