


Legal Update

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Legal Update

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MATS

Background:

June 2015—Supreme Court invalidated EPA's Mercury and Air Toxics Rule after concluding that EPA must consider costs when it issues regulations under Section 112 of the Clean Air Act. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). An EPA blog post the next day noted the decision was narrow; the ruling remained in effect; and the majority of power plants are already in compliance or well on their way to compliance.

MATS

December 2015—D.C. Circuit refused to stay implementation of the rule pending EPA's consideration of costs.

March 2016—Chief Justice Roberts refused a request for stay.

April 25, 2016—to no one's surprise, EPA determined that it was "appropriate and necessary to regulate air toxics" from power plants."

The same day, Murray Energy filed a lawsuit in the D.C. Circuit challenging EPA's determination.

GHGs—Tailoring Rule

Background:

2014: Supreme Court partially struck down EPA's "tailoring rule" for greenhouse gases. The Court invalidated EPA's alternative GHG emission thresholds for determining whether sources would be "major sources" for PSD and Title V, but held that sources that are already major sources for another pollutant can be required to obtain permits for GHGs.

April 2015: D.C. Circuit formally vacated the rules invalidated by the Supreme Court and ordered EPA to take steps to rescind and/or revise the applicable provisions of the Code of Federal Regulations "as expeditiously as practicable."

January 2016: Supreme Court declined review of the D.C. Circuit decision.

GHGs--Clean Power Plan

August 2015: EPA issued its “Clean Power Plan” setting state-specific reduction goals designed to reduce CO2 emissions from the energy industry by 32% (from 2005 levels) by 2030

September 2015: D.C. Circuit denied petitions by states and energy companies to stay the rule.

October 2015: Clean Power Plan published in the Federal Register. Numerous states, industries, and trade associations filed petitions for review and motions to stay the rule.

January 2016: D.C. Circuit denied the requests for stay but granted expedited briefing. States, industries, and trade associations requested stay from the Supreme Court.

GHGs--Clean Power Plan, cont.

Stay Request to Supreme Court:

Michigan v. EPA. . . starkly illustrates the need for a stay in this case. The day after this Court ruled. . .that EPA had violated the Clean Air Act. . . EPA boasted in an official blog post that the Court's decision was effectively a nullity. Because the rule had not been stayed during the years of litigation, EPA assured its supporters that 'the majority of power plants are already in compliance or well on their way to compliance.' Then, in reliance on EPA's representation that most power plants had already fully complied, the D.C. Circuit responded to this Court's remand by declining to vacate the rule. . . . In short, EPA extracted 'nearly 10 billion a year' in compliance from power plants before this Court could even review the rule. . . and then successfully used that unlawfully-mandated compliance to keep the rule in place even after this Court declared that the agency had violated the law.

GHGs--Clean Power Plan, cont.

February 2016:

In an unprecedented ruling, the Supreme Court in a 5-4 decision granted the petitions for stay of the Clean Power Plan.

April 2016: All parties' final briefs due

June 2016: Oral argument in D.C. Circuit

Does the Court's grant of a stay tell us anything about how the Court is likely to rule on the merits?

Ozone NAAQS

October 1, 2015: EPA finalized the ozone NAAQS at 70 ppb.

A coalition of industry groups, the US Chamber of Commerce, and several states filed challenges to the rule in the D.C. Circuit Court of Appeals. Environmental groups intervened on behalf of EPA. The cases have been consolidated under the name *Murray Energy Corp. v. EPA* (Case No. 15-1385). Briefing began last week and is expected to conclude in September.

Major issues:

- rule fails to account for uncontrollable sources of ozone
- studies since 2008 (when the rule was last revised to 75 ppb) do not support the new standard
- irrational to extend ozone monitoring season for several states based on readings above 60

Interstate Transport

Background:

2005 Clean Air Interstate Rule (CAIR) was vacated by the D.C. Circuit, but remained in effect until EPA could replace it with another rule.

2011 Cross-State Air Pollution Rule (CASPR) was invalidated and vacated by the D.C. Circuit, but the Supreme Court reversed. The Court agreed with the D.C. Circuit on one issue: that EPA cannot require a state to reduce its emissions by more than necessary to achieve attainment in downwind state. The Court found vacatur unnecessary and remanded the case to the D.C. Circuit.

Interstate Transport, cont.

July 2015: D.C. Circuit largely upheld CASPR, although it invalidated several state-specific emission budgets

November 16, 2015: EPA proposed updates to CASPR, requiring more stringent NO_x reductions in 23 states and proposing to address NO_x and SO₂ requirements for 11 states whose original reduction requirements had been remanded to EPA in recent court actions. The proposed rule was published December 3, 2015.

Regional Haze

Background: Numerous suits against EPA, both from states challenging EPA's disapproval of regional haze plans, and from environmental groups challenging approval of state BART determinations

Latest Case:

2/29/2016: Texas filed suit to challenge EPA's January 2016 partial disapproval of Texas' 2009 SIP and imposition of a FIP. *Texas v. EPA*, No. 16-60118 (5th Cir.)

EPA has moved for dismissal of the suit or, in the alternative, a transfer of the case to the D.C. Circuit

Note:

In March 2016, the Eighth Circuit found that it had jurisdiction to review EPA's approval of Minnesota's Regional Haze SIP.

SSM SIP Call

Background:

SSM Guidance 1982, 1983, 1999, 2001

9/2010: *Sierra Club v. Jackson*, No. 10-cv-04060 (N.D. Cal.) challenged EPA's failure to promulgate FIPs for the 1997 8-hour ozone NAAQS in several states and failure to object to non-compliant SSM provisions

6/2011: Petition for Rulemaking by Sierra Club

11/2011: *Sierra Club* settlement agreement

2013: Proposed rule by EPA (78 Fed. Reg. 12460 (Feb. 22, 2013))

2014: *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), held in challenge to Portland Cement MACT that an affirmative defense for SSM in private civil suits exceeded EPA's authority

SSM SIP Call (cont.)

6/2015: EPA published Final SSM SIP call for 35 states and D.C. with deadline of November 22, 2016

EPA Fact Sheet is available at:

<https://www3.epa.gov/airquality/urbanair/sipstatus/docs/20150522fs.pdf>

A number of states and industries filed petitions for review in the D.C. Circuit Court of Appeals. The cases have been consolidated under the name *Southeastern Legal Found., Inc. v. EPA*, No. 15-1166. Briefing began on March 16, 2016, with final briefs scheduled to be filed in October 2016.

Other Cases

United States v. Luminant Generation Co., No. 3:13-cv-3236-K, 2015 U.S. Dist. LEXIS 111322 (D. Tex. Aug. 21, 2015): Action for PSD violations was time-barred because failure to obtain a construction permit is not an ongoing violation; no cause of action for failure to amend Title V permit or submit complete permit application.

Sierra Club v. Okla. Gas & Elec. Co., No. 14-7065 (10th Cir. March 8, 2016): Statute of limitations for PSD violation was triggered on day construction began, so claim for civil penalties was dismissed.

Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685 (6th Cir. 2015): Clean Air Act does not preempt state law nuisance claims.

Beth's Crystal Ball

Litigation:

- Cross-State Air Pollution Rule (proposed rule issued December 2015)
- SO₂ Standards (designations this summer and appeal of CD)
- More suits to compel EPA action (sue and settle?)

Rules:

- Risk Management Program rule changes proposed March 2016
- Single Source Determination (Aggregation) rule proposed August 2015
- Effect of the 2016 election

Beth's Crystal Ball, cont.

Trends:

Climate change risk disclosures

Nuisance suits

Whistleblower claims

Chevron deference

Criminal cases