

SHOOK
HARDY & BACON

Up in the Air

Is Anything NOT Litigated?

Tom Grever

March 3, 2016

REGFORM Air Compliance Seminar

1

Air Litigation



1

**Federal Rule
Challenges**



2

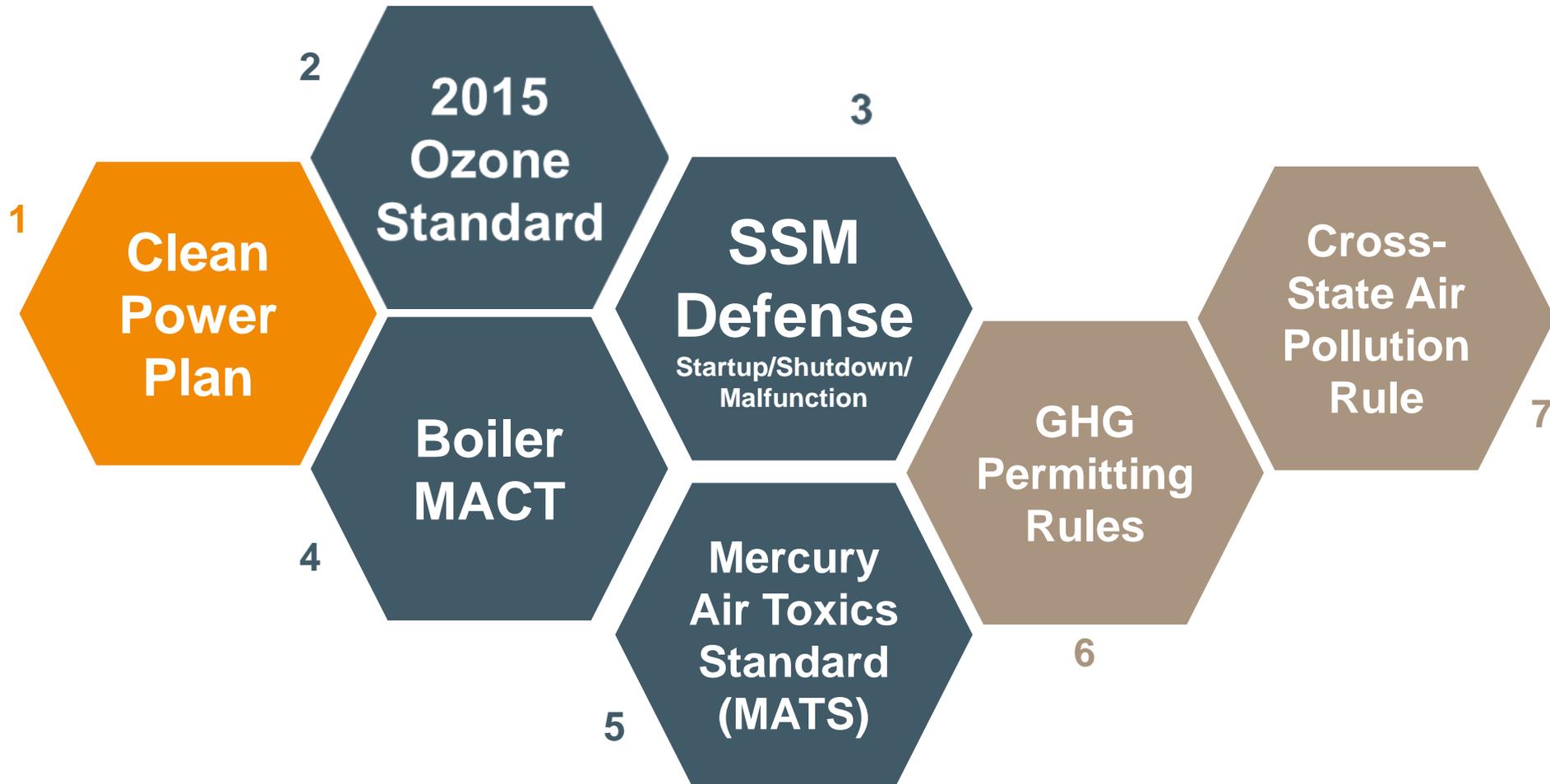
**Enforcement/
Citizen Suits**



3

**Nuisance/
Private Parties/
Class Actions**

Federal Rule Challenges



Federal Rule Challenges



EPA



**D.C. Circuit
Ct. of Appeals**
(3-judge panel)



**Supreme
Court**

En Banc
Review
(full court)

Federal Rule Challenges— Clean Power Plan

- Briefing ongoing
- Oral argument: June 2, 2016
- Rule stayed by Supreme Court
- Issues
 - EPA authority to regulate power plants under CAA 111(d)
 - EPA authority to regulate “beyond the fence”
 - Constitutional challenges

Federal Rule Challenges

Fossil Fuel Utility NSPS

- Final Rule issued October 2015
- Rule requires new coal plants to meet equivalent emissions of partial carbon capture/sequestration
- Challenges filed December 2015
- Briefing/argument schedule not set
- Decision—2017?

