Environmental Law Update

WEB CONFERENCE SERIES

The D.C. Circuit Court's Escalating Influence on Environmental Policy

Thursday, September 18, 2008
11:30 a.m. – 12:30 p.m. CST

FOLEY
FOLEY & LARDNER LLP

Welcome & Introductions

FOLEY
FOLEY & LARDNER LLP

Introductions

Richard G. Stoll

FOLEY
FOLEY & LARDNER LLP

Housekeeping Issues

- Call **866.493.2825** for technology assistance
- Dial ***0** (star/zero) for audio assistance
- Ample time for live Q & A will be allotted at the end of the formal presentation
- We encourage you to Maximize the PowerPoint to Full Screen Usage:
  - Hit F5 on your keyboard; or
  - Select "View" from the toolbar menu and click "Full Screen"

FOLEY
FOLEY & LARDNER LLP

Judicial Review Basics and D.C. Circuit's Primary Position in EPA Judicial Review

Richard G. Stoll

Richard G. Stoll is a partner in Foley & Lardner's Washington, D.C. office. He is a member of the firm's Environmental Practice, and concentrates on federal administrative and environmental law matters.

FOLEY
FOLEY & LARDNER LLP

EPA's Air Program Reforms: Is There Anything Left?

Brian H. Potts

Brian Potts is an associate with Foley and member of the firm's Environmental Regulation Practice and Energy Industry Team. Mr. Potts has extensive experience with permitting, compliance and litigation issues under the Clean Air Act, Federal Power Act, Clean Water Act, remediation and hazardous waste statutes (CERCLA, RCRA, & EPCRA).

FOLEY
FOLEY & LARDNER LLP

RCRA - The long and winding definition of ‘‘solid waste’’

Thomas K. Maurer

Thomas K. Maurer is a partner with Foley & Lardner and a member of the firm's Environmental Regulation Practice. For over 25 years, Mr. Maurer has represented clients in environmental and regulatory matters, including air pollution, hazardous waste management, underground storage tank, groundwater contamination and the siting of controversial projects.

FOLEY
FOLEY & LARDNER LLP

Judicial Review Basics and D.C. Circuit's Primary Position in EPA Judicial Review

Richard G. Stoll

FOLEY
FOLEY & LARDNER LLP

Judicial Review 101

- General federal law principle: agency rules subject to judicial review
- When agency has authority from Congress to issue rules, those rules may be subject to judicial review and affirmed or rejected by courts on various grounds
- (For purposes of these slides, rules = regulations)

FOLEY
FOLEY & LARDNER LLP

Judicial Review 101

- Agency rules presumed valid – rules stay in effect during judicial review (unless court grants stay, which is extraordinary)
- Despite presumption of validity, courts often reject agency rules
- Three basic ways courts may reject rules
  - By finding procedural defects
  - By disagreeing with agency's statutory/legal interpretations
  - By finding "reasoned decision making" failures

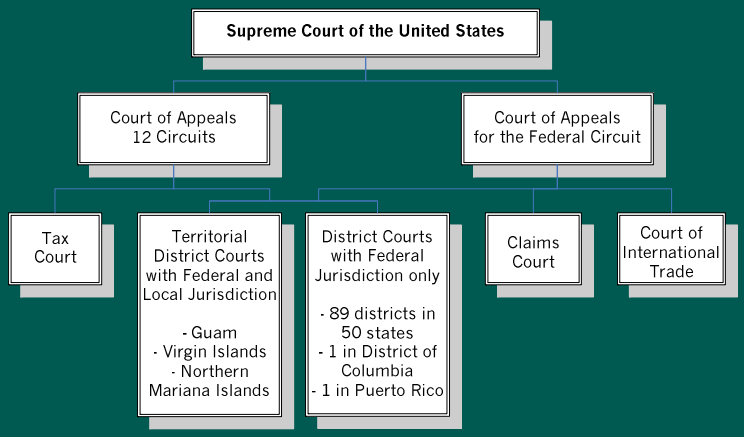
FOLEY
FOLEY & LARDNER LLP

Judicial Review 101

- Result of judicial review is *affirmance* of rule, or *remand* or *vacatur* of rule
- Remand – rule stays in effect during period agency obliged to reconsider and correct defects
- Vacatur – rule is no longer in effect
- Remands and vacaturs can apply to portions of a rule
- Courts have been inconsistent as to when remand appropriate as opposed to vacatur

