Clear Air Act Litigation Update

AAPCA Fall 2024 Meeting

James Beers, Jr.
Partner
Troutman Pepper
james.beers@troutman.com

Agenda

The Supreme Court Speaks – Making Sense of the New World

1. *Loper Bright Enterprises v. Raimondo*: The End of *Chevron*
2. *Ohio v. EPA*: Staying the Good Neighbor Rule

Recently Decided D.C. Circuit Cases

1. *Huntsman v. EPA:* Denying Challenge to MON Rule
2. *FCG v. EPA*: Rejecting (Most of) EPA's SSM SIP Call

And More Big Decisions on the Horizon …

1. *West Virginia v. EPA*: Climate Rules for Power Plants
2. *North Dakota v. EPA*: Mercury Rules for Power Plants
3. *Texas v. EPA*: Methane Rules for Oil and Gas
4. *Kentucky v. EPA*: Primary $PM_{2.5}$ NAAQS

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The Supreme Court Speaks – Making Sense of the New World

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Loper Bright Enterprises v. Raimondo – The End of *Chevron*

The *Loper Bright* Decision – June 28, 2024

- Case brought to challenge National Marine Fisheries Services' regulation requiring Atlantic herring fishing vessels to pay for observers
- Magnuson-Stevens Fishery Conservation and Management Act required three groups of vessels for pay for observers, but was silent about Atlantic herring vessels
- In 6-3 decision, the Court overruled *Chevron* but did not address merits

What ***was*** *Chevron* deference?

- *Chevron* addressed the definition of "stationary source" under Title I of CAA
- Courts deferred to agency interpretations of ambiguous statutory provisions, so long as interpretation was "permissible" (i.e., reasonable)
- Because more than one "permissible" reading, an agency's interpretation could change as power shifted between political parties

Loper Bright Enterprises v. Raimondo – The End of *Chevron*

What's a *Loper Bright* New Day?

- Courts must perform their constitutionally assigned duty to say what the law is
- There is one "BEST" reading of the statute, not many permissible readings from which an agency may choose
- But … deference to agency interpretation still possible depending on statute
  - Some statutes "expressly delegate" authority to define a statutory term
  - Others empower agency to make rules to "fill up the details" of statutory scheme or "leave agencies with flexibility" by using terms like "appropriate" or "reasonable"

What Happens Next? TBD (mostly)

- Challenges to agency actions (and likelihood of success)
- Battleground shifts: legal interpretation vs. scientific/fact finding; scope of delegation; more developed administrative records
- More predictability? The "best" meaning less likely to change but different courts may reach different interpretations
- "**We do not call into question cases that relied on the Chevron framework**"