Federal Rule Challenges— Mercury Air Toxics Rule

- Final Rule – 2012
- DC Circuit upheld
- July, 2015- *Michigan v. EPA*
 - Supreme Court reversed and remanded rule
 - EPA did not account for costs of compliance
 - “EPA must consider cost before deciding whether regulation is **appropriate and necessary**” under CAA Section 112 (HAPS) for power plants

MATS Rule (cont.)

- DC Circuit instructed EPA to reconsider, but did not vacate rule
- December 2015 EPA proposal: no changes
- Rule currently in effect
- February 23, 2015:
20 states move from stay by Supreme Court
EPA planning on completing an “appropriate and necessary” finding

Startup, Shutdown, Malfunction Defense/SIP Call

- Court decisions:
NESHAPs cannot include compliance defenses for SSM
- No “get out of jail free”:
EPA revised SSM policy to reject affirmative defenses in SIPs (NAAQS)
- May 2015 Rule: “SIP-call” to 36 states (including Missouri) requiring changes to SSM provisions:
 - states have 18 months to respond
- Challenges filed in D.C. Circuit
- Briefing through 2016

Boiler MACT

- D.C. Circuit appeals
 - Area Source rule
 - Major Source rule
 - CISWI rule
- Argument: December 2015
- Issues:
 - Incompatible technologies
 - CO as surrogate for HAPS
 - Numeric standards
 - Malfunctions

2015 Ozone Standard

- **October 2015 Final Rule:**
 - lowers ozone NAAQS to 70 ppb
- Appealed to D.C. Circuit Court of Appeals
 - 5 states, 1 Coal Mining Company
- 2008 Ozone NAAQS upheld by D.C. Circuit
 - no Supreme Court review
- 1997 Ozone NAAQS upheld by Supreme Court

2015 Ozone Standard (cont.)

- **February 2016:**
Notice of intent to sue for 2008 ozone nonattainment area designations (incl. St. Louis)

“... As explained in detail below, EPA has failed to perform these mandatory duties for the Metro Cleveland, Houston, Philadelphia, Pittsburg, San Luis Obispo, Sheboygan, **St. Louis**, Washington, D.C., Atlanta, Chicago, Denver, Greater Connecticut, Imperial County, Kern County, Mariposa County, CA, Nevada County, CA, New York, Phoenix, and San Diego nonattainment areas.”

Law Office of Robert Ukeiley

255 Mountain Meadows Road - Boulder, CO 80302 - tel.303-442-4033

Robert Ukeiley
rukeiley@iac.org

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

February 12, 2016

Gina McCarthy
Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Notice of Intent to Sue pursuant to 42 U.S.C. § 7604(b)(2) for failure to make “bump up” determinations for various marginal nonattainment areas for the 2008 ozone NAAQS

Dear Administrator McCarthy,

On behalf of the Center for Biological Diversity and Elizabeth Crowe, I write to inform you that they intend to file suit against you for “a failure of the Administrator [of the United States Environmental Protection Agency (“EPA”)] to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). Specifically, under 42 U.S.C. §§ 7509(c)(1) & 7511(b)(2)(A), EPA must determine by no later than January 20, 2016 whether the 2008 ozone National Ambient Air Quality Standard (NAAQS) marginal nonattainment areas have attained the 2008 ozone NAAQS and for each area that failed to attain, the reclassification of such area. Pursuant to 42 U.S.C. §§ 7509(c)(2) & 7511(b)(2)(B), EPA is then required to publish notice in the Federal Register of those determinations. As explained in detail below, EPA has failed to perform these mandatory duties for the Metro Cleveland, Houston, Philadelphia, Pittsburg, San Luis Obispo, Sheboygan, St. Louis, Washington, D.C., Atlanta, Chicago, Denver, Greater Connecticut, Imperial County, Kern County, Mariposa County, CA, Nevada County, CA, New York, Phoenix, and San Diego nonattainment areas.

