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Environmental Law Update

WEB CONFERENCE SERIES

New Leadership at Top of EPA; Recent Significant Clean Air Act Developments

Thursday, September 19, 2013

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Agenda

- New Leadership at Top of EPA
- New Source Review (NSR)
- Cross-State Rule
- Boiler MACT, Commercial, Industrial, Solid Waste Incinerators (CISWI), RCRA Non-Hazardous Secondary Materials (NHSM)
- Greenhouse Gas (GHG)
- Recent D.C. Circuit Court opinions on CAA rule challenges

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NEW LEADERSHIP AT TOP OF EPA

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Gina McCarthy



- Confirmed as Administrator in July – hitting ground running
- Long-standing environmental professional (Connecticut/Massachusetts)
- Four years as CAA Assistant Administrator (2009-2013)
- “Top priorities” (from September 16, 2013 speech)
 - Climate Change
 - Chemical Safety (West, Texas explosion)
 - Aging Water Infrastructure

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Janet McCabe

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- Named Acting CAA Assistant Administrator in July - hitting ground running
- Principal deputy to Gina McCarthy - in that slot 2009-2013
- Long-standing environmental professional (Indiana/Massachusetts)



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Avi Garbow

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- Confirmed as General Counsel in August
- Deputy General Counsel 2009-2013
- Previous legal work at EPA, DOJ, DC law firms



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NEW SOURCE REVIEW (NSR)

The Move From Legacy Issues to Current Compliance



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Background

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- Legacy New Source Review (NSR) status
 - Continuation of litigation against “non-settlers”
 - Section 114 information requests – smaller facilities with coal-fired boilers
 - Finalizing “large settlements” in target areas – utilities and petroleum refining
 - As coal facilities decline with natural gas conversions, less emphasis on legacy NSR
- Shift in focus on enforcement – current NSR



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Legacy NSR Developments

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- Legal issues of importance
 - Statute of limitations – failure to obtain permit
 - State Implementation Plan (SIP) enforcement
 - Concurrent remedy doctrine
- Excellent summary/analysis – *U.S. v. United States Steel Corp.*, No. 2:12-CV-304 (N.D. Ind., Aug. 21, 2013)



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Statute of Limitations - Penalties

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- Issue – federal statute of limitations is 5 years
 - For NSR, what event triggers running of 5 years?
 - Is there “continuing violation” or one-time event?
- Federal circuit courts lining up to say failure to obtain construction permit is one-time event and not continuing
- *U.S. v. Midwest Generation LLC*, 2013 WL 3379319 (7th Cir., July 8, 2013)
 - Statute requires “construction permit”; failure to obtain construction permit a one-time violation
 - However, issue here limited to penalties and obtaining a permit – relatively narrow
- *U.S. v. EME Homer City Generation, L.P.*, No. 11-4407 (3rd Cir., Aug. 21, 2013)



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SIP Enforcement Approach - Penalties

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- Background
 - Most states adopted state regulations incorporating NSR program
 - State requirements made federally enforceable through SIP process
 - SIP language can vary state to state



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SIP Enforcement Approach

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- 6th Circuit approach to legacy NSR
 - Relied on Tennessee SIP provision that stated
 - BACT an “emission limit”; not a dictate on pollution control equipment
 - Facilities subject to NSR shall “apply” BACT (emission limit)
 - Tennessee SIP allowed for permit amendments to incorporate after-the-fact permit requirements
 - Court found failure to apply BACT; continuing violation of state SIP



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SIP Enforcement Approach

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- Other state SIPs – many similar language to Tennessee SIP
- However, 3rd Circuit/8th Circuit/11th Circuit based on Pennsylvania/South Dakota/Alabama SIPs – not a continuing violation; one-time failure to “apply” BACT
- Open issue in many states – dependent on state SIP language and federal circuit court



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Concurrent Remedy – Injunctive Relief