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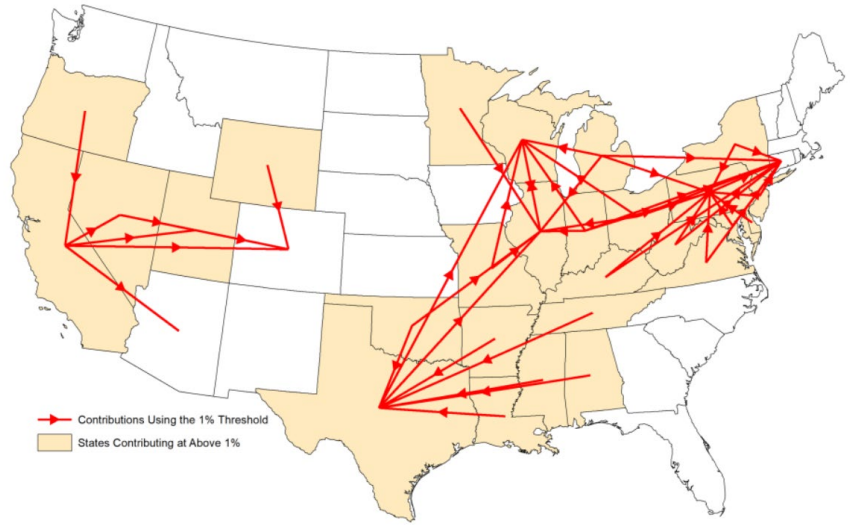
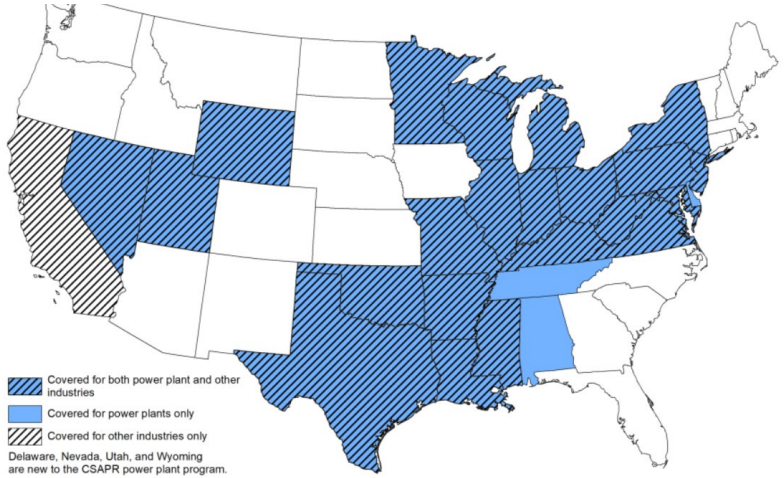
Ohio v. EPA – Staying the Good Neighbor Rule

Interstate Transport / Good Neighbor Background

- Requires states to reduce emissions if impacting ability of other states to achieve / maintain NAAQS
- After EPA reduced ozone NAAQS in 2015, new state plans (SIPs) were required to be submitted
- In 2023, EPA disapproved all SIPs and proposed the Good Neighbor Plan (FIP) that would cover 23 states
  - Covers power plants and other major industries
  - Based on very stringent control assumptions – e.g., SCR for all coal units >100MW
- Numerous states challenged their SIP denials, and 12 states got stays in their local U.S. Courts of Appeals
- EPA subsequently issued an administrative stay of the FIP as to those states that had had their SIP denials stayed





Ohio v. EPA – Staying the Good Neighbor Rule

Meanwhile …

- Several states also challenged the Good Neighbor Plan in the D.C. Circuit
- After D.C. Circuit rejected stay request, a few states sought a stay from Supreme Court

The Court Rules – A New Kind of Stay Based on Procedural Error

- In 5-4 decision (June 27, 2024), the Supreme Court stayed EPA's plan pending a final decision on the merits by D.C. Circuit
- The Court's stay was based on its finding that EPA failed to explain whether its "uniform" program still made sense with only a "fraction" of the states included
- Rejected EPA's attempt to use post-final rule explanation in denials of petitions for reconsideration, but didn't address substantive merits

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Ohio v. EPA – Staying the Good Neighbor Rule

Something to Watch – Barrett dissents

- "The Court downplays EPA's statutory role in ensuring that States meet air-quality standards."
- "The Court today enjoins the enforcement of a major [EPA] rule based on an underdeveloped theory that is unlikely to succeed on the merits."
- "It is hard to believe that a single sentence with no elaboration or explanation of the potential issue—in a sea of thousands of pages of comments—gave EPA reasonable notice that it should have included a detailed explanation of why the FIP's emissions limits did not depend on the number of States."

Current Status

- EPA plans to administratively stay plan as to all sources in the states covered by the plan as promulgated. See EPA 8/5/24 Memorandum.
- EPA asked D.C. Circuit to partially remand to address record deficiency identified by Supreme Court—and petitioners opposed
- The merits now fully briefed before D.C. Circuit (final briefs filed 8/22)
- Awaiting final rule on Supplemental GNP adding 5 states

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D.C. Circuit – Following the Supreme Court's Lead on Stays?

NOPE!