This notice involves EPA’s failure to timely implement the 2008 national ambient air quality standard for ground-level ozone, the principle component of what people commonly refer to as smog. According to EPA, based on exhaustive scientific review, ozone pollution causes decreased lung function, increased respiratory symptoms, emergency department visits, hospital admissions for respiratory causes, and even death. 73 Fed. Reg. 16,436 (Mar. 27, 2008). Those most at risk from ozone pollution are children; active people, e.g., runners and people who do

GHG Permitting Rules (PSD/Title V)

- 2014 (*UARG v. EPA*) Supreme Court invalidates applicability to “GHG-only” sources
Remands rule
- DC Circuit: EPA to determine triggering level for GHG – BACT determination in “anyway” sources
- 2015: Several parties unsuccessfully challenged EPA’s refusal to reconsider entire rule. Review denied by Supreme Court.
- EPA current triggering level – 75,000 CO₂ tpy
- EPA to publish rule on triggering level for GHG-BACT

CSAPR

- **2014**

Supreme Court reinstated CSAPR

- **July 2015**

D.C. Circuit requires EPA to reconsider certain state emission budgets

- **November 16, 2015**

EPA proposes CSAPR update rule to address 2008 ozone standard

- further NO_x reduction in 2017 in 23 states

Rule Review and Litigation— Supreme Court Results

2007
**CO₂ is an
“air pollutant”**
Mass. v. EPA (2007)
Authorizes CAA regulation
(5-4, Stevens)

2014
CSAPR
EME Homer v. EPA
(2014), Upheld regulation
(6-2*, Ginsburg)

Feb. 9, 2016
**Clean Power
Plan stay**
(5-4)

2001
**Ozone/PM
NAAQS**
*Am. Trucking Ass’n
v. Whitman* (2001),
Upheld regulations
(9-0, Scalia)

2014
GHG Permitting Rules
UARG v. EPA (2014), Partially
reversed regulation (5-4, Scalia)

2015
**Utility
Mercury rule**
Michigan v. EPA
(2015), Remanded
(5-4, Scalia)

Rule Review and Litigation— Supreme Court

- It's all a matter of [statutory] interpretation
- General Rule: Court will defer to reasonable agency interpretation of statute (“*Chevron* deference”)
- Supreme Court rarely finds agency exceeded authority. **BUT...**

“[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.”

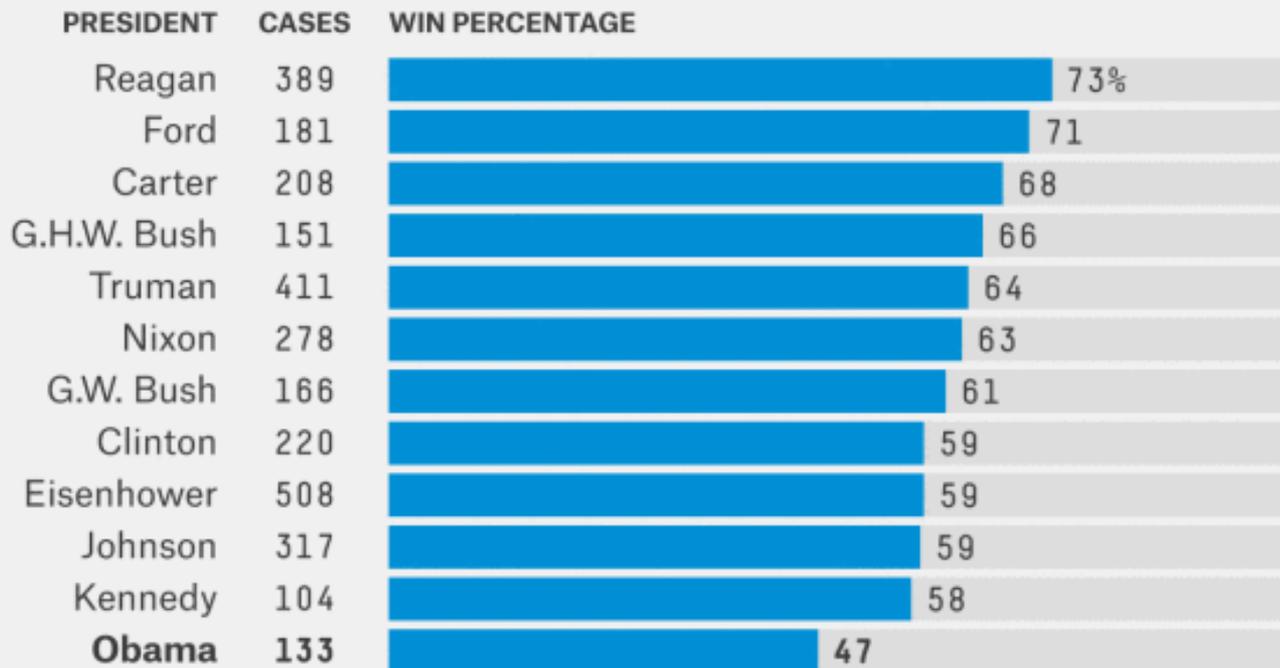
“When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy’ ... we typically greet its announcement with a measure of skepticism.” UARG (2014)

