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Legal Review of Clean Air Act Cases

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Background: Legal Standard of Review

- ▶ What kind of deference will a court give to EPA?
 - A lawyer's favorite answer: It depends.
 - Questions of Fact
 - Agencies are held to the “Arbitrary and Capricious” standard, which means that the EPA decision must be reasonable and explained.
 - Questions of Law
 - Is the statutory language unambiguous, or is it ambiguous?
 - If unambiguous or “plain” – the agency gets little to no deference.
 - If ambiguous – the agency gets deference, but its decision must still be based on a permissible interpretation of the statute.

Legal Review of Recent Clean Air Act Cases

- ▶ Discussion of Legal Opinions for the following areas:
 - Criteria Pollutants: Carbon Monoxide, Ozone, Particulate Matter, Nitrogen Dioxide, Sulfur Dioxide and Lead
 - NSPS/NESHAP
 - Interstate Transport of Pollution
 - Regional Haze
 - Permitting
 - Greenhouse Gas Regulation

Criteria Pollutants: Carbon Monoxide

Challenge to EPA's 2011 decision to not revise the primary CO NAAQS or adopt a secondary CO NAAQS

- ▶ *Communities for a Better Environment v. EPA*, 748 F. 3d 333 (D.C. Cir. 2014)
 - Upheld EPA's decision to not modify the primary CO NAAQS, and
 - Held that environmental groups lacked standing to challenge EPA's decision not to adopt secondary CO NAAQS.

Criteria Pollutants: Ozone

Challenge to the 2008 Ozone NAAQS

- ▶ *State of Mississippi v. EPA*, 723 F.3d 246 (D.C. Cir. 2013). Some of the court's findings:
 - EPA provided adequate support for determination that NAAQS revision was “requisite” to protect public health;
 - Information Quality Act did not provide independent measure of EPA's revision of NAAQS;
 - EPA's assertion of scientific uncertainty and more general public health policy considerations satisfied CAA; BUT
 - EPA's justification for setting secondary NAAQS was inadequate.

Criteria Pollutants: Particulate Matter

Challenge to the 2013 PM_{2.5} NAAQS.

- ▶ *National Ass'n. of Manufacturers v. EPA*, 750 F.3d 921 (D.C. Cir. 2014). The Court upheld:
 - EPA decision to lower the NAAQS;
 - EPA's elimination of use of spatial averaging to demonstrate compliance with the NAAQS; and
 - EPA's addition of near-road monitoring requirement for use in demonstrating NAAQS compliance.

Challenge to the Implementation Rule for the 2007 PM_{2.5} NAAQS and the PM_{2.5} NSR Implementation Rule.

- ▶ *N.R.D.C. v. EPA*, 706 F.3d 428 (D.C. Cir. 2013). The Court held:
 - that the CAA required EPA to promulgate the final implementation rule for PM_{2.5} in accord with the requirements of Title I, Part D, Subpart 4.

Challenge to EPA Rule establishing significant impact levels (SILs) and significant monitoring concentration (SMCs)

- ▶ *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013). The Court held:
 - that the SILs were vacated and remanded based on EPA's lack of authority to exempt sources from the requirements of the CAA; and
 - EPA's *de minimis* authority did not allow it to establish a SMC as a screening tool to determine when to exempt sources from the CAA preconstruction monitoring requirement.

Criteria Pollutants: Nitrogen Dioxide & Sulfur Dioxide Secondary NAAQS

Challenge to EPA's decision to defer new & joint secondary NAAQS for NO_x and SO₂

- ▶ *Center for Biological Diversity v. EPA*, 749 F.3d 1079 (D.C. Cir. 2014). The Court:
 - Denied challenge to EPA's decision to defer adopting a new & joint secondary standard for nitrogen and sulfur oxides.
 - Held that CAA requires EPA to make a "reasoned judgment" before promulgating a secondary standard, which is impossible without adequate scientific justification.

Criteria Pollutants: Sulfur Dioxides

- ▶ Pending Litigation: Challenge to EPA failure to designate all areas for the 2010 SO₂ NAAQS
 - *States of North Dakota, South Dakota, Nevada and Texas v. Regina McCarthy*, US District Court, N.D. Currently stayed awaiting outcome of other litigation filed in the N.D. California.
 - *Sierra Club and N.R.D.C. v. Regina McCarthy*, US District Court, N.D. California, San Francisco/Oakland Division. State intervenors include: North Dakota, Arizona, Kentucky, Nevada, Louisiana, Texas and North Carolina.
 - A motion for summary judgment was granted regarding EPA's nondiscretionary duty to designate; and briefing was filed regarding appropriate remedy.
 - Settlement discussions were proceeding, but ended when EPA and environmental petitioners reached settlement without intervenor states.
 - EPA published its proposed consent decree in the Federal Register on 06/02/2014; comments were due on 07/02/2014.
 - On 08/08/2014, EPA and the environmental petitioners filed notice of intent to enter the decree with the court.
 - State intervenors continue to oppose, and a hearing is set for 10/17/2014.
 - *Sierra Club and N.R.D.C. v. US EPA and Regina McCarthy*, US Court of Appeals, DC Circuit. States of North Dakota, Commonwealth of Kentucky, Louisiana and Texas intervened. Currently stayed.

