

Legal Pending and Trending:
Boiler MACT & Risk/Technology Reviews
US Supreme Court fresh look at Agency authority
More Reporting Rules

CIBO Policy & Technical Issues Conference
May 14, 2024

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AFPA/AWC/CIBO ISSUES

Retroactive definition of “new” source. “new” = begin construction after EPA “first proposes” rule

- 2022 Rule proposed in 2020
- 2015 Rule (amended)
- 2013 Rule (amended). Vacated then remanded.
- 2011 Rule proposed in 2010
- Boiler No. 9: 2016 – 2019 construction / commenced operation
- DC Cir (2 to 1) stayed effect of the Rule for Boiler 9

HCl limit for new solid fuel units (0.00021 lb/MMBtu v. 2011 rule 0.022 lb/MMBtu)

- does not reflect control achieved in practice by best controlled similar source
- Pm and other pollutant standards for new sources also challenged

ENV ISSUE

EPA must use all data it has, not only dataset from 2013 rule

- EPA used dataset for 2013 Rule
- floors for new and existing sources do not reflect emission levels achieved by best performers

ORAL ARGUMENT

3.21.24

Datasets for NESHAPS – CAA 112

(3) New and existing sources

The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than--

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

Datasets for NESHAPS – DC Circuit

- *NRDC v. EPA*, 529 F.3d 1077 (D.C. Cir. 2008) (SOCMI)
 - Reliance on “old” data is ok: For a *risk assessment* complete in 2006, data from 1999 may seem old, but the risk assessment “obviously began much earlier than that. [and] EPA explained that a significant amount of time was needed to collect the data, run the models, analyze the results, and prepare the rulemaking.” **Plus, EPA persuasively argued that, since MACT had been in place by 1999, “it was unlikely that there would be a substantial increase in emissions between 1999 and 2006.”**
- *Sierra Club v. EPA*, 884 F.3d 1185 (D.C. Cir. 2018) (BMACT)
 - Regarding startup/shutdown work practices, D.C. Circuit “**generally defer[s] to an agency’s decision to proceed on the basis of imperfect scientific information**, rather than to invest the resources to conduct the perfect study.”
- *National Association for Surface Finishing v. EPA*, 795 F.3d 1 (D.C. Cir. 2015) (hard and decorative chromium electroplating and steel pickling)
 - In 2010, EPA left standards as-is because there were no new technology developments; in 2012, it shifted approach, but that was reasonable based on receiving intervening information.
 - Again, D.C. Circuit “generally” defers to EPA’s choice not to “invest the resources to conduct the perfect study.”
 - = **EPA’s dataset not too small or unrepresentative**; agency sought detailed emissions info from various facility types and obtained data from state/local air agencies and from NASF itself

POST-ORAL ARGUMENT FILINGS – ENVs / EPA

ISSUES SEVERED

AFPA / AWC / CIBO

Multi-fuel boilers maximum operating load during stack testing

ENV

1. CO as surrogate and CO 130 ppm threshold
2. PCBs emission limits required, no record for control by dioxin/furan work practice standards

CAA 112 RISK & TECHNOLOGY REVIEWS – ISSUES

- Datasets
- Correction of data
- “new” source
- Surrogates
- Non-detects
- Health-based emission limit
- Pollutant non-detect
- Force majeure
- Subcategories
- Startup/Shutdown / work practices
- Malfunction affirmative defense
- LEAN each HAP must have a standard
- Fenceline monitoring
- New HAP
- Environmental justice analysis
- Science – analytic basis for conclusions
Standards based on IRIS value
- Floor setting in an RTR
- More than one Risk review?
- Revised or new IRIS value
- Risk analysis
- Cumulative risk
- Community risk

SUPREME COURT – AGENCY AUTHORITY

Judicial review of agency interpretation of statutes - *CHEVRON* doctrine

Loper Bright Enterprise v. US Sec of Commerce

2-step *Chevron* analysis

1. Is the statute clear on its face?

Court reviews whether Agency has given effect to clear text

2. Is the statute ambiguous (or silent)?

Court reviews whether Agency interpretation is reasonable /court must defer

ISSUE: When a statute is ambiguous **must** a court defer to an agency's reasonable interpretation even when the court concludes there is a better interpretation of the law?

What about science issues?



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SUPREME COURT – AGENCY AUTHORITY

Statute of limitations for US regulations

Corner Post v. Federal Reserve

Administrative Procedure Act: 6 years

from when the harm accrues

Legality of SEC Administrative Law Judges

Jarkesy v. SEC

On what basis should the US Supreme Court
issue an emergency stay of a federal rule?