FOLEY
FOLEY & LARDNER LLP

Federal Judiciary



FOLEY
FOLEY & LARDNER LLP

Judicial Review 101

- If substantive statute silent regarding judicial review, review initiated in federal district court
- District where "venue" appropriate based on residence of parties and other considerations

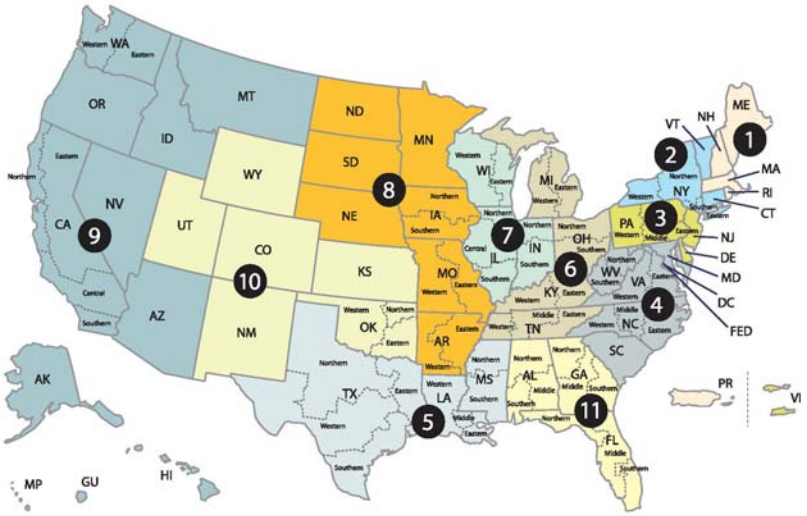
FOLEY
FOLEY & LARDNER LLP

- Many substantive statutes provide for direct judicial review of agency rules issued under those statutes – and impose deadlines
- Some specify any district court – some specify *any* of the 12 U.S. Courts of Appeals (depending on venue considerations)
- But many specify U.S. Court of Appeals for D.C. Circuit as *exclusive* forum

FOLEY
FOLEY & LARDNER LLP

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



Source: U.S. Courts

D.C. Circuit 101

- D.C. Circuit currently has ten active (plus three senior) judges
  - 4 appointed by Bush I
  - 3 by Clinton
  - 3 by Bush II

FOLEY

FOLEY & LARDNER LLP

D.C. Circuit 101

- D.C. Circuit often considered "2nd highest" court because Congress has specified D.C. Circuit as exclusive forum to review many (but not all) federal agency rules
- Seat on D.C. Circuit often step to Supreme Court – current Chief Justice Roberts, Justices Ginsburg, Scalia, Thomas, and former Chief Justice Burger all formerly D.C. Circuit judges

FOLEY
FOLEY & LARDNER LLP

D.C. Circuit 101

- For each case, three-judge panel will hear case and render decision
- Once three-judge panel issues opinion, losing party's options limited to
  a) requesting entire court rehearing ("en banc") – rarely granted
  b) trying for Supreme Court ("writ of certiorari") – rarely granted

FOLEY
FOLEY & LARDNER LLP

D.C. Circuit 101

- D.C. Circuit has exclusive jurisdiction to review EPA national rules under:
  - Clean Air Act (CAA)
  - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
  - Resource Conservation and Recovery Act (RCRA)
  - Safe Drinking Water Act (SDWA)
- D.C. Circuit often choice of parties challenging rules under other statutes, such as Clean Water Act, Toxic Substances Control Act

