

# AIR CASE LAW UPDATE

REGFORM Air Seminar

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David Shanks, Boeing Policy Analysis

Bob Lambrechts, Lathrop and Gage, LLP

# Air Law in Federal Courts



- U.S. Supreme Court
  - Greenhouse gas PSD permitting
  - Cross-State Air Pollution Rule (CSAPR)
- 3<sup>rd</sup> Circuit Court of Appeals
  - Permit shield against common law nuisance claims?
- New D.C. Circuit appointments

# Air Law in Federal Courts



- D.C. Circuit cases
  - Challenges to NESHAPs
    - Industrial, commercial & institutional boilers
    - Chrome plating and anodizing
    - Many others
  - Major source aggregation for permitting (NSR/TV)
  - Honorable mention: NAAQS deadlines, NAAQS implementation

# GHG PSD permitting, UARG

- Utility Air Regulatory Group v. EPA
- Argued on February 24, 2014
- Climate science not on trial
- Challenges to approach to resolving conflicting statutory commands
- A compromise intrigued Chief Justice Roberts – only require BACT for sources that need permits for other pollutants, but not when CO<sub>2</sub> is the only pollutant emitted in major amounts – this approach is hard to square with other statutory requirements.

# GHG PSD permitting, UARG



- The question on everyone's mind is whether a Supreme Court decision rejecting EPA's current permitting rules will mean that EPA cannot proceed with its planned Section 111 regulations for power plants.
- Everything depends upon the precise holding and rationale of that opinion.

# GHG PSD permitting, UARG



- The Court could easily issue an opinion rejecting those rules, while nevertheless leaving the agency's Section 111 authority fully intact.
- Conversely, the Court could sharply curtail EPA's Section 111 authority, although doing so would likely require the Court to either limit or overturn its prior decision in *Massachusetts v. EPA*.

# CSAPR Regional Transport

- EPA issued Cross State Air Pollution Rule (CSAPR) after D.C. Circuit remanded Clean Air Interstate Rule (CAIR).
  - ▣ CSAPR set NO<sub>x</sub> and SO<sub>2</sub> trading budgets in 28 states.
- D.C. Circuit vacated CSAPR in 2012 and denied request for rehearing.
  - ▣ ***EME Homer City Generation, L.P. v EPA***
  - ▣ Nov. 2012 EPA memo to Regions: allow states to rely on CAIR reductions for SIPs
    - ***Sierra Club et.al. v EPA*** challenges EPA memo and reliance on CAIR. Final briefs 3/11/14. Oral argument not scheduled.
    - Memo allowed MO to proceed with St. Louis 85 ppb Ozone Maintenance Plan. MACC hearing March 27 in Springfield.

# CSAPR Regional Transport

- Supreme Court granted certiorari
  - ▣ Oral arguments Dec. 10, 2013
  - ▣ Two major questions:
    - Did “FIP before SIP” approach violate the statute?
      - EPA: states could write SIPs later to replace FIP.
    - Did EPA properly interpret statutory language “contribute significantly” to downwind nonattainment?
      - Can EPA consider cost-effectiveness of controls?
      - D.C. Circuit said EPA must quantify each state’s significant contribution, and not require more.
  - ▣ EPA must win on both questions to reinstate CSAPR

# CSAPR Regional Transport

- Justice Alito recused himself. A 4-4 split could occur (Kennedy and Roberts most uncertain).
  - ▣ A 4-4 split means D.C. Circuit vacatur is upheld.
- If CSAPR survives:
  - ▣ Phase 1 deadlines passed. Phase 2 was to start Jan. 2014.
  - ▣ Try to implement Phase 2 starting midyear?
- If CSAPR fails:
  - ▣ EPA meeting with states on Son of CSAPR rule
    - NOx only? Restart NOx SIP Call? Summer 2014 proposal?
  - ▣ Some states filing Sec. 126 petitions and filing suit to challenge upwind state SIPs: **Connecticut v EPA**, 6<sup>th</sup> Circuit.
  - ▣ Ozone Transport Commission seeks to expand its boundaries into Ohio Valley