Criteria Pollutants: Lead

- ▶ Challenge to the 2008 Lead NAAQS
 - Coalition of Battery Recyclers Ass'n. v. EPA, 604 F.3d 613 (D.C. Cir. 2010). The court held that:
 - The record supported EPA's determination that revised lead NAAQS was “requisite” to protect public health with an adequate margin of safety;
 - EPA's reliance on scientific study without making raw data underlying study publicly available was not arbitrary and capricious; and
 - EPA lacked authority to waive lead NAAQS attainment requirements for lead sulfides based on their lower bioavailability compared with other forms of lead.

NSPS / NESHAP Cases of Interest

Challenge to Cement Kiln MACT

- ▶ *N.R.D.C. v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). The court:
 - Upheld emission-related provisions as reasonable; but
 - Vacated the inclusion of an affirmative defense, finding it exceeded EPA's statutory authority.

Challenge to Mercury Air Toxics Standard (MATS)

- ▶ *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). The court upheld EPA's action in setting the standards, finding among other things, that:
 - EPA reasonably relied upon CAA criteria for delisting pollutants in determining necessity of regulating EGU emissions;
 - EPA was not required to consider costs in determining whether to regulate EGU emissions;
 - EPA could regulate all HAP emissions from EGUs;
 - EPA reasonably relied upon chromium emissions data in assessing risks from non-mercury EGU emissions; and
 - public power companies failed to demonstrate entitlement to blanket extension of deadline to comply with EPA final rule.

Interstate Transport of Pollution

Challenge to the Cross-State Air Pollution Rule (CSAPR)

- ▶ *EPA v. EME Homer City Generation L.P.*, 134 S. Ct. 1584 (2014).
 - Supreme Court issued its opinion on 4/29/14, reversing and remanding to the D.C. Circuit; finding that:
 - EPA did not have to give states another opportunity to develop and submit a SIP after EPA quantified the state's interstate pollutant obligations; and
 - EPA's use of cost to quantify and allocate emission reductions among upwind states was a permissible interpretation of the CAA.
 - But, "EPA cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State or at odds with the one-percent threshold the Agency has set."
 - Many issues remain before the D.C. Circuit, including as-applied challenges from states; adequacy of public notice; etc.

Challenge to EPA November 2012 Memorandum Re: Continued Implementation of CAIR

- ▶ *Sierra Club v. EPA*, 754 F.3d 995 (D.C. Cir. 2014)
 - CAIR had been vacated by the D.C. Circuit, but remained in effect until EPA could replace it with another rule. EPA replaced it with the CSAPR, but that rule was also vacated by the D.C. Circuit. The memorandum instructed Regional Administrators that certain pending state submissions could proceed based on emissions reductions from CAIR.
 - The court held that the suit was not moot (even though the transport rule has been revived); but dismissed the suit based on lack of standing.

Regional Haze

Challenges to EPA's authority to approve or disapprove Regional Haze Plans

- *WildEarth Guardians v. EPA*, 2014 WL 3513119 (9th Circuit, 2014). Some of the court's findings:
 - EPA decision to approve SO₂ BART determination was not arbitrary and capricious; and
 - Organization failed to show that EPA approval of regional haze plan interfered with applicable attainment requirement.
- *North Dakota v. EPA*, 730 F. 3d 750 (8th Circuit, 2013). Some of the court's findings:
 - Simultaneous final rule disapproving SIP revision and FIP permissible;
 - EPA disapproval of BART determination on basis that factor contained data flaws that led to overestimated cost of compliance was not arbitrary, capricious, or abuse of discretion;
 - EPA disapproval without waiting for state to supplement SIP to address data error was not arbitrary, capricious, or abuse of discretion;
 - EPA disapproval of reasonable progress determination based on cumulative source visibility modeling was not arbitrary, capricious, or abuse of discretion;
 - EPA refusal to accept state's placeholder statement regarding SIP visibility component for "good neighbor" provision under CAA was not arbitrary, capricious, or abuse of discretion; BUT
 - EPA refusal to consider existing pollution control technology in use at plant because it had been voluntarily installed was arbitrary and capricious.
- *Oklahoma v. EPA*, 723 F. 3d 1201 (10th Circuit, 2013)
 - EPA has authority to disapprove BART determinations of States, when the state does not follow the BART guidelines.

Permitting

Challenge to EPA issued PSD permit (Avenal)

- ▶ *Sierra Club v. EPA*, 2014 WL 3906509 (9th Cir. 2014)
 - The court held:
 - EPA has to apply standards in effect at the time of its permitting decision, rather than the standards in effect at the time the application is submitted, in acting on applications.

Greenhouse Gas Regulation

Consolidated Cases Re: GHG Regulation

- ▶ *U.A.R.G. v. EPA*, 134 S. Ct. 2427 (2014). The Court:
 - struck down EPA's alternative GHG emission thresholds for determining whether sources would be "major" and therefore subject to both Title I and Title V permitting; and
 - held that sources that are already major for another pollutant could be required to be subjected to Title I and Title V permitting for their GHG emissions also.
- ▶ Current status: case has been sent back to the D.C. Circuit, which has issued an order requiring all parties to file Motions to Govern by no later than September 30, 2014.