

*OSB Environmental and Natural Resources Section*

## 2012 Annual Environmental and Natural Resources CLE

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# Clean Air Act Update

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# Discussion Points

- n Federal Court Litigation
- n What's Coming Next Year

# Federal Court Litigation

- n EPA's Greenhouse Gas (GHG) Rules
- n EPA's Cross-State Air Pollution Rule for Power Plants
- n Washington SIP Litigation
- n EPA's Aggregation Policy

# Background on EPA's Greenhouse Gas Regime

## In 2007: Supreme Court decides *Mass. v. EPA*

- Challenged EPA's decision not to regulate GHG emissions from cars and light trucks under the Clean Air Act
- Supreme Court: GHGs fall within the Clean Air Act's "sweeping" and "unambiguous" definition of "air pollutant."
- Issue for EPA on remand: "may [GHGs] reasonably be anticipated to endanger public health or welfare," and whether motor-vehicle emissions "cause, or contribute to" that endangerment?

# Background on EPA's Greenhouse Gas Regime, con't

## n Dec. 2009: Endangerment Finding

- Required EPA to develop GHG emission limits for new cars and light trucks under Clean Air Act

## n May 2010: Tailpipe Rule

- Effective Jan. 2, 2011 (MY 2012-2016)
- 250g CO<sub>2</sub> / mile (35.5 mpg)

# Greenhouse Gas Tailoring Rule

## n Prevention of Significant Deterioration Program

- New and modified major stationary sources
- 100 / 250 ton threshold
- BACT required for any air pollutant “subject to regulation”

## n April 2010: Timing Rule

- “Subject to regulation” = actual emission controls

## n November 2010: Tailoring Rule

- “Tailored” statutory thresholds

# Greenhouse Gas Tailoring Rule, con't.

## n **Phase I (Jan. – June 2011)**

- “Anyway” new and modified sources and
- PTE > 75,000 MtCO<sub>2</sub>e

## n **Phase II (July 2011 and beyond)**

- ***New Sources***

- § Subject to permitting under Phase I or

- § PTE > 100,000 MtCO<sub>2</sub>e

- ***Modified Sources***

- § Subject to permitting under Phase I or

- § PTE > 100,000 MtCO<sub>2</sub>e and

- § Modification has net emission increase > 75,000 MtCO<sub>2</sub>e

# Coalition for Responsible Regulation v. EPA, 684 F.3d 102 (D.C. Cir. June 26, 2012)

n Consolidated over 80 petitions for review

n Endangerment Finding Holdings

- EPA may not account for policy considerations (i.e. economic benefit of emission activities) when making Endangerment Finding
- “[S]ome residual uncertainty” about climate change did not excuse EPA from regulating GHGs
- EPA need not develop numeric levels of “safe” GHG concentrations in Endangerment Finding
- Affirmed EPA’s denial of rehearing request based on “Climategate” emails

# Coalition for Responsible Regulation v. EPA, con't.

## n Tailpipe Rule Holdings

- EPA need not consider cost of stationary source permitting when developing mobile source rules
- Rules need not achieve a particular level of mitigation

## n PSD Trigger Holdings

- Upheld EPA's interpretation that regulation of mobile source emissions made the pollutants "subject to regulation" as to stationary sources

# Coalition for Responsible Regulation v. EPA, con't.

## n Tailoring Rule and Timing Rule Holdings

- No jurisdiction – petitioners lacked standing
- No injury in fact
- Tailoring and Timing Rules mitigate harm suffered by petitioners
  - § Petitioners “want more regulation, not less, and that they wanted regulation sooner rather than later.”
- State petitioners’ arguments were speculative

# Cross-State Air Pollution Rule

## n Clean Air Act – Cooperative Federalism

- EPA sets air quality standards (NAAQS)
- Usually implemented through State Implementation Plans (SIPs)

## n SIPs must include “good neighbor” provisions

- Emissions in “upwind” states may not “contribute significantly” to air quality exceedances in “downwind” states

# Cross-State Air Pollution Rule, con't.

n EPA's rules have focused on power sector

- SO<sub>2</sub> (precursor to PM<sub>2.5</sub>)
- No<sub>x</sub> (precursor to ozone and PM<sub>2.5</sub>)

n 2005 Clean Air Interstate Rule (CAIR)

- Established cap-and-trade program for SO<sub>2</sub> and No<sub>x</sub>
- *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008)

§ Rule unlawfully required some states to reduce emissions more than their contribution

§ Did not vacate; remanded to EPA



# Cross-State Air Pollution Rule, con't.

## n Prescribed Federal Implementation Plans

- Converted budgets into tradable allowances
- Prescribed how allowances should be distributed within each State
- FIPS to remain in place until States submitted compliant SIPs

# EME Homer City Generation v. EPA, --F.3d-- (D.C. Cir. Aug. 21, 2012)

## n “Good neighbor” obligations

- Like CAIR, the Cross-State rule required some States to reduce their emissions more than their contribution, based on costs
- “[W]hen EPA asks one upwind State to eliminate *more* than its statutory fair share, that State is necessarily being forced to clean up another upwind State’s share of the mess in the downwind State. Under the statute and *North Carolina*, that is impermissible.”