# Permit Shields and Common Law Claims

- Bell v. Cheswick Generating Station (3d Cir. 2013)
- Is compliance with a federal clean air permit sufficient to preempt state common law claims?
- How to protect against nuisance claims, e.g., odor?
- Some states have supported the view that the CAA does not preempt common law claims because states want additional remedies available to them.
- What can sources do to obtain dismissal if preemption is not an option?

# D.C. Circuit Appointments



- There are currently thirteen United States courts of appeals.
- The eleven numbered circuits and the D.C. Circuit are geographically defined. Federal Circuit is #13 – limited by subject matter rather than geography.
- While the DC Circuit is the smallest geographic jurisdiction of any of the United States courts of appeals, the D.C. Circuit is arguably the most important inferior appellate court.

# D.C. Circuit Appointments



- The court is given the responsibility of directly reviewing the decisions and rulemaking of many federal independent agencies of the United States government based in the national capital, often without prior hearing by a district court.
- A judgeship on the D.C. Circuit is often thought of as a stepping-stone for appointment to the Supreme Court.
- As of January 2013, four of the nine Justices on the Supreme Court are alumni of the D.C. Circuit.

# D.C. Circuit Appointments Challenge Question



- How many judgeships are authorized by statute in the DC Circuit?

# D.C. Circuit Appointments Challenge Question



- How many judges have been confirmed by the Senate for the DC Circuit in the last 12 months?

# D.C. Circuit Appointments



- Patricia Millet
- Cornelia Pillard
- Sri Srinivasan
- Robert Wilkins

# Industrial Boiler NESHAP

- Starting 2004, several rounds of final rules, partial vacatur, and court remands
- As soon as 2011 rules were issued, EPA began reconsideration and stayed effective date of major source rule.
- Multiple parties challenged the January 2013 final rules. Cases consolidated as ***U.S. Sugar v EPA*** in D.C. Circuit.
  - ▣ EPA granted administrative petition to reconsider several issues, to remove them from the suit. EPA must report progress to court, but no firm deadline to complete.
    - Includes startup/shutdown recordkeeping for natural gas boilers at major sources. An apparent oversight by EPA.

# Industrial Boiler NESHAP

- Issues still in lawsuit include numeric emission standards
- Court planned to receive final briefs by Sept. 2014, but
  - ▣ On Feb. 28, EPA filed motion to
    - Suspend the briefing schedule
    - Seek voluntary remand (without vacatur) of many emission limits
    - Allow 60 days for EPA to supplement the record to explain methodology setting limits based on 9 or fewer data points.
      - To address questions raised by D.C. Circuit in Aug. 2013 decision *Natl. Assoc. of Clean Water Agencies v EPA*.

# Industrial Boiler NESHAP



- In the meantime:
  - New or reconstructed boilers are subject to the 2013 rules
    - Including startup/shutdown recordkeeping on natural gas boilers at major sources. EPA has not even proposed its reconsideration rule for easy cleanup issues.
  - Existing boilers face a January 31, 2016 compliance deadline.
    - Tune ups and energy assessments not likely to change much due to litigation. Compliance planning AOK.
    - Bigger problem is for solid and liquid fueled boilers that have numeric limits. What is the design target for control device retrofits?

