

FEDERAL PLAINTIFFS OR DEFENDANTS

Suits Joined or Defended 2011- 2016

through 9.21.16 - Emory Smith

ENVIRONMENTAL LITIGATION

1. ***STATE OF GA V. MCCARTHY - WOTUS CHALLENGE (SDGA & 11TH / 6TH CIRCUITS)***

BACKGROUND: We filed challenges to EPA's new Waters of the United States definition in both the Southern District of GA and an original action in the 11th Circuit as a precaution b/c of jurisdictional uncertainties. Both of these two tracks are pending.

STATUS:

- The So. District determined that it lacked jurisdiction to grant an injunction and we have appealed that decision. 11th Cir. heard appeal in July but has not issued a decision.
- The original action in the 11th Circuit has been consolidated in the 6th Circuit. The Sixth Circuit has issued a nationwide injunction of WOTUS while it determines jurisdiction. Sixth Circuit has determined it has jurisdiction and is proceeding.

2. ***STATE OF WV, ET AL V. USEPA (111d case challenging rule re emissions from EXISTING coal fired power plants) (15-1363 –DC Circuit)***

BACKGROUND: We have joined in the several challenges to this Rule in its proposed and final stages claiming the EPA lacked authority under §111d of the Clean Air Act to promulgate this rule regulating carbon emissions from existing coal-fired power plants. Only one challenge is currently pending.

Currently pending is our multi-state Petition for Review of Final Rule filed on October 23, 2015.

Status: Rule stayed by SCOTUS. Argument re Petition scheduled for September 27, 2016.

3. ***STATE OF WEST VIRGINIA, ET AL V. USEPA (14-1146 –DC Circuit) (Challenging proposed rule re emissions from NEW power plants – 111b)***

Background / Issues: We joined in a Petition for Review filed November 4, 2015, challenging this rule regulating carbon emissions from NEW power plants.

Status: Briefing

4. ***STATE OF WEST VIRGINIA, ET AL V. USEPA*** (16-1264 - DC Circuit)

Challenges EPA's recently-finalized Methane Rule. The Rule is a Clean Air Act Section 111(b) regulation of methane from new oil and gas sector operations, and is a precursor to EPA's express plans to regulate methane from existing oil and gas operations in the near future.

Status: Early – Petition for Review to initiate action filed at the end of July

5. ***MICHIGAN, WHITE STALLION ENERGY CENTER, ET AL V USEPA***
12-1100 (DC Circuit -) (Challenges EPA's MATS (mercury air toxics standards) / MACT (maximum achievable control technology) Rule)

Background / Issues: This Petition for Review challenges EPA's MATS (mercury air toxics standards) / MACT (maximum achievable control technology) Rule that sets national emission standards for hazardous air pollutants (HAP) from coal- and oil-fired electric utility steam generating units. The suit contends that the Rule violates the Clean Air Act (CAA).

By a 5-4 vote last June, SCOTUS held that EPA acted unreasonably when it interpreted the Clean Air Act as not requiring it to take costs into account when deciding whether to regulate hazardous air pollutants emitted by power plants.

On remand from SCOTUS, the DC Circuit remanded the case to the EPA to issue a final finding. EPA issued a supplemental finding that we opposed by comment letter and now in a petition for review.

Status: Petition for review pending as to supplemental findings.

6. ***STATE OF FLORIDA, ET AL V. EPA*** (DC Circuit 15-1267)

Background / Issues: We joined in this Petition for Review challenging the EPA's conclusions that the EPA approved State Implementation Plans are "substantially inadequate" regarding emissions during periods of startup, shutdown and malfunction and must be revised.

Status: The Court has set a briefing schedule that stretches into October, 2016.

7. ***HOMER CITY, ET AL V. EPA*** - ENDED
(Challenges cross-state air pollution rule)

Background / Issues: This Petition for Review challenges EPA's transport rule a/k/a CSAPR (Cross-state air pollution rule) that is intended to limit interstate transport of nitrogen oxides and sulfur dioxide emissions from power plants. The DC Court of Appeals vacated the Rule. The

Supreme Court granted EPA's Petition for Cert. and on April 29, 2014, overturned the DC Circuit's decision with Scalia and Thomas dissenting and Alito not participating. The Court gave deference under, *Chevron v. USA*, to the EPA's interpretation of the Clean Air Act. Nebraska is the lead state.

Status: Ended On remand from SCOTUS, the DC Court of Appeals issued an opinion on 7.27.15 holding invalid the SO₂ and "ozone-season NO_x "emission budgets" requiring certain emission reductions for SC and some other states under the EPA's transport rule a/k/a CSAPR (Cross-state air pollution rule). The Court rejected other challenges to the Rule itself including facial challenges.