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- Background
 - If penalties barred by statute of limitations, is “injunctive relief” barred?
 - Technical legal analysis is “concurrent remedy” – i.e., if penalty remedy barred is related remedy injunctive relief also barred?
 - Goes back to “arcane” law of remedies – “at law”/“equity”



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Concurrent Remedy – Injunctive Relief

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- Importance of injunctive relief
 - Penalty not assessed, but controls; compliance with new limits can be required
 - Significant cost issues
- *U.S. v. United States Steel*
 - Concurrent remedy does not apply against federal government
 - Uniform holding of courts
 - Court critical of application to NSR case but ultimately “as a matter of public policy, the government must be allowed to bring violators in compliance with its laws”



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Successor Liability

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- Background – effort to hold current operators liable for NSR violation of predecessors
 - Superfund for air program
 - Issue in asset sale transactions; not stock sale
 - Theory is current operator attesting to compliance in Title V application; if wrong, liable
- Courts – hostile to this enforcement theory
- *U.S. v. EME Homer City Generation, L.P.*, No. 11-4406 (Aug. 21, 2013) (Clean Air Act language does not allow injunctions against former owners)



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Legacy NSR – Lessons

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- Not a dead issue with respect to government enforcement
- Penalty assessment – more difficult to obtain (statute of limitations)
- Injunctive relief – alive and well for government to pursue
- Purchase facilities with NSR questions – asset sale preferred



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New NSR – New Enforcement Opportunities

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- Background
 - NSR reform – allowed past actual to projected actual test
 - Required use of documented past actuals
 - Projections based on business forecasts, SEC/financing statements
 - Allowed recognition of “growth accommodations” but within specific limits and documentation
 - Bush U.S. EPA – little interest in enforcement
 - Obama U.S. EPA – seeking to set limits on new NSR



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New NSR – Focus of Enforcement

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- *U.S. v. DTE Energy*, 711 F.3d 643 (6th Cir. 2013)
 - Allows enforcement as to whether actual to future actual projection “is made pursuant to requirements of the regulations”
- Areas of “interest”
 - Baseline actuals – proper baseline year and quality of baseline data
 - Projections – all relevant information to make project, including corporate representations regarding project
 - Growth accommodation calculation
 - Use of “managing the emissions” approach



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New NSR – Focus of Enforcement

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- Likely pitfalls
 - Inaccurate emission factors in baseline data
 - Projections – all relevant information must be assessed (documentation); must do a projection
 - Growth accommodation – specific regulatory methodology
 - Shortcuts to “simplify”; likely enforcement traps



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New NSR – Focus of Enforcement

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- Note for competitive businesses
 - Projections based on production increases and projected market demand
 - Competitor sensitive information
 - Wisconsin requires all information used in projection to be provided to general public upon request
 - Check how other states handle information



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U.S. SUPREME COURT REVIEW OF THE CROSS-STATE RULE

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CSAPR Background

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- Detailed background is available on past webinar slides
- Based on "good neighbor" provision - CAA 110(a)(2)(D)(i)(I)
 - Requires states to prohibit emissions that "contribute significantly to nonattainment in, or interfere with maintenance by, any other state"
- Three allowance programs
 - SO2
 - Annual NOx
 - Ozone-season NOx (May-Sept)



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EME Homer Decision

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- On August 21, 2012 the D.C. Circuit overturned CSAPR
 - 2-1 split
 - Judge Rogers wrote the dissent
- Majority
 - EPA's method of setting state budgets unlawful
 - "FIP-first" unlawful
- Dissent
 - No jurisdiction on either issue



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CSAPR - Issues Before S. Ct.

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- Significant contribution
 - Cost v. contribution
- SIP/FIP
 - Lawfulness of EPA's "FIP first" approach
- Specificity of comments during rulemaking
 - Focus of D.C. Circuit dissent



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U.S. Supreme Court Schedule

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- Opening briefs already filed by EPA and environmental groups
 - Generally mirrored arguments made in D.C. Circuit
- Various amicus briefs have also been filed in support of EPA
- Industry/state briefs due on Oct. 31st
- Argument scheduled for Dec. 10th
- Decision expected in Spring 2014
- Earliest EPA could implement CSAPR if it wins on all issues is likely 2015 or 2016



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What will a revised CSAPR rule look like?