FOLEY
FOLEY & LARDNER LLP

D.C. Circuit 101

- D.C. Circuit playing increasingly pivotal role controlling EPA's policy – also in driving agenda, staff resources, priorities, workload
- Almost every major EPA rulemaking draws comments from regulated parties arguing for less stringent approaches and comments from environmental groups (and often state governments and other NGOs) taking opposite view
- Almost every rule, when final, draws parties from all sides into the D.C. Circuit

FOLEY
FOLEY & LARDNER LLP

D.C. Circuit 101

- EPA rules have been affirmed (or at least largely affirmed) many times but there have been major exceptions where the Court has rejected EPA's rules and sent EPA back to the drawing board
- Recent major cases (especially during the Bush II era) show how significant Court's role can be – both on substance and effect on regulated parties and agency priorities/ resource allocations

FOLEY
FOLEY & LARDNER LLP

EPA's Air Program Reforms: Is There Anything Left?

Brian H. Potts

FOLEY
FOLEY & LARDNER LLP

The Clean Air Interstate Rule

- Issued May 12, 2005 (70 Fed. Reg. 25,162)
- Statutory Authority – CAA § 110(a)(2)(D)(i)(I):
  - CAA Requires SIPs to "contain adequate provisions—(i) prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—(I) **contribute significantly** to nonattainment in, or **interfere with maintenance** by, any other State with respect to any [NAAQS]"
- Same authority as NOx SIP Call (Oct. 1998)
- Purpose: to reduce or eliminate the impact of upwind sources on out-of state downwind nonattainment of NAAQS for PM2.5 and 8-hr. ozone

FOLEY
FOLEY & LARDNER LLP

State of North Carolina v. U.S. E.P.A., 531 F.3d 896 (July 11, 2008)

- Lawfulness of Trading Programs
  - Argued "lack of reasonable measures in CAIR to assure that upwind states will abate" (not that trading is per se unlawful)
  - Ct: CAIR trading system inadequate
- "Interfere with maintenance" language ignored
  - Ct: EPA should have also included upwind states contributing to areas barely meeting attainment levels for ozone
- CAIR vacated in full

FOLEY
FOLEY & LARDNER LLP

Net Result: Confusion

- EPA asking states to reinstate NOx SIP Call
- Title IV (SO2) trading remains
- States have the option of filing Section 126 petitions to seek relief from EPA for controlling upwind sources
- EPA relied on CAIR for other rules (e.g., NSR PM2.5, proposed NSR emissions test)
- CAIR equaled NOx RACT for some areas
- States included CAIR emissions reductions in attainment demonstrations/contingency plans
- Many states need to re-evaluate BART programs
- Sources may need to revise permits containing CAIR language
- Trading markets are a mess (e.g., prices tumbling, annual NOx market basically dead, contract issues)
- Senate roundtable discussions occurred on September 11

FOLEY
FOLEY & LARDNER LLP

The Clean Air Mercury Rule

- Congress required EPA to study public health risks from EGUs and regulate them as HAP sources under section 112 if "appropriate and necessary"
- December 2000 – EPA concluded that it was “appropriate and necessary” under Section 112(n) and listed EGUs as sources of HAPs (mercury)
- EPA 2003 proposal: MACT or cap-and-trade
- EPA 2005 Section 112 delisting
- EPA 2005 CAMR - Section 111 mercury performance standards adopted
  - Required approx. 70% reduction by 2018 (15 tons)
  - Voluntary cap-and-trade program for new and existing EGUs

FOLEY
FOLEY & LARDNER LLP

New Jersey v. U.S. E.P.A. 517 F.3d 574 (Feb. 8, 2008)

- Section 112(c)(9):
  The Administrator "may delete any source category" from the Section 112 list only after determining that "emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source."
- EPA rationale: because it has authority to list EGUs, it also has authority to delist them through reconsideration (aka change its mind)
- Ct: Section 112(c)(9) requires EPA to make specific findings before delisting; EPA never made these findings
- Ct: if EGUs are listed sources, EPA cannot regulate under Section 111 (vacating CAMR)

