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Clean Air Act Legal Update

Asher Spiller, Special Deputy Attorney General
North Carolina Department of Justice

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Overview

- **Climate Litigation:**
 - Emission Guidelines for Power Plants
 - Social Cost of GHGs
 - Vehicle Emissions
- **Sovereign Immunity and Clean Air Act**
- **Startup Shutdown and Malfunction**
- **SIP and Attainment Designation Cases**

Climate: Emission Guidelines for Power Plants

Background

- **December 2009:** GHG endangerment finding.
- **2015:** Obama administration finalizes the Clean Power Plan (CPP).
- **February 2016:** Supreme Court stays the CPP.
- **September 2016:** En Banc D.C. Circuit hears oral argument in CPP challenge.
- **April 2017:** CPP case held in abeyance before court reaches decision (case ultimately dismissed as moot)
- **June of 2019:** Trump Administration repeals the CPP and finalized the Affordable Clean Energy (ACE) Rule.
- **February 2021:** D.C. Circuit vacates the ACE Rule.
- **June 2022:** Supreme Court decision in WV v. EPA.

Climate: Emission Guidelines for Power Plants

West Virginia v. EPA, 142 S. Ct. 2587 (June 30, 2022)

- First, the Court held that the case was justiciable notwithstanding EPA's stated intention not to enforce the Clean Power Plan and to instead engage in new rulemaking. States had Article III standing.
- Second, applying the "major questions" doctrine, the Court held that EPA exceeded its authority in promulgating the Clean Power Plan.
- When the major questions doctrine applies, the agency must point to "clear congressional authorization" for the authority it claims.
- Court held that where, among other things, the Clean Power Plan would "substantially restructure the American energy market" Congress use of "best system of emission reduction" was insufficient.

Climate: Emission Guidelines for Power Plants

When does an agency action implicate the major questions doctrine? Things to look for:

- “extraordinary cases” in which the “history and the breadth of the authority that the agency has asserted,” and the “economic and political significance” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer such authority
- “extraordinary grant of legislative authority”
- “extravagant statutory power over the national economy”
- “transformative expansion in regulatory authority”
- “unheralded”
- “radical or fundamental change”
- “regulatory program Congress had conspicuously and repeatedly declined to adopt itself”

Climate: Emission Guidelines for Power Plants

Case Status: On remand to the D.C. Circuit. Parties have been ordered to file motions to govern by October 3, 2022.

Remaining questions:

- Court left for another day whether “‘system of emission reduction’ refers exclusively to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER.”
- Lawfulness of the ACE Rule?
- State flexibility?
- Chevron?

Climate: Social Cost of GHGs

Executive Order 13990, Sec. 5:

- Creates interagency working group on social cost of GHGs and directs the working group to, among other things, develop interim and final social cost of GHGs.

***Louisiana v. Biden*, 2:21-cv-01074 (W.D. La):**

- Plaintiff states challenged the Biden Administration's implementation of Executive Order 13990, sec. 5.
- Louisiana district court issued broad preliminary injunction enjoining executive officers from, among other things, complying with Executive Order 13990 and employing estimates developed for the social cost of GHGs.

Climate: Social Cost of GHGs

***Louisiana v. Biden*, No. 22-30087 (5th Cir. Mar. 16, 2022), 2022 U.S. App. LEXIS 7589:**

- The Fifth Circuit stayed the district court's injunction pending appeal, holding that:
 - (1) Plaintiff states lacked standing and, therefore, federal defendants were likely to succeed on the merits; and
 - (2) federal defendants would be irreparably harmed absent a stay.
- The Fifth Circuit denied motion for rehearing en banc and the Supreme Court denied Plaintiff States' request to vacate the Fifth Circuit stay.
- Fifth Circuit briefing complete as of July 18, 2022. Case tentatively calendared for oral argument in December 2022.

