

CIBO
EE Meeting December 12, 2023
Virtual

Lisa M. Jaeger
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- I. Boiler MACT case update *US Sugar v. EPA*
- II. NESHAPS / RTRS update
- III. Headline Cases

BMACT 2022 *US Sugar Corp v. EPA* (DC Cir 22-1271)

Challenges the NESHAP for Major Source Industrial, Commercial, Institutional Boilers and Process Heaters
87 Fed. Reg. 60,816 (Oct. 6, **2022**)

2022 Rule addresses the **2011/2013** Rule remanded (not vacated) for EPA to re-do floors for mixed solid fuel boiler subcategories

PETITIONERS	v.	RESPONDENT
US Sugar Corp 22-1271 American Forest & Paper Assn 22-1302 American Wood Council CIBO California Communities Against Toxics 22-1303 Coalition For A Safe Environment Sierra Club Utah Physicians for a Healthy Environment		EPA
		INTERVENOR FOR RESPONDENT
		Sierra Club AFPA, American Wood Council, CIBO ACC, AISI, CRWI

BMACT 2022 *US Sugar Corp v. EPA* (DC Cir 22-1271)

ISSUES BRIEFED – ORAL ARGUMENT NOT YET SCHEDULED

IND

“New” source definition should be 08.24.20 (2022 rule proposed) not 08.2010 (2011 rule proposed)

- Boiler No. 9, construction began 12.2016 and commenced operation 03.2019
- DC Cir (2 to 1) stayed effect of the Rule for Boiler 9

HCl limit for new solid fuel units illegal because does not reflect control achieved in practice by best controlled similar source

ENV

Floors illegal - EPA did not use recent data so floors do not reflect emission levels achieved by best performers

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

BMACT 2022 *US Sugar Corp v. EPA* (DC Cir 22-1271)

HISTORIC CASES - Non-Hazardous Secondary Materials Rule

Solvay v. EPA No. 11-1189 (and consolidated cases)

In 2014 severed issues: construction & demolition wood, railroad ties, paper recycling residuals

- Issues transferred to Case 14-1201
- EPA did reconsideration final rule
- In 2023, 14-1201 was voluntarily dismissed

Another created for severed issue: Petitioners' challenges to any classification of other treated wood as waste

- Issues transferred to Case 14-1202
- Petitioners (including CIBO) reviewing position now – will anyone continue to pursue that issue?
- voluntary dismissal?

1995 Once-in Always-in Policy

2018 Policy Withdrawn, rulemaking announced

2020 Major MACT To Area Rule (MM2A) (85 FR 73854; Nov 19, 2020) >> likely to be reversed by

2023 Proposed Rule *Review of Final Rule Reclassification of Major Source as Area Sources Under CAA §112*
(88 Fed. Reg. 66336; Sept 27, 2023)

Policy HAP major source reclassified to area source always subject to major source MACT

2020 Rule no legal authority for policy; major can reclassify to area source with effective limits on potential to emit (PTE)

2023 Proposed Rule reverses 2020 rule, major can reclassify to area, but *effectively* must remain major

NESHAPS / RTRs OIAI MM2A

CIBO joined Industry Coalition comments on Proposed Rule

Uses different – flawed -- legal interpretation, does not reverse 2020 rule legal position

- Source can reclassify only with anti-backsliding measures to fulfill Congress’s intent to reduce HAP emissions
- How to qualify as “area source” – must “consider controls” that support area source status
- CAA § 112(a)(1) “major source” = a source “that emits or has the potential to emit *considering controls*,”
10 tpy of any HAP or 25 tpy of any combination of HAP
- “controls” = at least as effective at reducing emissions as the MACT standard & that are federally enforceable

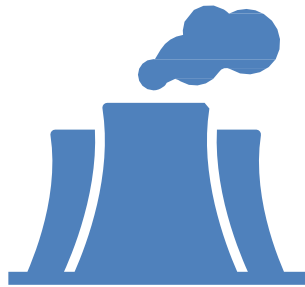
Does not address 2020 rule facts and emissions impact analysis

- A “hypothetical” reclassified source may increase emissions more than it emitted as a major source
- 2020 analysis of emissions consequences of MM2A
 - 69 reclassifications, 68 no emissions increase, one HAP increase not likely to result in significant health effects
 - general assessment of 72 categories of sources that could reclassify, emissions increases and decreases, nothing pointed to significant health effects

Federal enforceable limits to allow EPA & citizen enforcement

Retroactive to cover sources reclassified since the 2018 Wehrum Memo Jan 25 2018

Effectiveness of reclassification depends on having submitted electronic notice to EPA



Section 112 Program Status

SEPTEMBER 2023
AAPCA MEETING

Program Status (cont.)