- Less deference in “significant” cases?

Rule Review and Litigation

Obama Has Struggled In Court

Supreme Court win percentage for the federal government by administration, 1946 to present



US EPA Enforcement

- **NSR/PSD Enforcement**

- Statute of limitations
- Interpretation of “modification”

- **Air Toxics/HAPS**

- **EPA enforcement results**



Nuisance/Class Actions



NO FEE GOV'T CODES SEC. 6103
 AMOUNT RECOVERABLE PURSUANT
 TO 6103.5 GC & OTHERS
 PLUS A ONE-TIME ADMINISTRATIVE FEE UPON JUDICIAL FILING - Govt. Code § 61031

1 MICHAEL N. FEUER, City Attorney, SBN 143900
 2 THOMAS H. PETERS, Chief Assistant City Attorney, SBN 143900
 3 TINA L. HESS, Assistant City Attorney, SBN 211642
 4 JESSICA B. BROWN, Deputy City Attorney, SBN 211642
 5 NICK KARNO, Deputy City Attorney, SBN 210805
 6 OFFICE OF THE LOS ANGELES CITY ATTORNEY
 7 200 North Main Street, 500 City Hall East
 Los Angeles, California 90012-4131
 Telephone (213) 473-6922/Facsimile (213) 978-8112
 Sherri R. Carter, Executive Officer/Clerk
 By Shayla Chambers, Deputy

FILED
 Superior Court of California
 County of Los Angeles
 DEC 07 2015
 Shayla Chambers

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

11 THE PEOPLE OF THE STATE OF CALIFORNIA,
 12 Plaintiff,
 13 vs.
 14 SOUTHERN CALIFORNIA GAS
 15 COMPANY, and DOES 1-50, inclusive,
 16 Defendants.

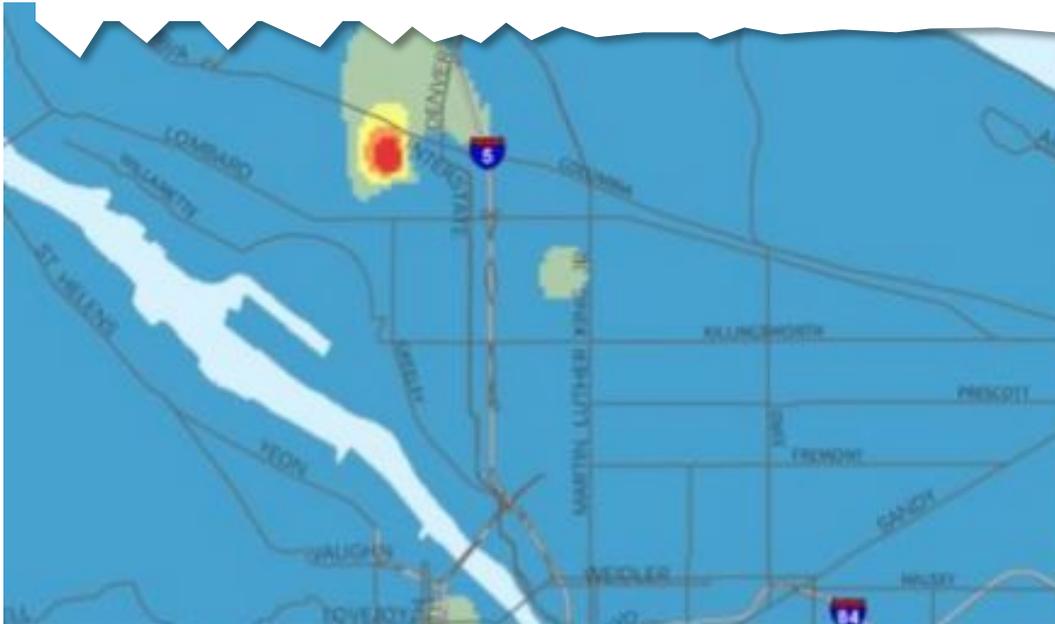
Case No.: **BC 6 0 2 9 7 3**
 COMPLAINT FOR EQUITABLE
 RELIEF AND CIVIL PENALTIES FOR:
 (1) PUBLIC NUISANCE; AND
 (2) VIOLATION OF THE CALIFORNIA
 UNFAIR COMPETITION LAW (Bus. and
 Prof. Code § 17200, *et seq.*)