FOLEY
FOLEY & LARDNER LLP

Net Result: Back to 2000

- Prior EPA studies make it very difficult for EPA to make delisting findings
- MACT standard will probably take effect around 2014 (estimated 85-90% reduction)
- MACT hammer: immediate impact on new plants in planning/permitting stages
- Some may argue that Section 112(j) triggers an obligation for existing sources to implement source-specific MACT limits through state permit actions
- Congressional Research Service: because EGUs not listed as a source category at the beginning of the MACT program, they are not subject to the MACT hammer

FOLEY
FOLEY & LARDNER LLP

New Source Review

- The Clean Air Act requires major sources to undergo New Source Review if they are new or undertake a major "modification."
- The New Source Performance Standards are also triggered by a "modification"
- Modification = "a physical change" + "significant net emissions increase."
- "Physical change" is broadly interpreted but excludes routine maintenance, repair, and replacement (RMRR).
- "Significant net emissions increase" = projected actual post-project emissions – baseline emissions

FOLEY
FOLEY & LARDNER LLP

New York v. EPA, 413 F.3d 3 (2005); *New York v. EPA,* 443 F.3d 880 (2006)

- 2002 NSR Rule package (mostly upheld)
  - Upheld: Baseline Emission Calculation, Actual-to-Projected Actual Applicability Test, and Plantwide Applicability Limits (PALs)
  - Overturned: Clean Unit Exemption, Pollution Control Project Exclusion (rehearing denied on both)
- 2003 RMRR 20% Rule (overturned)

FOLEY
FOLEY & LARDNER LLP

South Coast Air Quality, 472 F.3d 882 (Dec. 2006)

- EPA implemented new 8-hour ozone standard in April, 2004 (69 FR 23951)
- CAA Anti-Backsliding: EPA may relax NAAQS, but must "provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation."
- The 2004 EPA rule mandates that all "controls" from the one-hour era must remain
- EPA says one-hour NSR not a "control"
- EPA also tried to regulate some 8-hour nonattainment areas under Subpart 1 rather than Subpart 2
- D.C. Circuit vacated rule (except for withdrawal of one-hour standard); updated decision in June 2007
- Ct: "EPA violates logic, its own past practice, and the Act's plain meaning."

FOLEY
FOLEY & LARDNER LLP

Net Result: It's Not Over Yet

- NSR reform leftovers: Baseline Emission Calculation, Actual-to-Projected Actual Applicability Test, and Plantwide Applicability Limits (PALs)
- RMRR - still use four-factor test
- One-hour nonattainment NSR still applicable
- Problems getting EPA to approve NSR reforms because of *South Coast* antibacksliding language
- EPA's never-ending NSR battle with the D.C. Cir. will not end soon

FOLEY
FOLEY & LARDNER LLP

Sierra Club v. EPA, No. 04-1243, D.C. Circuit August 19, 2008.

- EPA does 180 flip-flop on an issue (going from Clinton to Bush II) and D.C. Circuit vacates *both* sides of the flip-flop
- Focuses on CAA provision requiring state Title V permits to include monitoring requirements to "assure compliance" with permit terms. CAA §504(c).
- Issue arose in 1990s (Clinton era) – if a regulatory emission standard (NSPS, MACT, etc.) specified monitoring methods and frequency, could states require in Title V permit *more* than the regulatory standard if state deemed more monitoring necessary to "assure compliance?"

FOLEY
FOLEY & LARDNER LLP

- Original Title V regulations vague on this, but in 1997, Clinton EPA issued "guidance document" strongly advocating that Title V permits *should* include more monitoring requirements
- D.C. Circuit vacated "guidance" in 2000, finding EPA in effect amended Title V regulations without notice-and-comment. *Appalachian Power v. EPA,* 208 F.3d 1015 (D.C. Cir. 2000)
- A 2006 final Bush II rule (after notice-and-comment), provided that states were *prohibited* from including monitoring provisions in Title V permits that required more than the relevant regulatory emission standard. 71 FR 74,422 (Dec. 15, 2006)