- RTRs required for 11 additional major source categories
 - Haz. Waste Combustors; Recip. Internal Combustion Engines; Polyvinyl Chloride; Boilers (3 categories); Brick; Clay Ceramics; Primary Magnesium; Primary Copper; Coke Ovens-Pushing Quenching and Battery Stacks
- RTRs also required for several area source categories: Area Source Boilers; Gold Mines; Electric Arc Furnaces

Recent and Upcoming CAA NESHAP Reviews

DATE	ACTION
February 22, 2023	Miscellaneous Coating Manufacturing Final TR published in <i>Federal Register</i>
February 23, 2023	Lead Acid Battery Manufacturing Area Sources Final TR published in <i>Federal Register</i>
March 8, 2023	Wood Preserving Area Sources Final TR Published in <i>Federal Register</i>
April 13, 2023	Commercial Sterilizers RTR proposal published in <i>Federal Register</i> (final due March 1, 2024)
April 24, 2023	MATS (Elec. Utilities) proposed review of RTR Published in <i>Federal Register</i> (final rule planned for March 2024)
April 25, 2023	Hazardous Organics NESHAP (HON) RTR, Polymers & Resins I RTR/TR, and Polymers and Resins II TR proposal published in <i>Federal Register</i> (final due March 29, 2024)
July 24, 2024	Primary Copper RTR supplemental proposal published in the <i>Federal Register</i> (final due May 2, 2024)
August 16, 2023	Coke Ovens Pushing Quenching and Battery Stacks RTR and Coke Oven Batteries TR proposal published in the <i>Federal Register</i> (final due May 23, 2024)

Recent and Upcoming CAA NESHAP Reviews

(cont.)

DATE	ACTION
February 1, 2024	Perchloroethylene Dry Cleaning Major and Area Source final TR due (pursuing extension until December 2024)
February 12, 2024	Hospital Sterilizers Area Source TR proposal (planned date, final 12/2024)
February 29, 2024	Gasoline Distribution Major Source and Gas Distribution Bulk Terminals Area Source final TR due
November 13, 2024	Chemical Manuf. Area Sources TR proposal due (final Sept. 17, 2025, per draft CD)
December 10, 2024	Oil and Gas TR proposal due (final rule due Dec. 10, 2025, per draft CD)
September 30, 2025	Secondary Lead TR proposal due (final due Sept. 30, 2026, per draft CD)
December 18, 2026	Marine Tank Vessel Loading Major Source final TR due
Negotiating or litigating schedule	Hazardous Waste Combustors RTR, Secondary Lead TR and RTR reconsideration, and Chemical Manufacturing Area Sources TR; Polyether Polyols TR
TBD	Primary Magnesium RTR (final date being renegotiated from May 2024 due to temporary facility shutdown and need for additional emissions testing)

Other Actions

- Recently proposed action to add requirements for facilities that reclassify from major source to area source status
- Recently proposed action regarding issues related to adding new pollutants to the CAA section 112(b) HAP list
- Court-ordered deadlines for setting new MACT standards for previously unregulated processes or pollutants in recently reviewed rules

Source Category	Court-Ordered Final Rule Date
Lime Manufacturing Plants	Requesting revised date of June 30, 2024
Integrated Iron and Steel	Requesting revised date of March 11, 2024
Plywood and Composite Wood Products	November 16, 2023
Taconite Iron Ore Processing	November 16, 2023
Rubber Tire Manufacturing	Requesting revised date of November 13, 2024

Other Upcoming Actions (cont.)