ORIGINAL



Nuisance/Class Actions

Portland Heavy Metals Emissions Linked To Glass Facility



“Current federal and state regulatory programs are clearly inadequate to assure the public that their health is being protected.”

*Oregon Governor
Kate Brown*

“They're in compliance with the permit.”

Oregon DEQ

Nuisance/Class Actions

Air Quality Issues in Portland, Oregon a Focus of Erin Brockovich and Weitz & Luxenberg



“I can’t believe that in this day and age companies would **knowingly** allow their dangerous chemicals to **pollute the air**. It’s outrageous. We have known for decades the harm these toxic chemicals are capable of causing.”

Calif. Newswire, Feb. 26, 2010

Nuisance/Class Actions

The New York Times

Kentuckians Take Distilleries to Court Over Black Gunk



Nuisance/Class Actions

“...the Clean Air Act does not preempt claims brought by plaintiffs under the common law of the source state.”

Merrick v. Diageo Supply, 6th Cir. 2015

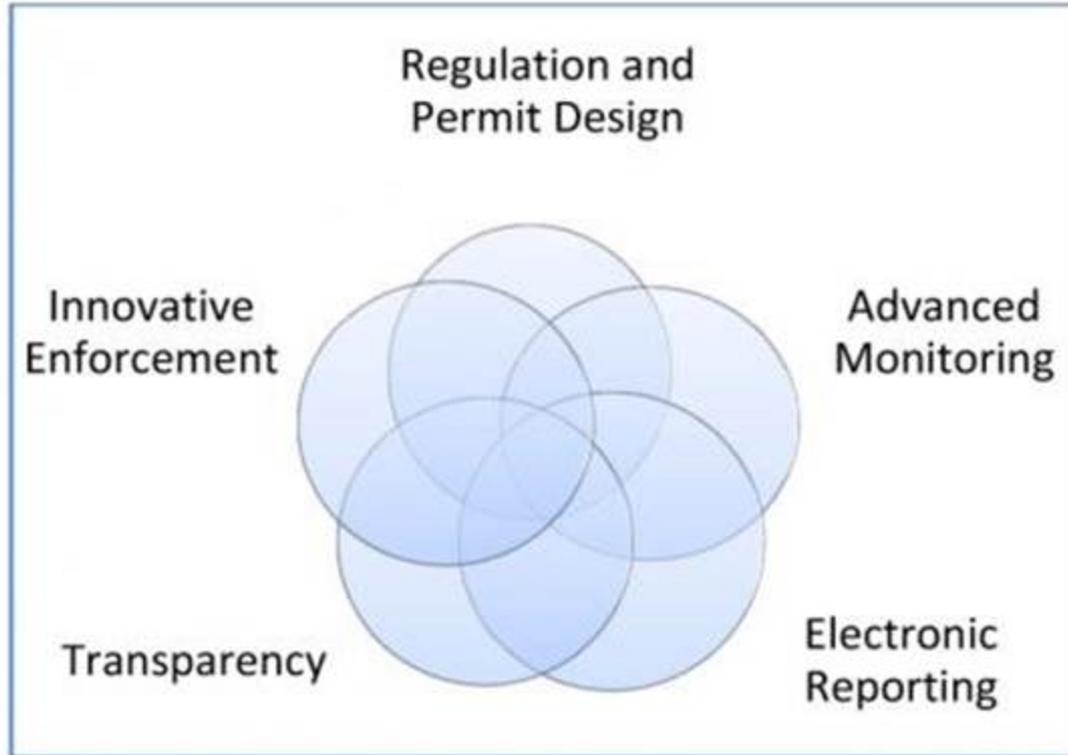
Unless...



Source is in another state.
Interstate nuisance claims
ARE preempted by the
Clean Air Act.

*North Carolina, ex rel. Cooper
v. TVA*, 615 F.3d 291 (4th Cir. 2010)

Next Generation Compliance



Source: U.S. EPA

Up in the Air

Is Anything NOT Litigated?

Tom Grever

816.559.2375 | tgrever@shb.com