FOLEY
FOLEY & LARDNER LLP

- In August 19, 2008 opinion, D.C. Circuit (2-1) vacated this regulatory prohibition, finding it contrary to plain terms of the statute
- Net result:
  - 1997 Clinton EPA position vacated by D.C. Circuit in 2000 is now deemed correct position – states are free to include (and perhaps even obligated to consider) more stringent monitoring provisions in each Title V permit

FOLEY
FOLEY & LARDNER LLP

CAA MACT for hazardous waste burners – a 12-year saga with no end in sight

- Affected sources – portland cement kilns, aggregate kilns, commercial incinerators, chemical industry on-site incinerators, boilers (primarily chemical industry) that burn hazardous waste

FOLEY
FOLEY & LARDNER LLP

- April 1996 – EPA proposes subpart "EEE" rules (40 C.F.R. part 63 MACT)
- September 1999 – EPA issues final EEE rules
  - Sierra Club and various industry parties seek D.C. Circuit review
- July 2001 – D.C. Circuit vacates EEE rules in their entirety, agreeing with Sierra Club arguments, but invites parties to agree to "Interim Standards" so no lack of controls
  - *CKRC v. EPA*, 255 F.3d 855 (D.C. Cir. 2001)
- February 2002 – EPA publishes "Interim Standards" as agreed to by parties

FOLEY

FOLEY & LARDNER LLP

- April 2004 – EPA proposes "Replacement" EEE rules
- October 2005 – EPA issues final "Replacement" EEE rules
  - Sierra Club and various industry parties seek D.C. Circuit review
- January 2006 – D.C. Circuit suspends judicial review (at parties' request) while EPA undertakes administrative reconsideration on certain issues
- March 2007 – D.C. Circuit issues opinion in entirely separate MACT case ("Brick MACT"), *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007), with holdings severely undercutting EPA's legal interpretations and rationale in issuing many 2005 "Replacement" EEE rules

FOLEY

FOLEY & LARDNER LLP

- Famous D.C. Circuit quote from Brick MACT:
  - "If the Environmental Protection Agency disagrees with the Clean Air Act's requirements for setting emissions standards, it should take its concerns to Congress. If EPA disagrees with this court's interpretation of the Clean Air Act, it should seek rehearing en banc or file a petition for a writ of certiorari. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court." 479 F.3d at 884.

FOLEY
FOLEY & LARDNER LLP

- September 2008 – EPA announces it will undertake entirely new rulemaking for many EEE rules,; parties agree to defer litigation for several more months on existing (2005) rules
- Bottom line – EPA proposed rules in 1996 and because of D.C. Circuit rulings and proceedings twelve years later impossible to predict when final rules will be in place

FOLEY
FOLEY & LARDNER LLP

RCRA - The long and winding definition of "solid waste"

Thomas K. Maurer

FOLEY
FOLEY & LARDNER LLP

- Since 1980 EPA has defined "Solid Waste" to include anything discarded, which has served its intended purpose or is a byproduct regardless of whether you....

FOLEY
FOLEY & LARDNER LLP

- Discard it
- Use it
- Reuse it
- Reclaim it
- Store it

FOLEY
FOLEY & LARDNER LLP

- 1987

FOLEY
FOLEY & LARDNER LLP

- *American Mining Congress v. EPA* 824 F2d 1177 (D.C. Cir. 1987)
- EPA exceeded its authority "in seeking to bring materials that are not discarded or otherwise disposed of within the compass of 'waste'

FOLEY
FOLEY & LARDNER LLP

- *Association of Battery Recyclers v. EPA* 208 F3d 1047 (D.C. Cir. 2000)
- "Congress unambiguously expressed its intent that 'solid waste' (and therefore EPA's authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away"

FOLEY
FOLEY & LARDNER LLP

- EPA has proposed changes to the definition of solid waste many times. The latest was proposed on 10/23/03 as modified on 3/26/07. Now before OMB.