Denka v. EPA **(HON) ……*Denied* (June 26)**

Texas v. EPA **(Methane)……*Denied* (July 9)**

West Virginia v. EPA **(GHG)…….*Denied* (July 19)**

North Dakota v. EPA **(MATS)……*Denied* (Aug. 6)**

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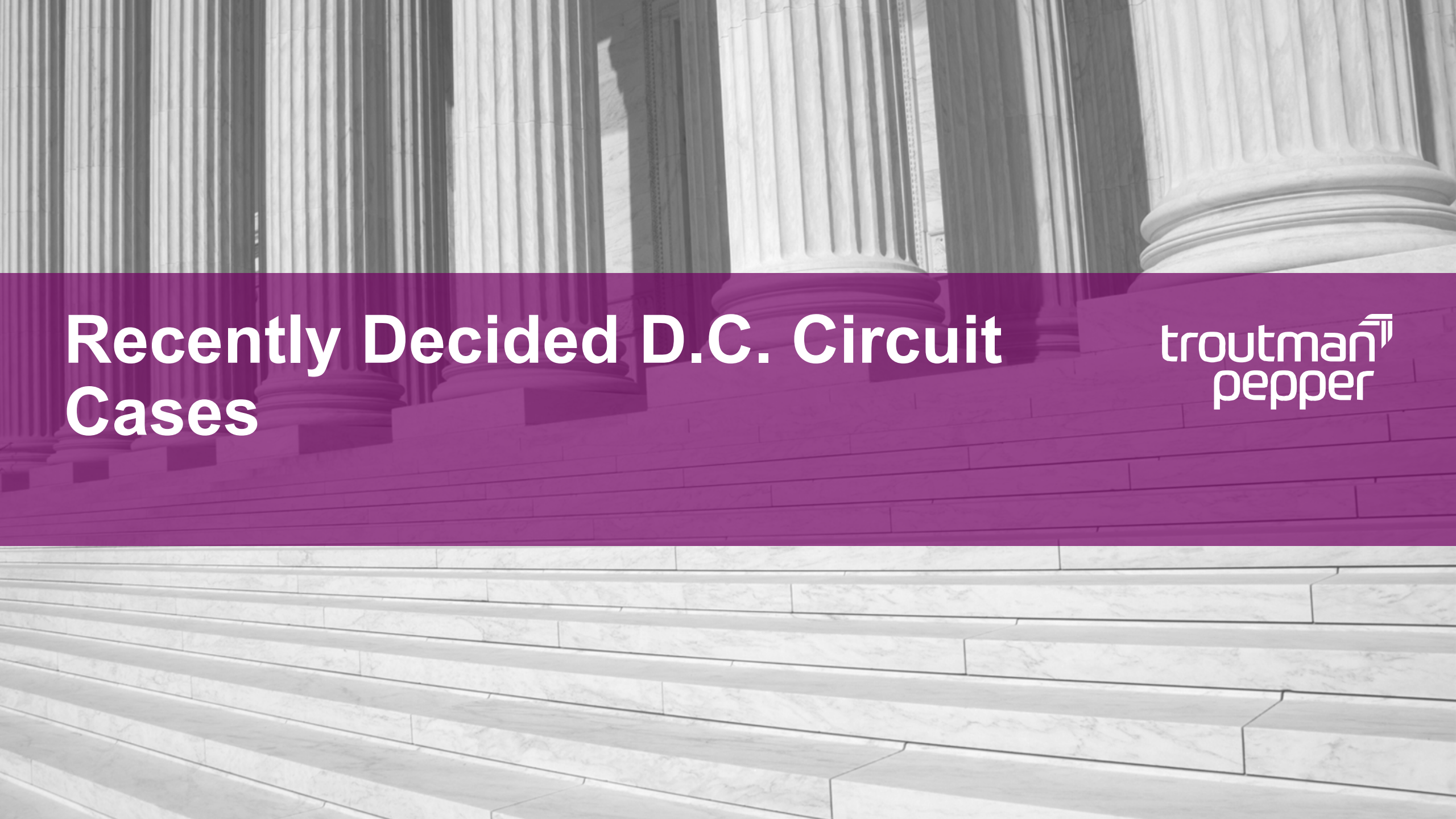

Recently Decided D.C. Circuit Cases

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Huntsman Petrochemical v. EPA – Denying MON Challenge