Climate: Light Duty Vehicle Emission Standards

Background:

- **April 2007:** *Massachusetts v. EPA*, 549 U.S. 497 (2007)
- **June 2009:** California GHG Waiver
- **December 2009:** Endangerment finding
- **May 2010:** GHG standards and CAFE standards for MYs 2012-2016
- **October 2012:** Light duty GHG and CAFE standards for MYs 2017-2025.
- **September 2019:** SAFE Rule 1: One National Program, California GHG Waiver revocation and NHTSA preemption determination.
- **April 2020:** SAFE Rule 2, Light duty GHG and CAFE standards for MYs 2021-2026
- **December 2021:** Revised light duty GHG standards for MYs 2022-2026
- **April 2022:** Revised CAFE standards for MYs 2024-2026

Climate: Vehicle Emissions

California Waiver:

- ***California v. Wheeler*, No. 19- 1239 (D.C. Cir.):** Petition challenging Safe Rule 1, EPA's revocation of California's waiver for vehicle emissions standards for GHGs. Case in abeyance. Parties ordered to file motions to govern after ruling in *Ohio v. EPA*, 22-1081 (D.C. Cir.).
- ***Ohio v. EPA*, No. 22-1081 (D.C. Cir.):** Petition challenging reinstatement of California waiver. Opening Briefs due October 24, 2022. Oral argument anticipated for September 2023.

Climate: Vehicle Emissions

Light-Duty Vehicle Emissions Standards:

- ***Competitive Enterprise Institute v. NHTSA, 20-1145 (D.C. Cir.)***: Petition challenging Safe Rule 2, EPA GHG standards for light duty vehicles and NHTSA CAFE standards for model years 2021-2026 . Parties ordered to file motions to govern after ruling *Texas v. EPA*, Nos. 22-1031.
- ***Texas v. EPA, No. 22-1031 (D.C. Cir.)***: Petition challenging EPA vehicle emission standards for 2022-2026. Opening Briefs due November 3, 2022. Oral argument expected September 2023.
- ***NRDC v. NHTSA, 22-1080 (D.C. Cir.)***: Challenge to NHTSA CAFE standards for model years 2024-2026. Opening Briefs due November 17, 2022. Oral argument expected September 2023.

Sovereign Immunity and the CAA

***North Carolina v. United States*, 7 F.4th 160 (4th Cir. 2021)**

- NC DEQ assessed civil penalties against Marine Corps Air Station Cherry Point for failed stack tests. North Carolina sought to collect the civil penalty, and Cherry Point removed the case to federal court and moved to dismiss on sovereign immunity grounds.
- Held:
 - (1) Removal to federal court was proper.
 - (2) The Clean Air Act unambiguously and unequivocally waives the United States' sovereign immunity as to all civil penalties assessed pursuant to state air pollution law.

Circuit Split on Sovereign Immunity and Removal

Under the CAA, can the Federal Government remove a state civil penalty action to federal court?

Yes	No
<i>City of Jacksonville v. Dep't of Navy</i> , 348 F.3d 1307, 1311 (11th Cir. 2003)	<i>California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States</i> , 215 F.3d 1005 (9th Cir. 2000)
<i>North Carolina v. United States</i> , 7 F.4th 160 (4 th Cir. 2021)	

Does the CAA contain a clear and unambiguous waiver of sovereign immunity?

Yes	No
<i>North Carolina v. United States</i> , 7 F.4th 160 (4 th Cir. 2021)	<i>City of Jacksonville v. Dep't of Navy</i> , 348 F.3d 1307, 1311 (11th Cir. 2003)
<i>United States v. Tennessee Air Pollution Control Bd.</i> , 185 F.3d 529, 534 (6th Cir. 1999)	

Startup, Shutdown and Malfunction

Background:

- **2011:** Sierra Club files petition asking EPA to find SIPs containing SSM provisions inadequate.
- **May 2015:** EPA announces policy that SIP provisions containing exemptions from emission limits during SSM events are inconsistent with the Clean Air Act and issues SIP Call to 36 states and air districts
- **August 2015:** States challenge SIP Call in the DC Circuit.
- **January 2020:** EPA Region 6 obtains approval to deviate from national policy and withdraws Texas SIP Call.
- **April 2020:** EPA Region 4 obtains approval to deviate from national policy and withdraws NC SIP Call.
- **October 2020:** EPA withdraws 2015 policy and proposes to address SSM provisions on a “case by case basis in light of the SIP as a whole.”
- **October 2020:** EPA Region 7 withdraws Iowa SIP Call.
- **September 2021:** EPA reinstates 2015 policy.

Startup, Shutdown and Malfunction

Environ Comm FL Elec Power v. EPA, No. 15-1239 (D.C. Cir.) (and consolidated cases): 2015 SSM SIP Call challenge.