# EME Homer v. EPA, con't.

## n Federalism

- Court affirmed boundary's of EPA's authority under the Clean Air Act
- EPA simultaneously set "good neighbor" obligations and imposed FIPs
- EPA, not the States, placed in the position of "first implementers"
- EPA's rule took States "down the rabbit hole to a wonderland where EPA defines the target *after* the States' chance to comply with the target has already passed."

n Rule vacated; EPA to continue administering CAIR

# Washington Environmental Council v. NW Clean Air Agency

- n Seeks to require GHG “reasonably available control technology” (RACT) determinations for Washington refineries
- n District court held that a RACT regulation in Washington’s SIP is federally enforceable against GHG emissions
- n District court also held that the regulation requires state agencies to act and directed them to complete RACT process within 26 months
- n Appeal is pending before the Ninth Circuit

# Summit Petrol. v. EPA, --F.3d-- (6<sup>th</sup> Cir. Aug. 7, 2012)

- n Title V permits required for major sources (100 tpy)
- n EPA must aggregate dispersed sources if:
  - Common control
  - Contiguous or adjacent properties
  - Same major industrial grouping (SIC code)
- n EPA interpreted “contiguous” as including “functionally related” facilities

# Summit Petroleum v. EPA, con't.

- n EPA aggregated emissions from 100 natural gas production wells spread out over 43 square miles, flares, and production facility
- n None of the sources individually would have triggered permitting
- n Sixth Circuit held that EPA's interpretation was inconsistent with the plain language meaning of "adjacent"; EPA may aggregate only if properties are physically adjacent.
- n Impact permitting decisions related to natural gas and other facilities

# Federal Litigation Summary

## n Courts have been deferential to EPA on technical issues

- GHG rules - *Coalition for Responsible Gov't v. EPA*
- 1-hour NO<sub>2</sub> NAAQS - *American Petrol. Inst. v. EPA* (D.C. Cir. July 17, 2012)
- SO<sub>2</sub> NAAQS - *Nat'l Environmental Development Ass'n v. EPA* (D.C. Cir. July 20, 2012)

## n Less deferential when issues involve bounds of EPA's authority

- Cross-State rule – *EME Homer*
- NSR Permitting – *Texas v. EPA* (5<sup>th</sup> Cir. Aug. 13, 2012)

# What to Watch Next Year

## n **Final NAAQS revisions for annual PM2.5 (expected December 2012)**

- Not expected to result in new nonattainment in Oregon

## n **Boiler MACT**

- Hazardous air pollutants from industrial boiler
- Reconsidered final rule sent to OMB in May 2012
- Original rule subject to litigation – *U.S. Sugar Corp. v. EPA*, D.C. Cir. No. 11-1108 (held in abeyance)

# What to Watch Next Year, con't.

## n **California Low Carbon Fuel Standard**

- *Rocky Mtn. Farmers Union v. Goldstene*, 9<sup>th</sup> Cir. No. 12-15131
- District Court ruled that LCFS violated dormant Commerce Clause by favoring in-state businesses
- Sets up challenges to California's GHG cap-and-trade program

# What to Watch Next Year, con't.

## n **New Source Performance Standards for GHGs**

- **Power plants**

- § Proposed rule issued (Mar. 2012)

- § Final rule expected by year's end

- **Petroleum refineries**

- § Unclear when draft rule will be published, but under a consent decree, the final rule is due in November 2012

# What to Watch Next Year, con't.

## n **Treatment of biomass under Tailoring Rule**

- GHG emissions from biomass temporarily exempted from Tailoring Rule
- EPA conducting three-year scientific review on biogenic v. anthropogenic GHG emissions
- Exemption decision subject to appeal – *Center for Biological Diversity v. EPA*, Ninth Cir. No. 11-1101

# What to Watch Next Year, con't.

## n ***Coalition for Responsible Regulation v. EPA***

- Cert. Petition likely

## n ***American Petroleum Institute v. EPA*** (D.C. Cir.)

- § On July 12, EPA issued the third step of the tailoring rule, retaining existing permitting thresholds for Title V and PSD
- § EPA said state permitting authorities need more time to develop the infrastructure necessary to issue GHG permits before thresholds are lowered
- § Suit challenges EPA reaffirmance of GHG permitting thresholds

# Questions?

*Thank you for attending.  
For additional information on  
today's topic, please contact:*



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\*Map by EPA (<http://www.epa.gov/airtransport/statesmap.html>)