- After setting initial NESHAP standards based on MACT, EPA is required to conduct risk and technology reviews under 42 U.S.C. 7412(f) and 7412(d)(6)
- In 2020, EPA tightened ethylene oxide standards (EtO) for Miscellaneous Organic Chemical Manufacturing (MON) sector as part of residual risk review
- Chemical industry challenged EPA's 2022 decision not to reconsider the rule based on TDEQ cancer-risk assessment model that EPA didn't originally consider
  - EPA had relied instead on the Integrated Risk Information System (IRIS) value
- Court denied petition in 3-0 decision issued on 8/13

Key Takeaways

- Court rejected request for additional briefing on *Loper Bright* and *Ohio v. EPA*
- "Extreme degree of deference" afforded to EPA's evaluation of scientific data, particularly its statistical and modeling analyses
- Foreshadows outcome of *Denka v. EPA* (challenge to May 2024 HON Rule for chloroprene)?

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FCG v. EPA – Rejecting (Most of) EPA's SSM SIP Call

- In 2015, EPA issued SIP Call under 42 U.S.C. 7410(k)(5) that required 35 states and D.C. to remove four types of SSM exemptions from their SIPs:
  - Automatic exemptions, director's discretion exemptions, overbroad enforcement discretion, and affirmative defenses
- Many states changed their rules, but some did not
- Petitioners challenged EPA's overarching SIP-Call authority and as applied to specific SSM provisions
- In lengthy 2-1 decision (March 1, 2024), the Court affirmed EPA's general SIP Call authority but scrapped most of the 2015 SSM SIP Call rule

Key Takeaways

- As to general SIP Call authority, no predicate findings of real-world air quality impacts or costs needed
- But EPA must explain why "necessary or appropriate" to have "emission limitations"—that continuously apply during SSM periods—to meet the CAA's applicable requirements
  - In practice, few states still have SSM exemptions in their plans; more refined approach needed by EPA
- Either way, EPA unlikely to approve new exemptions/affirmative defenses and continues to remove its own affirmative defenses (Title V emergency, MACT/NSPS)

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And More Big Decisions on the Horizon …

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West Virginia v. EPA – GHG Rules for EGUs, pt. 2

How Did We Get Here?

- Ping pong between Administrations over how to regulate GHG emissions under Section 111
  - Clean Power Plan's cap based on "generation shifting" vs. ACE's state-determined limits based on efficiency improvements
- In 2022, Supreme Court vacated Clean Power Plan, invoking "major questions" doctrine—noting that prior to 2015, EPA had always set Section 111 emission limits based on measures applied to individual sources
- Under Section 111, EPA must determine a "best system of emission reduction" that "has been adequately demonstrated" and then set the "degree of emission limitation achievable" with that BSER
- EPA's new climate rules for power plants follow this general approach, but …

Mission Impossible?

- Existing Coal: 90% carbon capture and sequestration (CCS) by 2032 or retire (a 3rd option of 40% gas-cofiring by 2030 and retire by 2039 is available, but unlikely anyone will use it)
- New Gas: 90% CCS by 2032 or limit capacity factor to 40%
- BUT CCS at 90% has never been done—the closest anyone has come is Boundary Dam in Canada, and that facility commented on the rule to say they can't achieve 90%
- And can't forget about other elements of CCS—transport and storage (pipelines, sequestration facilities, etc.)

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West Virginia v. EPA – GHG Rules for EGUs, pt. 2

No Surprise, litigation is underway

- Challenge filed in D.C. Circuit on May 9 (same day rule published)
- D.C. Circuit denied stay request on July 19
  - Said petitioners unlikely to succeed "given the record in this case" (suggests arbitrary and capricious review)
  - "Nor does this case implicate a major question"--emission limits based on source-specific measures "well within EPA's bailiwick"
- State/Industry challengers filed stay request with Supreme Court on July 23 (fully briefed)
- Meanwhile, D.C. Circuit set expedited briefing schedule, with final briefs due Nov. 1

Loper Bright Watch

- Battle over framing—straight statutory interpretation issue or deference to EPA acting w/in delegated authority
- EPA: statute delegates to EPA to determine what's "adequately demonstrated" and "achievable"
- Challengers: plain language of statute ("has been adequately demonstrated") requires backward-looking analysis
- More typical challenge – arbitrary and capricious for EPA to use CCS @ 90% with no proven track record?