Ohio v. EPA

CAA CWA SEC REPORTING RULES

| STATUTORY AUTHORITY | FINAL RULE | EFFECTIVE DATE COMPLIANCE DATE | LITIGATION |
|---|--|---|--|
| Clean Water Act §§ 311(j)(5) and 501(a) | Hazardous Substance Facility Response Plans 89 FR 21924 (Mar 28, 2024) | 5.28.24 36 months to do FRP | |
| Clean Air Act §112(r)(1) Risk Management Plan | Safer Communities by Chemical Accident Prevention Rule (SCCAP) 89 FR 17622 (March 11, 2024) | 5.10.24 effective 1 st compliance 3 years | DC Circuit 5.9.24 |
| SEC ESG Climate Rule Securities Act 1933 Securities Exchange Act 1934 | The Enhancement and Standardization of Climate-Related Disclosures for Investors 89 FR 21668 (March 28, 2024) | 5.28.24 effective 5 th Cir administrative stay 1 st compliance Q1 2025 certify disclosures | 8 th Circuit SEC stayed rule |
| Clean Air Act §114 | [Air Emissions Reporting Rule] [Proposed. Comments 11.17.23. OMB] | [Final June 2024] | likely |

CWA HAZARDOUS SUBSTANCE FACILITY RESPONSE PLAN

Concerns with Final (and proposed) rule

- 1) Duplicates other prevention programs that address the same potential hazards, no additional protection
- 2) Applicability to sources ambiguous
 - a) 2 Screening criteria: container capacity 1000x reportable quantity & within ½ mile of navigable water
 - b) 4 Applicability criteria: ability to cause injury/impact to
 - fish, wildlife, sensitive environments, or
 - public water system, or
 - public receptors, or
 - reportable discharge above RQ in last 5 years that reached navigable water
 - c) EPA Regional Administrator discretion to declare applicability at any time, open-ended factors
- 3) Cost to comply not justified

CWA HAZARDOUS SUBSTANCE FACILITY RESPONSE PLAN

Final Rule Preamble

Re duplication concern: few federal programs “comprehensively cover all CWA section 311(j)(5)(D) requirements for all CWA hazardous substances” but “duplicative requirements should be avoided.”

“As such, a regulated facility owner or operator may augment an existing plan with the requirements of this rule or use an Integrated Contingency Plan (ICP) approach, such as One Plan, which will reduce the administrative burden.

However, an owner or operator may not assume they are compliant with this regulation due to their compliance under other programs (e.g., the Oil Pollution Prevention FRP regulation, [Risk Management Plan] regulation).”

CAA RISK MANAGEMENT PLAN

Process Hazard Analysis (PHA) – now only criteria for consideration – added mandatory actions

- must address “natural hazards, including those caused by climate change” and standby or emergency power systems
- Safer Technology and Alternatives Analysis (STAA) if facility had reportable accident since last PHA
- stationary source siting, now in Program 3 sources PHAs. NOW siting decisions involve proximity of offsite facilities

Program 3 RAGAGEP Recognized & Generally Accepted Good Engineering Practices

- for PAHs must consider gaps between codes when constructed and updated

Publicly available information – Security concern – eg:

- If facility does not adopt recommendation from hazard review /PHA or from audit, must provide justification and make available to public upon request
- Risk management public availability tool - anyone can logon and gain access to info, not just w/in 6 miles
- Must provide upon request, regulated substances (SDSs), 5-year accident history, emergency response program, scheduled exercises

Required 3-year audit must be 3d party (new independence criteria (§ 68.59(c) & (§ 68.80(c))

- If audit follows reportable release OR regulator finds “conditions that could lead to an accidental release of regulated substance”
- audit findings & facility response must be submitted to Audit Committee of the Board

[Bracewell LLP \(sharefile.com\)](https://www.sharefile.com) -- Excellent specific compliance advice

SEC ESG CLIMATE-RELATED DISCLOSURES

Rule amending Regulation S-K to require companies to disclose climate-related risks and opportunities, including

- effect of climate on business operations and financial performance
- strategies for mitigating risks

Major changes from March 2022 Proposed to March 6 2024 Final rule

- Scope 1, 2 emissions – no Scope 3 emissions
- Compliance delayed until FY27 for smaller companies
- GHG emissions reasonable assurance deadlines phased-in for large accelerated filers and no longer required for accelerated filers
- Description of Board Member climate expertise removed
- New requirement – company officer climate expertise required

SEC ESG CLIMATE-RELATED DISCLOSURES

Concerns

- Materiality – what a reasonable investor would consider material to an investment or voting decision
- Materiality of GHG emissions – appears that even for ghg emissions deemed non-material, tracking will be required for emissions
- third-party attestations – demand for attestors will exceed supply
- Timing – certifications of disclosures commence Q1 2025 – so systems to track and record climate related information must developed and tested immediately
- Compliance costs and liability

<https://bracewell.com/insights/secs-final-rules-climate-related-disclosures-guide-house-counsel>

Cases challenging rule consolidated in 8th Circuit. SEC stayed the rule pending litigation.

AIR EMISSIONS REPORTING REQUIREMENT

Proposed summer 2023 – at OMB for final rule July 2024

Requires reporting by all emitters (130k facilities, major, area) of HAP

- All NAICS codes covered
- Goal: standardize HAP reporting to US and all States
- supply data to the National Emissions Inventory to use for risk assessments
- Standardize reporting of emissions during startup shutdown
- Some commenters seek to include malfunction period reporting

EPA invokes CAA 114 authority for data collection

Cost impact on reporting entities and States, local, tribal governments

Thank you for your attention

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