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- EPA has announced that it will release a new proposal in Spring 2014
- This means EPA is working on the rule now, and presumably drafting it assuming that it will lose the Supreme Court case
- If EPA follows the D.C. Circuit decision, certain states will be significantly more impacted than others. For example:
 - Illinois and Indiana are likely to be hit harder
 - Texas, Iowa and Wisconsin are likely to have more relaxed requirements



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BOILER MACT, CISWI, NHSM

Administrative Reconsideration and Judicial Review Status

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Early 2013, EPA Issues Four Closely-Related Final Rules ³⁴

- CAA Major Source Industrial Boiler NESHAP
– 78 FR 7186 (Jan. 31, 2013)
- CAA Area Source Industrial Boiler NESHAP
– 78 FR 7512 (Feb. 1, 2013)
- CAA Commercial & Industrial Solid Waste Incinerators (CISWI)
– 78 FR 9112 (Feb. 7, 2013)
- RCRA Non-Hazardous Secondary Materials (NHSM)
– 78 FR 9112 (Feb 7, 2013)



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BOILER MACT, CISWI, NHSM ³⁵

- All four rules based on EPA's "reconsideration" of earlier final rules issued under court deadline in March, 2011
- Multiple industry and public interest parties filed D.C. Circuit judicial petitions for review of all four final March 2011 rules
- In light of EPA's pending "reconsideration" rulemakings to amend all four March 2011 rules, D.C. Circuit held all cases in abeyance pending new final rules
- Multiple industry and public interest parties filed D.C. Circuit judicial petitions for review of all four final January/February 2013 rules (largely the same parties with 2011 petitions being held in abeyance)



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BOILER MACT, CISWI, NHSM ³⁶

- D.C. Circuit consolidated the 2011 and 2013 cases for each rule as follows:
 - Major source boiler – *U.S. Sugar Corp. v. EPA*, No. 11-1108
 - Area source boiler – *American Chemistry Council v. EPA*, No. 11-1141
 - CISWI – *American Forest & Paper Assn. v. EPA*, No. 11-1125
 - NHSM – *Waste Mgmt. Inc. v. EPA*, No. 11-1148



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BOILER MACT, CISWI, NHSM

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- Multiple industry and public interest parties also filed CAA § 307(d)(7)(B) "administrative reconsideration" petitions with EPA for the three final January/February CAA 2013 rules (no similar process specified in RCRA)
- August 5, 2013, EPA announced reconsideration process for a few (not many) of the issues raised in administrative petitions, as follows:
 - Major source boiler issues being reconsidered
 - Definitions of startup and shutdown periods and the work practices that apply during such periods
 - Revised carbon monoxide (CO) limits based on a minimum CO level of 130 ppm
 - The use of continuous parameter monitoring systems (CPMS), including the consequences of exceeding the operating parameter



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BOILER MACT, CISWI, NHSM

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- Area source boiler issues being reconsidered
 - Definitions of startup/shutdown periods
 - Alternative PM standard for new oil-fired boilers that combust low-sulfur oil
 - Establishment of subcategory for limited-use boilers and standards for that subcategory
 - Provision eliminating further performance testing for PM for boilers whose initial compliance test shows PM emissions equal to or less than half of the PM emission limit
 - Provision eliminating fuel sampling at coal-fired boilers that demonstrate compliance with mercury emission limit by fuel analysis based on results of the boiler's initial compliance demonstration



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BOILER MACT, CISWI, NHSM

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- CISWI issues being reconsidered:
 - Definitions of "CEMS data during startup and shutdown periods;"
 - PM limit for the waste-burning kiln category



