

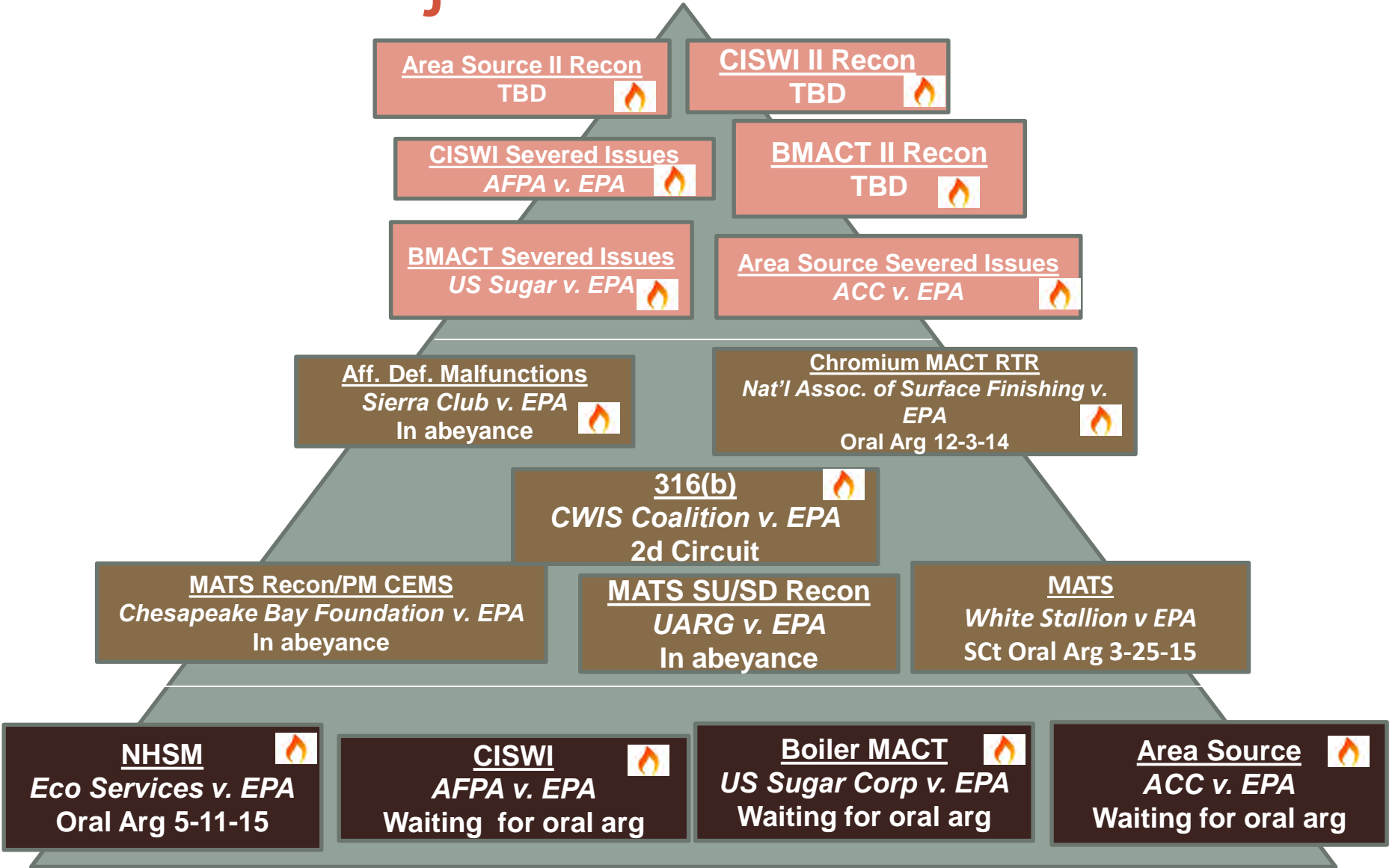
# LITIGATION & REGULATORY UPDATE

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CIBO E&E Meeting  
June 2-3, 2015

Lisa M. Jaeger  
Bracewell & Giuliani, LLP

# Major Rules in Court



# GHG/Utility NSPS/ESPS



# GHG/Utility Cases – Quick Look

Case	Issue	Action
<i>Nebraska v. EPA</i> (DNE 14-3006)	NSPS Federal Power Act Administrative Procedure Act	Case dismissed
<i>West Virginia v. EPA</i> (DC Cir. 14-1146)	Settlement Agreement 111/112 duplicative	Oral Arg 4-16-15
<i>Murray v. EPA</i> (DC Cir. 14-1112) and <i>Murray v. EPA</i> (DC Cir. 14-1151)	ESPS Writ of Prohibition Standing EPA lacks authority 111/112 duplicative	Oral Arg 4-16-15
<i>Murray et al. v. EPA</i> (NDWV 14-39)	NSPS CAA § 321(a): jobs & economic impact must be evaluated	EPA m/ to dismiss Denied EPA Summary Judgment pending

## *Murray Energy et al. v. EPA (WVDC 14-39)*

CAA § 321(a) “The Administrator **shall** conduct continuing evaluations of potential loss or shifts of employment which may result from the administration...of the provision...including...investigating threatened plant closures or reductions in employment allegedly resulting from such administration...”

