

# CLEAN AIR ACT 2011 LITIGATION UPDATE

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# Today's Topics

- Status of Boiler MACT litigation
- Status of Tailoring Rule and Related Litigation
- GHG Litigation Update
- California

# Boiler MACT Litigation

- Sierra Club v. EPA, Civil Action No. 11-1278 (D.D.C.)
  - Challenge to EPA's stay of boiler MACT and CISWI.
  - August 15, 2011 Order denying EPA request to stay litigation pending resolution of EPA Motion to Dismiss for lack of subject matter jurisdiction.
  - Argument scheduled for September 8, 2011.
- U.S. Sugar Corp. v. EPA, Docket No. 11-1108
  - Industry challenge to boiler MACT.
  - Currently stayed pending EPA reconsideration.



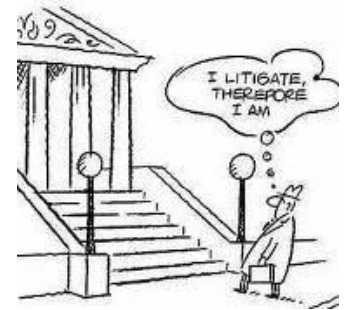
# Tailoring Rule Background

- Massachusetts v. EPA, 549 U.S. 497 (2007)
- Endangerment Determination (2009)
- Light-Duty Vehicle Rule ( May 2010)
- Timing Decision (April 2010)
- Tailoring Rule (June 2010)



# Tailoring Rule and Related Litigation

- Literally dozens of cases challenging
  - Endangerment Determination
  - Light-Duty Vehicle Rule
  - GHG Tailoring Rule
  - EPA's 1978, 1980, and 2002 PSD Rules



# Key Issue

Does the “absurdity” of regulating tens of thousands of small sources of GHGs result from the text of the Clean Air Act or EPA’s allegedly erroneous interpretation of that Act?

# What Triggers PSD?

- Construction or major modification of a “major emitting facility” in any area to which Part C of the Clean Air Act applies.
- A “major emitting facility” has the potential to emit at least 250 tpy of “any air pollutant” or 100 tpy of “any air pollutant” for certain specified industrial source categories.

# EPA's Interpretation

A permit is required for the construction of any facility that has the potential to emit 100/250 TPY of any regulated air pollutant in any area that is in attainment for any NAAQS.

*Fact: every area of the country has always been in attainment with at least one NAAQS*



# Industry's Interpretation

A permit is required for the construction of a facility that has the potential to emit 100/250 TPY of a regulated air pollutant whose NAAQS is being attained in the area where the source is located.

*Fact: GHGs are not criteria pollutants  
and have no NAAQS*

# Ramifications of the Tailoring Rule Litigation

- Possible end of the “pollutant-indifferent” situs requirement
- A NAAQS for GHGs
- More confusion for EPA and the regulated community

# GHG Litigation Update

- Am. Elec. Power Co. v. EPA
- Sierra Club v. U.S. Defense Energy Support Center, No. 01:11-cv-41 (E.D. Va. July 29, 2011)
- Amigos Bravos v. BLM, No. 6:09-cv-37 (D.N.M. Aug. 3, 2011)

# California

- Cap-and-Trade Program delayed to 2013
- Association of Irrigated Residents v. CARB
  - Trial court Enjoined CARB's implementation of cap-and-trade program
  - Court of Appeals stayed that order
  - Appeal pending before California Supreme Court

THANK YOU!

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