FOLEY
FOLEY & LARDNER LLP

The proposed regulatory change to "solid waste"

1. Exclusion for secondary materials that are reclaimed under the control of the generator. Notice is required.

FOLEY
FOLEY & LARDNER LLP

2. Conditional exclusion for secondary materials that are transferred to another company if:
   - No middlemen or brokers
   - "Reasonable efforts" to ensure legitimacy and handling
   - Three year record keeping
   - Manage materials as safely as raw materials
   - Proper management of residuals
   - Financial assurance

FOLEY
FOLEY & LARDNER LLP

3. Petitions for non-waste determinations

FOLEY
FOLEY & LARDNER LLP

Legitimacy

Promote reuse, but keep it real

- Useful contribution to the process
- Produce a valuable product
- No toxics “along for the ride”

FOLEY
FOLEY & LARDNER LLP

State RCRA Programs

- Not applicable until states act
- The checkerboard effect

FOLEY
FOLEY & LARDNER LLP

- Back to the DC Circuit???

FOLEY
FOLEY & LARDNER LLP

TMDLs

- Deference?
- What Deference?

FOLEY
FOLEY & LARDNER LLP

TMDLs

- Under Section 303(d) of CWA states develop lists of impaired water bodies
- These waters do not meet designated uses
- TMDLs are the maximum amount of a pollutant that a water body can receive and still safely meet water quality standards

FOLEY
FOLEY & LARDNER LLP

- *Friends of the Earth v. EPA* 446 F3d 140 (D.C. Cir 2006)
- Challenge to TMDL that set seasonal and annual limits rather than daily
- Held: Daily means daily. Nothing in CWA "even hints at the possibility of seasonal or annual limits"

FOLEY
FOLEY & LARDNER LLP

- But see NRDC v. Muszynski, 268 F3d 91 (2d Cir. 2001)
- Daily does not only mean daily

FOLEY
FOLEY & LARDNER LLP

- EPA Guidance November 2006
- No new rules or policies needed
- Express TMDLs as daily limits but take into account seasonal variations

FOLEY
FOLEY & LARDNER LLP

Examples:

- Minimum/maximum limits on daily basis with average daily loads
- Different daily limits for each season
- Daily loads as a range based upon stream flows

FOLEY
FOLEY & LARDNER LLP

Practice Pointers

- In business planning and due diligence, be sure to consider whether an EPA rule that may be critical to your plans is still subject to judicial review – recognize that review of some rules can get hung up for years sometimes – you could get zapped badly if a rule critical to your planning suddenly gets vacated by D.C. Circuit
- Also, when considering impacts of rules for whatever reason, be sure to check to see whether they may have been vacated in whole or part by D.C. Circuit – EPA often is not swift to publish revocations in the FR after a court vacatur

FOLEY
FOLEY & LARDNER LLP

Practice Pointers

- Consider whether your company or association needs to participate in the D.C. Circuit review process
  - Often important to provide counterweight even when you are happy with a final rule
  - Often critical to be at the table when important follow-up issues (both substantive and procedural) issues get negotiated

FOLEY
FOLEY & LARDNER LLP

Questions & Answers

FOLEY
FOLEY & LARDNER LLP

Upcoming Web Conferences

- Please mark your calendars for the remaining session of the 2008 Environmental Law Update Web Conference Series, a special Friday Focus edition with a healthcare and environmental focus.
  - **November 14, 2008**

FOLEY
FOLEY & LARDNER LLP

Contact Us

- **Thomas K. Maurer**
  Orlando, FL
  407.244.3242
  tmauer@foley.com
- **Richard G. Stoll**
  Washington, DC
  202.295.4021
  rstoll@foley.com
- **Brian H. Potts**
  Madison, WI
  608.258.4772
  bpotts@foley.com

©2008 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP

Thank You!

- A copy of the PowerPoint presentation and a multimedia recording will be available on our website within 24 to 48 hours:
  http://www.foley.com/news/event_detail.aspx?eventid=2349
- We welcome your feedback. Please take a few moments before you leave the web conference today to provide us with your feedback:
  http://www.zoomerang.com/Survey/?p=WEB2289EQRGPL3

FOLEY
FOLEY & LARDNER LLP