# *Murray Energy et al. v. EPA* (WVDC 14-39)

Motion	Details	Action
EPA m/ Dismiss	Sovereign immunity Discretionary action	Denied -EPA can't "categorically refuse" to do evaluation -Scope of jurisdiction
EPA m/ Clarification	Subject matter jurisdiction over 304(a)(2)	Denied
EPA m/ Dismiss	Plaintiffs lack standing	Denied
EPA m/ Summary Judgment	-EPA satisfied CAA 321(a), see 53 documents -If Court denies EPA SJ, grant Murray SJ instead MURRAY: -EPA documents do not meet 321(a). -We do not seek SJ	
Murray m/ Compel Discovery		Granted
EPA m/ Protective Order		Denied

# GHG/Utility Cases – Relevance for ICI Boilers

DC Circuit (*Murray Energy v. EPA & West Virginia v. EPA*)

- Oral argument 4-16-15
- Decision/Rule Summer 2015

WV District Court (*Murray Energy et al. v. EPA*)

- CAA § 321(a)
- Schedule: Discovery due 7-31-15. Trial 1-5-16.
- Motions  
EPA summary judgment. ABEYANCE  
Murray compel discovery. GRANTED  
EPA protective order. DENIED

# GHG/Utility Rules

Final rules “summer” 2015 per EPA

111(b) at OMB 5-7-15

- New and modified/reconstructed units

111(d) at OMB 6-1-15

*De minimis* Threshold Rule

- Response to Supreme Ct decision in *UARG v. EPA*
- Threshold would trigger PSD permitting program
- Would modify current 75,000 tpy trigger
- No proposal date



# US House and Senate

## Endangered Species Act Consultation

- House Committee on Natural Resources hearings

## HR 2042 Ratepayer Protection Act

- Judicial review of any final rule before requiring compliance
- Allow States to opt out
- Passed House Energy & Commerce 28-22

## McConnell “Just Say No” Letter

# Supreme Court



*Nickols v. Mortgage Bankers Assoc.* (SCt 13-1041; March 2015)  
*Sotomayor opinion, unanimous*

- HELD: agency “interpretive rule” is not subject to notice and comment even if the interpretation diverges substantially from prior agency interpretation
- Administrative Procedure Act: notice / comment “do not apply” to interpretive rules
- *Paralyzed Veterans* doctrine is inconsistent with APA
- Agency must “provide more substantial justification” for findings that underlay contrary prior policy and must account for upset reliance interests
- Alito, Scalia, Thomas concurrences: room to explore *Seminole Rock* deference to agencies and suggest agency deference has gone too far

*FERC v. Electric Power Supply Assoc., et al.* (S.Ct 14-840)

-Cert granted 5-4-15

- ISSUES: 1) Whether FERC reasonably concluded that it has authority under the Federal Power Act, 16 U.S.C. 791a et seq., to regulate the rules used by operators of wholesale electricity markets to pay for reduction in electricity consumption and to recoup those payments through adjustments to wholesale rates.
- 2) Whether the Court of Appeals erred in holding that the rule issued by FERC is arbitrary and capricious.

# Riding the Regulatory Wave



## CEQ NEPA

- Revised Draft Guidance should be withdrawn
- Coalition comments filed 3-25-15
- House Natural Resources hearing



## Social Cost of Carbon

- Commercial Warm Air Furnaces 4-6-15
- Hearth Products 4-10-15
- Commercial Pumps 6-1-15
- Residential Boilers 7-1-15
- Residential Furnaces 7-10-15

## Migratory Bird Treaty Act Permitting Rule

## CWA Effluent Guidelines

- Final by 9-2015
- FOIA case *Environmental Integrity Project v. SBA* (DC Dist. 13-1962)
- Claim: Utility industry influenced process
- Briefing m/ for Summary Judgment

## NSPS Electronic Reporting & Recordkeeping

- Comments 6-18-15
- Covers: Stack tests and CEM performance evals  
Summary and excess emission reports  
Compliance Status Reports  
Subpart specific reports
- Seeks comment on whether this would require submissions beyond current 40 CFR 60.4(b)
- Only reporting format is different
- Effective 90 days after final rule

## Waters of the US

- Final rule signed 5-27-15
- Clarification of authority to regulate certain waters under CWA



# Herding Cats Through the Court House



## CWA 316(b)

- CWIS v. EPA* (14-4645)
- FWS/NMFS, Biological Opinion issues
- Schedule: Briefing Oct-Jan  
Oral arg Spring 2016





## Definition of Solid Waste

*USWAG v. EPA* (DC Cir 15-1083)

Petitioners: IND: USWAG, EEI, NRECA, AGA, API, Freeport-McMoRan, NAM, ACC

ENV: CA Communities Against Toxics, Clean Air Council, Coalition for a Safe Environment, LEAN, Sierra Club

Issues: transfer-based exclusion, secondary materials not yet been discarded, uniform legitimate recycling standards, legitimacy criteria