# Chrome Plating/Anodizing NESHAP

- In Sept. 2012, EPA finalized Risk & Technology Review revisions to 1995 rule
  - ▣ Added housekeeping, lower emission limits for scrubbers and mesh pad control devices AND
    - Elimination of mist suppressants that contain perfluorooctane sulfonate (PFOS) based chemicals
    - PFOS is not a HAP. EPA concern was PFOS in rinsewater. Can EPA use NESHAP to regulate a non-HAP? Dept. of Defense raised this issue in comments, but didn't pursue.
- Mostly area sources
  - ▣ 80% of affected facilities employ <75 people

# Chrome Plating/Anodizing NESHAP

- In Nov. 2012, National Association for Surface Finishing (NASF)
  - ▣ filed suit in D.C. Circuit and
  - ▣ filed a 37 page detailed petition for EPA administrative reconsideration.
    - Largely focused on technical errors in EPA analysis.
    - EPA rejected reconsideration April 2013. Rejection letter skirted most of the technical issues raised.
  - ▣ Earthjustice also filed suit, seeking more emission reduction

# Chrome Plating/Anodizing NESHAP

- D.C. Circuit consolidated case as ***Natl. Assoc. for Surface Finishing v EPA***
  - ▣ Initial briefs due last week, briefing schedule ends July 2014.
- In the meantime:
  - ▣ Sept. 2015 compliance deadline for existing sources
  - ▣ Non-PFOS mist suppressants are passing some tests for part quality, failing others.
    - Testing is expensive and most job shops are small businesses.
    - Alternative to mist suppressants: install ductwork and scrubbers or mist-pad controls. By Sept. 2015. Court decision expected late 2014 at best.

# Other NESHAPs



- Electric utility mercury & air toxics (MATS)
  - *White Stallion Energy Center v EPA*
  - Oral arguments Dec. 10, 2013
- Cement kilns (NSPS & NESHAP)
  - *NRDC, et.al. v EPA*
    - Challenges to PM limits, 2015 compliance deadline, and affirmative defense to malfunctions
  - Oral arguments Oct. 24, 2013

# The Functional Interrelatedness Test: Is the End in Sight?

- Determining the scope and extent of a source for air permitting purposes becomes complex when regulators try to assess the interrelationships between sources (in the oil and natural gas industry).
- In *Summit Petroleum Corporation v. EPA*, No. 09-4348 (6th Cir. Aug. 7, 2012), the Sixth Circuit held that EPA's decades-long policy of determining whether sources are adjacent by looking at whether the sources are functionally related was unreasonable and contrary to the plain meaning of the term adjacent.
- EPA issued a memorandum in December 2012 instructing the regional offices that *Summit* only applies in the Sixth Circuit.

# The Functional Interrelatedness Test: Is the End in Sight?



- Enter - *Nat'l Env'tl. Dev. Assoc.'s Clean Air Project v. U.S. EPA*, No. 13-1035 (D.C. Cir. filed June 21, 2013).
- The *NEDA* petitioners have challenged whether EPA is authorized to use different permitting criteria based on the location of the emission source.

# The Functional Interrelatedness Test: Is the End in Sight?

- Petitioners in *NEDA* argue that EPA's December 2012 memo must be struck down.
- Petitioners claim that the "non-acquiescence doctrine," which allows the government to relitigate issues in multiple circuits, has been displaced by Congress's directive in the CAA to "assure fairness and uniformity in the criteria, procedures and policies applied by the various regions in implementing and enforcing"

# The Functional Interrelatedness Test: Is the End in Sight?



- EPA has also adopted a "Regional Consistency" requirement to ensure "fair and uniform application by all EPA Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing" the CAA.
- By spring 2014, the regulated community may finally know whether the functional relatedness test is truly a thing of the past.

# Numerous NAAQS Cases

- Next Ozone NAAQS deadline
  - *Sierra Club et.al. v EPA* (N.D. Cal.)
    - EPA requests pushing proposal to Jan. 15, 2015 and final to Nov. 15, 2015.
    - 2<sup>nd</sup> draft Policy Assessment supports primary in 60-70 ppb range, and another run at W126 seasonal secondary standard
- SO<sub>2</sub> Designations
  - Multiple district courts and D.C. Circuit
  - D.C. Circuit granted motions to extend negotiating a remedy until July 21, 2014