- Issues (some of them)
 - Whether a finding of substantial inadequacy requires considering impact on NAAQS attainment
 - Whether SSM provisions are inconsistent with the CAA notwithstanding general duty provisions or other requirements that apply at all times
 - Whether director discretion provisions authorize states to unlawfully modify SIPs without following CAA procedures
- Status:
 - Briefing complete as of October 2016
 - Case held in abeyance from April 2017 through January of 2022
 - Oral argument held on March 25, 2022. Awaiting decision.

Startup, Shutdown and Malfunction

Environmental groups file suit challenging EPA's withdrawal of SIP Calls for:

- **North Carolina** – Case No. 20-1229 (D.C. Cir. June 2020)
- **Texas** – Case No. 20-1115 (D.C. Cir. Apr. 2020)
- **Iowa** – Case No. 21-1022 (D.C. Cir. January 2021)

In all cases, the Court granted EPA's motion for voluntary remand without vacatur to allow it to reconsider the SIP call withdrawals in light of its reinstatement of the 2015 SSM policy.

Startup, Shutdown and Malfunction

Sierra Club et al. v. EPA, Case No. 4:21-cv-6956 (N.D. Ca):

- NGOs files suit to compel EPA to (1) make findings of failures submit SIPs in response to the 2015 SIP Call and (2) take action to approve or disapprove SIPs that were submitted in response to the 2015 SIP Call.
- On January 12, 2022, EPA published findings of failure to submit for 12 states and districts, mooted the first claim.
- On June 27, 2022, the court entered a [consent decree](#) establishing various deadlines for EPA to take action on pending SIP submittals.

SIP and Attainment Designation Cases

Board of County Commissioners of Weld County, CO v. EPA, et al (D.C. Cir.):

- In 2018, EPA determining El Paso County, Texas and the northern portion of Weld County, Colorado did not contribute to the nearby violations of the 2015 ozone NAAQS and designated the areas as “attainment.”
- Environmental Groups, Illinois and 3 municipalities challenged that determination in *Clean Wis. v. EPA*, 964 F.3d 1145 (D.C. Cir. 2020). The Court granted EPA’s motion for voluntary remand, viewing EPA’s motion as “a concession that its explanations [supporting the designation] fall short of the Clean Air Act’s requirement of reasoned decision-making.”
- EPA reevaluated on remand and determined that El Paso and northern Weld County did contribute to NAAQS violations.
- Texas and weld county petitioned for review. EPA filed its response brief on September 2, 2022.

SIP and Attainment Designation Cases

State of Texas v. EPA, 17-60088 (5th Cir.)

- In 2016, EPA issued 2010 SO₂ NAAQS non-attainment designations for Rusk and Panola Counties, relying on air dispersion modeling because no monitors were in place.
- Petitioners sought reconsideration and EPA reassessed, but ultimately affirmed its prior determination.
- Petitioners challenge the non-attainment designation arguing that EPA should have used different modeling or designated the areas unclassifiable until monitoring data could be obtained.
- Oral argument occurred on July 7, 2022. Awaiting decision.

SIP and Attainment Designation Cases

Ass'n of Irrigated Residents v. EPA, 10 F.4th 937 (9th Cir.)

- EPA approved portions California's SIP designed to meet the 2008 ozone NAAQS in San Joaquin Valley nonattainment area. The plan contained a single contingency measure and otherwise relied upon "surplus reductions" from existing measures. Environmental groups petitioned for review.
- The Court held that EPA's SIP approval was arbitrary and capricious.

"The premise of the EPA's rule appears to be that contingency measures will not be needed because already-implemented measures . . . will also ensure sufficient continued progress in the event of a failure to achieve a reasonable further progress milestone."
- The Court explained, EPA could not "avoid the need for robust contingency measures by assuming that they will not be needed"

SIP and Attainment Designation Cases

***Sierra Club v. EPA*, No. 20-1121 (D.C. Cir. Aug 26, 2022), 2022 U.S. App. LEXIS 24018**

- Environmental groups challenged EPA's 2020 decision to decisions to lift anti-backsliding requirements in Houston and Dallas.
- The court held that venue was not proper in the D.C. Circuit because (1) the challenged rules are locally or regionally applicable, not nationally applicable; and (2) EPA never made and published a finding that the challenged rules in this case were based on a determination of nationwide scope or effect.

Questions?

Asher Spiller

Special Deputy Attorney General

N.C. Department of Justice