8-11 COALITION FOR RESPONSIBLE REGULATION ET AL / UTILITY AIR GROUP V. EPA - ENDED

(4 Cases re greenhouse gas regulation)

Background / Issues: These Petitions for Review challenged EPA's "endangerment" finding, which sets in motion regulation of emissions of greenhouse gases, and related rules. The rules included the Tailpipe Rule (emission standards for cars and light trucks), the Timing a/k/a Triggering rule (permit requirements for stationary sources of pollution) and the Tailoring Rule (relieving burdens under the timing rule but also beyond the authority of EPA under the Clean Air Act).

The DC Circuit ruled that the Endangerment Finding and Tailpipe Rule are neither arbitrary nor capricious, that EPA's interpretation of the governing Clean Air Act provisions is unambiguously correct; and that no petitioner has standing to challenge the Timing and Tailoring Rules. 684 F.3d 102, 113 (D.C. Cir. 2012).

The Supreme Court granted the Texas Petition for Cert, in which we joined, and considered limited issues. In June, 2014, SCOTUS issued an Opinion affirming in part and reversing in part. Among the findings of SCOTUS are that:

- The Clean Air Act did not require that stationary sources could be subject to Prevention of Significant Deterioration (PSD) permitting requirements applicable to major sources, solely on the basis of the source's potential to emit greenhouse gases. (Triggering rule)
- EPA exceeded its authority when it adjusted levels at which a source's potential to emit greenhouse gases trigger Clean Air Act permitting requirements. (Tailoring rule)

Status: ENDED - SCOTUS remanded the case to the DC Circuit. On April 10, 2015, the DC Circuit issued a ruling vacating the regulations to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i)that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification; (2) the regulations under review be vacated to the extent they require a stationary source to obtain a title V permit solely because the source

emits or has the potential to emit greenhouse gases above the applicable major source thresholds; and (3) the regulations under review (in particular 40 C.F.R. § 52.22 and 40 C.F.R. §§ 70.12, 71.13) be vacated to the extent they require EPA to consider further phasing-in the requirements identified in (1) and (2) above, at lower greenhouse gas emission thresholds. Some of the original Petitioners, but not the states, petitioned for Rehearing. I believe that Petition was denied.

12. ***STATE OF OKLAHOMA, ET AL V. EPA (DCOK) - ENDED***

Background / Issues: This suit sought to enforce a FOIA request of the EPA made by Oklahoma, SC and other states seeking information related to state and federal implementation plans and consent decrees entered by EPA and certain environmental organizations regarding regional haze.

Status: District Court dismissed. OK was to consider a revised FOIA request and did not recommend appeal.

OTHER FEDERAL LITIGATION

13. ***STATE OF SOUTH CAROLINA V. UNITED STATES, ET AL (USDC)***

Background: Suit against Federal government for failure to remove defense plutonium from South Carolina.

Status:

14. ***TEXAS, ET AL V. U.S.***

Background: South Carolina joins Texas and 16 other states suing the Federal government in DCTX for an illegal overreach on executive privilege on immigration.

Status: Injunction issued against Federal action. I have requested an update.

15. ***STATE OF NEBRASKA, ET AL V. USA***

Background: Suit in the USDC NE challenges Federal transgender bathroom, etc. rule

Status: Early stages

16. ***NFIB v. Perez***

Background: This suit in the USDC ND Texas challenges a new Dept. of Labor Rule and Interpretation that requires extensive reporting to the government by attorneys on the legal advice provided to companies regarding union elections and efforts to persuade employees not to join a union." This rule could intrude on attorney-client privileges.

Status: Nationwide preliminary injunction issued.

17. *NEVADA, ET AL V. US DEPARTMENT OF LABOR*

Background: The lawsuit in the USDC EDTX challenges the Department of Labor's overtime rule on grounds that include the doubling of the "salary level" threshold for overtime-exempt employees, the automatic ratcheting of the salary level every three years, the improper delegation of congressional authority to promulgate these regulations, and the application of those regulations to the States in violation of the 10th Amendment. The suit claims that the rule exceeds Congressional authorization and violates the APA.

Status: Just filed.

18. *FLORIDA V. USDHHS* - ENDED

Background: Challenge to Affordable Healthcare Act.

Status: Ended – The Supreme Court upheld the ACA except for penalty for states choosing not to participate in the Medicaid expansion program.

19. *USA v. STATE OF SC* - Ended

Background: Challenge to SC's immigration statute

Status: Ended – statute found to be preempted and enjoined.