- Several reconsiderations are also underway:
 - Stationary Combustion Turbines: Establishing standards for previously unregulated HAP (proposal upcoming); also reviewing petition to delist source category
 - Miscellaneous Organics NESHAP, Ethylene Production, Petroleum Refineries, and Organic Liquids Distribution related to PRDs and flares (final rule upcoming)

Newly listed HAP - 1-bromopropane (1-BP) (Jan 2022)

- Now: Proposed HAP Infrastructure Rule, to address immediate impacts, comment closed 11.13.23
- Later: EPA will inventory sources that emit 1-BP, propose rules for affected source categories

Datasets – old? new? which must or may EPA use for standards on remand?

- Which standards are revised? all? only those remanded by court? CAA 112(d)(2)&(3)

“New” source: date of original proposal or new proposal on remand?

Surrogates

Fenceline monitoring required in multiple rules.

- EG integrated iron & steel manufacturing; coke ovens; multiple other rules. BUT SEE lead acid battery NSPS/NESHAP rules (in litigation), where EPA is opposing mandatory fenceline monitoring.
- **“Community risk”** covers all industrial sources within defined radius. EG synthetic organic chemical mftg (SOCMI); Polymers.

IRIS (Integrated Risk Information System) risk value to assess risk and set emission limits

- EG Ethylene Oxide standard in Misc Organic Chem Manufacturing (MON) rule (in litigation)
- EG Chloroprene emission limit in Denka Performance Elastomer enforcement action (in litigation)

Headline Cases / Issues

Judicial deference to Agency actions – *Chevron* *Loper Bright Enterprises v. Raimundo* (USSCT)
Relentless v. Department of Commerce

Agency Administrative law judges – constitutional? *Jarkesy v. SEC* (USSCT)

Clean Air Scientific Advisory Committee Selection of experts *S. Stanley Young v. EPA* (DC Cir)

Headline Cases / Issues

Judicial deference to Agencies - *Chevron*:

Loper Bright Enterprises v. Raimundo
Relentless v. Dept of Commerce

Facts

- National Marine Fisheries Service (NMFS) regulation of commercial fishermen
- Magnuson-Stevens Act requires fishing vessels to carry onboard a federal enforcement monitor
- Act requires, in 3 narrow scenarios, vessel to pay salary of agent, up to 2-3% of value of vessel's haul
- NMFS rule requires, in other circumstances, vessel to pay salary up to 20% of vessel's haul

QUESTION

Does statutory silence create an ambiguity and wide interpretive path for NMFS?

DC CIR HELD

Act silent on the specific matter = ambiguity >> court must defer to reasonable agency interpretation

ISSUE AT SUPREME COURT

Whether the Court should overrule *Chevron*
or at least clarify that **statutory silence** concerning *controversial powers*
expressly but narrowly granted elsewhere in the statute
Is not an ambiguity requiring deference to the agency.

Constitutional issues: Separation of Powers; Nonappropriation Funding; Due Process

Oral argument Jan 17, 2024

Headline Cases / Issues

Agency Administrative Law Judges – constitutional? *SEC v. Jarkesy* USSCT

FACTS

- Jarkesy was compelled to have case heard by ALJ rather than US District Court, by choice of SEC
- 5th Circuit held statutory authority for SEC ALJ actions unconstitutional

ISSUES

- Whether statutory authority for SEC administrative judges to adjudicate enforcement proceedings seeking civil penalties violates the Seventh Amendment right to a jury trial
- Whether statutory authority for SEC to choose agency adjudication instead of federal court for enforcement violates the nondelegation doctrine
- Whether statutory grant of for-cause removal protection for ALJs in agencies whose heads have for-cause removal protection violates Article II

Oral argument Nov 29 2023

Headline Cases / Issues

Clean Air Scientific Advisory Committee Selection of experts *S. Stanley Young v. EPA*

FACTS

- 2 scientists with industry background appointed to 3-year terms on CASAC panel 2017, 2018
- Biden Administration dismissed the panel, reconvened it without them or others with similar views
- Administrative Procedure Act & Federal Advisory Committee Act require “fairly balanced” advisory panels

DC District Ct HELD: law requires only that EPA explain why it chose new members

ISSUES on appeal to DC Circuit Court

- Did EPA violate APA and FACA in the selection process of the CASAC members?
- Do the scientists have standing to challenge the EPA action?

MERRY CHRISTMAS & HAPPY NEW YEAR!

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