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North Dakota v. EPA – MATS Rule for EGUs

How Did We Get Here?

- In 2020, EPA maintained 2012 standards as part of risk review and first technology review
  - Risk Review: whether MACT standards provide "ample margin of safety"
  - Technology Review: whether "developments in practices, processes or control technologies" warrant revision
- In 2024, EPA reviewed the 2020 action and tightened surrogate standard for non-mercury metals, while also requiring lignite units to meet same mercury limits as other coal units
  - Didn't reopen risk review, but technology review found that compliance had been cheaper and easier than expected, so more stringent limits needed to bring "stragglers" in line with the rest of the industry

Litigation is underway—Supreme Court stay applications pending

- D.C. Circuit denied stay request on 8/6; briefing schedule TBD
- Stay request filed with Supreme Court on 8/16
- ***Loper Bright* Watch**: Does "*revise as necessary*" language in 112(d)(6) allow EPA to revise standards w/o any consideration of risk?
  - Will *Surface Finishing* precedent (citing *Chevron*) addressing meaning of "developments" be followed?

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Texas v. EPA – Methane Rules for Oil & Gas

How Did We Get Here?

- Final rule published in December 2023 (nearly 1 million comments received)
  - NSPS for methane and VOCs for oil & gas sources under 111(b)
  - Existing Source Guidelines under 111(d), which included "presumptive" standards
  - Enables third parties to monitor and report "Super Emitters," requiring facilities to investigate
- Unlike power plants, oil and gas facilities have wide variety of small emission units, so EPA's rules contain a wide mix of standards and work practices, including leak detection technologies
- States have two years (March 2026) to submit plans; sources have three more years to comply

Litigation is underway, while petitions for limited reconsideration pending before EPA

- D.C. Circuit denied stay request on 7/9; stay sought in Supreme Court on 8/23
- Challenges—"presumptive standards" constrain state authority to consider remaining useful life and other factors; no formal cost-benefit analysis (esp. marginal wells); insufficient time to submit plans
- No apparent *Loper Bright* issues; final briefing schedule TBD (likely 2025)

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Kentucky v. EPA – Lowering Primary NAAQS for PM

How Did We Get Here?

- In 2020, EPA retained all PM standards based on EPA's 2019 Science Assessment
- Rule challenged in D.C. Circuit by several states and environmental groups
- In 2021, EPA announced it would reconsider 2020 decision, staying litigation challenges
- This year, EPA lowered annual $PM_{2.5}$ standard from 12 ug/m^3 to 9 ug/m^3
- Large areas of country may fall into "nonattainment" – more challenging permitting, new control requirements for NOx and SO_2 emissions (precursors to $PM_{2.5}$)

Litigation Underway, unlikely to implicate *Loper Bright*

- No stay requested; merits briefing complete by 10/15
- Challenges: EPA can't revise 2020 NAAQS under 109(d) w/o "thorough review" of air quality criteria, should have considered costs, and arbitrary and capricious to land at 9 ug/m^3
- Major Hurdles: *American Trucking v. Whitman* (Scalia) (CAA "unambiguously bars cost considerations from the NAAQS-setting process"); discretion to reconsider well-established

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And there's still more to talk about …

Rule	Status
Revised RMP under 112(r)	Pending challenge in D.C. Circuit (no stay)
HFC Transition Rule under Title VI	Pending challenge in D.C. Circuit (no stay); supplemental proposed rule
Supplemental Good Neighbor Plan	Awaiting final rule; would add 5 states (AZ, IA, KS, NM, TN)
Regional Haze – Round 2	Deadlines for SIP decision set by D.C. Circuit; disapprovals underway
PFAS as a HAP?	Test method development; still TBD

Thank You

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