## Coal Ash

Petitions for Review 7-16-15

Issues: ENV: health/environment

IND: enforcement  
revisiting classification



# SSM



Rule/Case	Description	Status
<i>Sierra Club v. EPA</i> (DDC 13-1639)	POTWs. EPA failed to complete 8-year review for 46 MACTs	Stayed until 5-27-15
<i>Sierra v. EPA</i> (DC Cir. 14-1110)	9-rule Affirm Defense 9 §112 and §129 rules	In abeyance Interventions pending  Admin Petition granted
BMACT, Area, CISWI	Affirmative defense severed and put into reconsideration cases  Proposal: delete aff defense	Case in abeyance  Recon rule proposed
Primary & Secondary Aluminum Supplemental Notice	Malfunction/affirmative defense	Comments filed 2-6-15
SSM SIP Call		EPA meeting & letters Apr/May 2015 Final rule May 5-2015

# SSM SIP Call

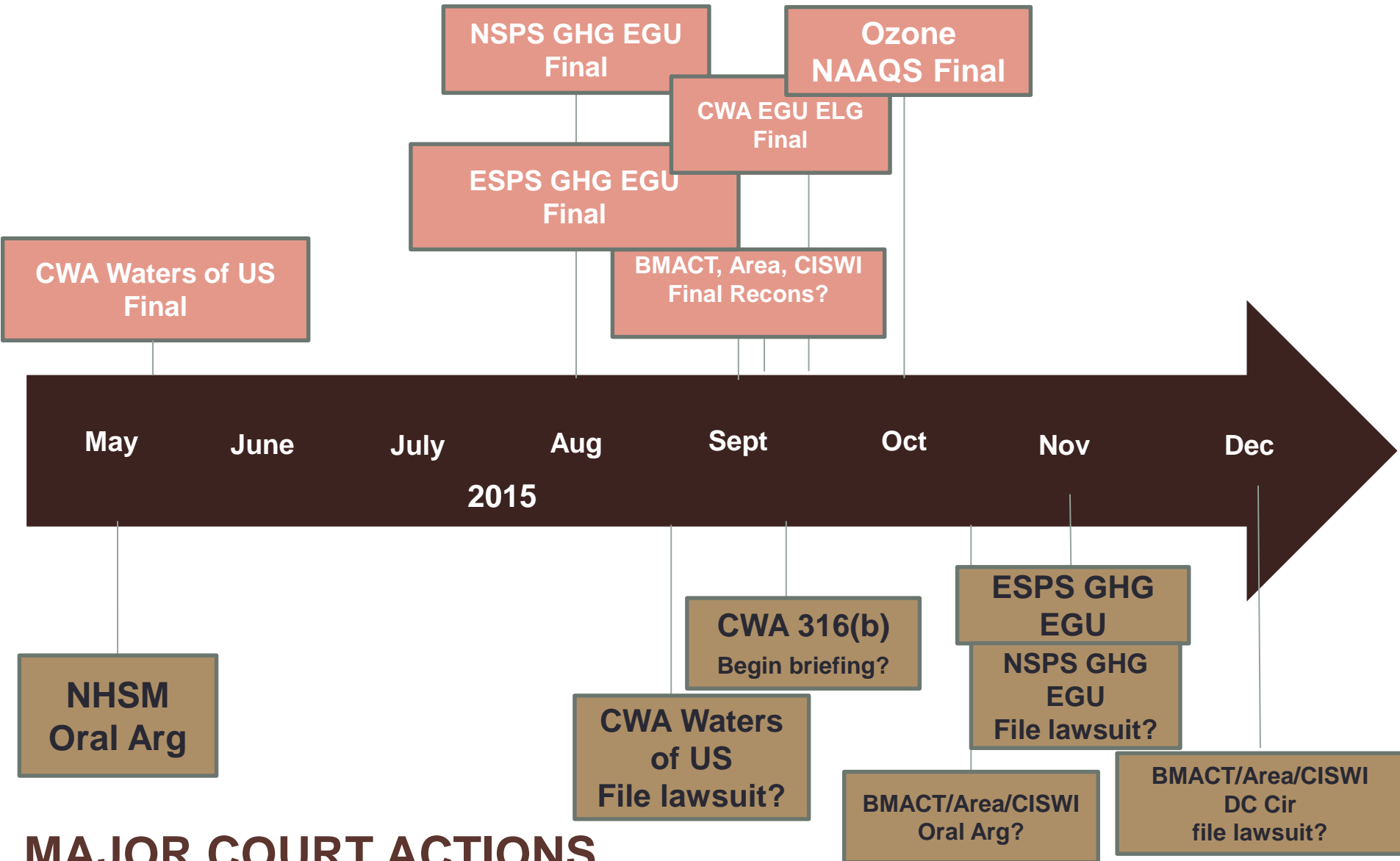
Final action signed 5-22-15

- settlement agreement with Sierra Club and WildEarth Guardians

36 SIP calls to be issued

- 5 or 6 states may not be included

# MAJOR RULES



## MAJOR COURT ACTIONS

# Cruising through Summer!