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BOILER MACT, CISWI, NHSM

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- For each of three reconsiderations, EPA also stated it might make other adjustments, corrections, etc. for problems with rules identified by parties (fairly vague)
- EPA apparently in process of preparing Federal Register notices for each CAA rule proposing changes to rules based on reconsideration and seeking public comment
- For those issues addressed in the new proposed rules, briefing will be held in abeyance by D.C. Circuit; briefing will proceed, however, on other issues



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BOILER MACT, CISWI, NHSM

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- Parties in D.C. Circuit now in process of preparing motions to establish briefing format and schedule
- Likely timing – all briefs will probably be filed by spring 2014, so final D.C. Circuit decisions possible by end of 2014
- Sierra Club and related parties raising fundamental issues on some rules that could – if Sierra wins – throw EPA back to drawing board.



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FORTHCOMING GREENHOUSE GAS POWER PLANT RULES (GHG)

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Obama's Climate Plan

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- Released on June 25, 2013
- Includes a number of actions aimed at reducing GHGs "in the range of 17 percent below 2005 levels by 2020"
- Regulation of power plants by EPA is the centerpiece of the plan b/c power plants account for more than a third of U.S. emissions
- Also focused on the auto industry (CAFE standards), renewable energy initiatives, and energy efficiency measures



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Power Plant Regulation

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- EPA already proposed an NSPS for power plants in April of 2012
- The executive order issued with Obama's plan calls for EPA to:
 - Re-propose a new plant NSPS by tomorrow
 - Finalize this new plant rule "as expeditiously as possible"
 - Propose an NSPS for existing plants by Spring 2014
 - Finalize the existing plant NSPS by 2015



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First EPA NSPS Proposal – 77 Fed. Reg. 22392

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- EPA trying to set a "standard of performance" for power plants under CAA section 111
 - "Standard of performance" is defined as "a standard for emissions . . . which reflects the degree of emissions limitation achievable through the application of the best system of emission reduction which (taking into account cost . . .) the Administrator determines has been adequately demonstrated."
- EPA combined coal and natural gas plants into one category
- Set standard at level achieved by a combined-cycle gas plant – 1,000 lbs/MWh



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Tomorrow's Re-proposal of New Plant NSPS

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- Various legal problems with original proposal spurred re-proposal
- Gina McCarthy announcement at 9 am at National Press Club
- Will be splitting up coal/gas plants and setting two different standards
- Press reports claiming level will be about 1,400 lbs/MWh for coal and about 1,000 or a little higher for gas
- Basically will require CCS for coal



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Existing Plant NSPS - 2014/2015

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- Based on Section 111(d) of CAA:
 - “each State shall submit . . . a plan which (A) establishes standards of performance for any existing source . . . which is not . . . emitted from a source category which is regulated under section [112] . . .”
- Rarely used section
- EPA has only set five of these in the past
- Still based on same “standard of performance” language (i.e., adequately demonstrated and cost)



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Legal Questions Abound

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- New Plant NSPS (assumes 1400 lbs/MWh)
 - EPA has essentially banned new coal-fired power plants by requiring CCS
 - Is CCS achievable and cost-effective?
 - No large-scale use of CCS (Southern Co. will be first)
 - Past EPA statements about cost of CCS don't help the agency
 - Prior BACT determinations hurt EPA
- Existing Plant NSPS
 - NRDC and others have argued that EPA has broad authority and can allow trading (including offsets)
 - Question of whether 112 trumps
 - Same BACT issues



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RECENT D.C. CIRCUIT CASES ON JUDICIAL REVIEW OF EPA CAA RULES

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Consideration of Costs for MACT Standards

- MACT standards set under both CAA 112 (NESHAP) and 129 (CISWI and other waste incinerators)
- Sierra, et al. have challenged many aspects of EPA's MACT-setting over years, often with great success (e.g., "Brick MACT," *Sierra Club v. EPA*, 479 F.3d 875 D.C. Cir. 2007)
- Sierra, et al. have lost D.C. Circuit challenges to MACT standard-setting in two recent cases, both regarding degree to which EPA can factor costs into standard setting

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Association of Battery Recyclers v. EPA, No. 12-1129, May 29, 2013

- CAA 112(d)(6) provides that after EPA has issued NESHAP standard for industry category, EPA shall at least each 8 years "review and revise as necessary" the standards, "taking into account developments in practices, processes, and control technologies."
- Sierra argued that since 112(d)(6) did not mention costs, EPA was precluded from considering costs in setting revised standards.
- D.C. Circuit rejected Sierra position, ruling that costs can be considered, and reaffirmed earlier D.C. Circuit decision that "EPA has no obligation to recalculate the MACT floor when revising standards." *NRDC v. EPA*, 529 F. 3d 1077 (D.C. Cir 2008)

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National Association of Clean Water Agencies (NACWA) v. EPA, No. 11-1131, Aug. 20, 2013

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- CAA 129 specifies that EPA, in determining whether to go "beyond-the-floor" for MACT, shall take "into consideration the cost of achieving" any such standards.
- Sierra argued that this language, when coupled with other language in CAA 129 requiring the "maximum" degree of emission reduction, does not allow EPA to consider (as it did) "cost-effectiveness."
- D.C. Circuit rejected Sierra's position.
- Sierra has argued same point in a CAA 112 NESHAP case now pending in D.C. Circuit (to be argued October 24, 2013). *NRDC v. EPA*, No. 13-1112. In recent filings in No. 13-1112, Industry and EPA have both argued that NACWA ruling is controlling; Sierra has argued NACWA not controlling or (in alternative) NACWA is wrong and Sierra and NRDC will be seeking rehearing.



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Three Losses for Industry in Two Weeks, July 2013

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- **Center for Biological Diversity v. EPA, No. 11-1101, July 12, 2013**
 - EPA had – at industry urging – deferred for three years requirement that non-fossil-fuel CO2 sources (such as ethanol) be subject to new "tailoring" PSD review regulations for GHGs.
 - D.C. Circuit 2-1 ruled that EPA had failed adequately to explain the basis for its deferral and vacated the deferral. Ethanol sources are currently temporarily "saved" from PSD kicking in because Court mandate not yet issued – may issue early October however.
 - Note EPA lost this case as well as industry.



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Three Losses for Industry in Two Weeks, July 2013

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- **State of Mississippi v. EPA, No. 08-1200, July 23, 2013**
 - Court upholds EPA's 2008 primary NAAQS for ozone; remands secondary NAAQS for ozone because EPA failed to adequately explain basis.
 - Note Sierra, et al. lost partially here, as they challenged primary NAAQS as not sufficiently stringent.
 - Also note: plenty more coming re NAAQS for ozone (and other NAAQS)!



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Three Losses for Industry in Two Weeks, July 2013

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State of Texas v. EPA, No. 10-1425, July 26, 2013

- Follow on to industry loss in *Coalition for Responsible Regulation v. EPA* (2012), where D.C. Circuit rejected industry challenges to all aspects of EPA's GHG rules, including PSD "tailoring" rule. 684 F. 3d 102.
- After Texas (and several other states, all with industry support) refused to implement GHG PSD tailoring review, EPA imposed federal PSD GHG permitting rules in those states directly.
- D.C. Circuit upheld EPA's interpretation of CAA as including prohibition of new/modified sources without a permit, and therefore held that Texas (and industry petitioners) had no "standing" to challenge.
- Note decision was 2-1, with Judge Rogers writing majority opinion and Judge Kavanaugh dissenting. Compare the D.C. Circuit's 2012 "Cross-State" decision, with Judge Kavanaugh writing the 2-1 majority opinion and Judge Rogers in vigorous dissent. *EME Homer City v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) (now under review in U.S. Supreme Court).



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QUESTIONS & ANSWERS

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Thank You!

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- A copy of the PowerPoint presentation and a multimedia recording will be available on the event Website early next week. <http://www.foley.com/environmental-law-update-web-conference-new-leadership-at-top-of-epa-recent-significant-clean-air-act-developments/>
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