The Three Amigos

PRESENT

CLEAN AIR ACT CASE UPDATE

ARKANSAS ENVIRONMENTAL FEDERATION
APRIL 12, 2016

STARRING

MARK ALLISON
AL ECKERT
WALTER WRIGHT

The Three Amigos

MARK ALLISON

CLEAN AIR ACT - ALLISON

COOPERATIVE FEDERALISM AND THE REGIONAL HAZE RULE

"LUCY, YOU GOT SOME 'SPLAININ TO DO"

WHAT IS COOPERATIVE FEDERALISM?

STATE AND FEDERAL GOVERNMENT WORKING TOGETHER

TO ACCOMPLISH A **COMMON GOAL**

DEVELOPED IN RESPONSE TO GREAT DEPRESSION

CLEAN AIR ACT - ALLISON

HOW DOES COOPERATIVE FEDERALISM WORK?

TWO MODELS

"SHOW ME THE MONEY"

FED. PAYS STATES TO IMPLEMENT FEDERAL PROGRAM

STATE PROGRAM MEETS FEDERAL STANDARDS

STATE LOSES MONEY

EXAMPLES: AFDC, MEDICAID

KING V. SMITH (US 1968)

CLEAN AIR ACT - ALLISON

HOW DOES COOPERATIVE FEDERALISM WORK?

"LESSER OF TWO EVILS"

FED REGULATES ACTIVITY UNLESS STATE IMPLEMENTS PROGRAM

- STATE PROGRAM MEETS FEDERAL STANDARDS
- STATE LOSES CONTROL
- EXAMPLES: CWA, CAA, OTHER ENV. PROGRAMS
- NEW YORK V. US (US 1992)

CLEAN AIR ACT - ALLISON

FEDERAL OVERSIGHT UNDER CAA

- PERMITS
  - TITLE V – RIGHT TO OBJECT
  - PSD – PERMIT REVIEW AND COMMENT
- SIPS
  - EPA REVIEW AND APPROVAL
  - FEDERAL IMPLEMENTATION PLAN
- OTHER
  - RIGHT TO ENJOIN CONSTRUCTION (PSD AND CAA)

CLEAN AIR ACT - ALLISON

HOW DOES THIS WORK IN PRACTICE?

REVIEWING COURT DOES NOT SUBSTITUTE ITS JUDGMENT
MAKES SURE AGENCY FOLLOWS RULES
- CONSIDER RELEVANT FACTORS
- CLEAR ERROR OF JUDGMENT
- RELY ON FACTORS NOT INTENDED BY CONGRESS
- ENTIRELY FAIL TO CONSIDER IMPORTANT ASPECT
- EXPLANATION COUNTER TO EVIDENCE
- DECISION IMPLAUSIBLE

MOT. VEHICLE MFG. ASSOC. V. STATE FARM (US 1983)

CLEAN AIR ACT - ALLISON

HOW DOES THIS WORK IN PRACTICE?

"CONFUSING AND INCONSISTENT ANALYSIS . . . WAS SO INCOMPLETE AND CONCLUSORY AS TO FALL BELOW THE STANDARD OF REASONED DECISIONMAKING"

"ANALYSIS . . . IS INTERNALLY INCONSISTENT AND INADEQUATELY EXPLAINED"

GEN. CHEMICAL CORP. V. US (D.C. CIR. 1987)

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ALASKA DEC V. EPA (US 2004)

WHAT IS EPA'S ROLE?

STATE - DID PERMIT CONTAIN BACT? CHECK THE BOX

EPA – WAS BACT DECISION REASONABLE? ANALYSIS

COURT: STATE HAS "CONSIDERABLE LEEWAY" BUT

EPA MAY STEP IN WHEN STATE DECISION IS NOT BASED ON "REASONED ANALYSIS"

CLEAN AIR ACT - ALLISON

BART FACTORS

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NPCA V. EPA (9TH CIR. 2014)

EPA ISSUED RHR FIP

NOX – SOFA (TOO COLD)

SOFA +SNCR (TOO HOT)

SOFA + SCR (JUST RIGHT)

EPA: CHOICE "JUSTIFIED WHEN THE VISIBILITY IMPROVEMENT IS CONSIDERED"

COURT: DECISION UNSUPPORTED BY ANY EXPLAINED REASONING

WONDER WHAT METRIC, IF ANY, EPA USED TO DETERMINE BART

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NPCA V. EPA (9TH CIR. 2014)

$1,500/TON NOX COST-EFFECTIVE AT ONE PLANT

$1,487/TON NOX **NOT** COST-EFFECTIVE AT ANOTHER PLANT

COURT: EPA DID NOT PROVIDE REASONS JUSTIFYING ITS DECISION

WONDER WHAT RATIONALE EPA USED TO DETERMINE COST-EFFECTIVENESS

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NPCA V. MCCARTHY (8TH CIR. 2016)

EPA APPROVED MINNESOTA RHR SIP

TRANSPORT RULE BETTER THAN BART

- BART – MORE SO_2, LESS NOX
- TRANSPORT RULE – LESS SO_2, MORE NOX

EPA: TRANSPORT RULE DOES NOT REQUIRE DEMONSTRATION FOR EACH CLASS I AREA

COURT: EPA OFFERED A RATIONAL EXPLANATION FOR ITS DECISION

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NEBRASKA V. EPA (8TH CIR. 2016)

EPA DISAPPROVED NEB. SIP; ISSUED FIP

EPA DISAPPROVAL -

STATE: SO_2 CONTROLS TOO EXPENSIVE ON $/DV BASIS

EPA: ERRORS IN COST ANALYSIS; REASONABLENESS OF COSTS OF CONTROLS; SIGNIFICANT VISIBILITY IMPROVEMENT

COURT: EPA REVIEW MORE THAN MINISTERIAL

IN BATTLE OF EXPERTS COURT MUST DEFER TO EPA

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ARIZONA V. EPA (9TH CIR. 2016)

EPA DISAPPROVED SIP; ISSUED FIP

CLEAN AIR ACT - ALLISON

CLEAN POWER PLAN STATUS

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AL ECKERT

CLEAN AIR ACT – ECKERT

EME Homer City Generation L.P. v. EPA 795 F. 3d 118 (2015)

- Cross-State Air Pollution Rule (aka "Air Transport Rule")

- The Clean Air Act seeks to prevent the spread of air pollution from "upwind" states to "downwind" states. Under the Act, individual states are responsible for ensuring attainment within their states of federal air quality standards. The Clean Air Act's "good neighbor" provision speaks to that problem by prohibiting upwind states from "emitting any air pollutant in amounts" that will "contribute significantly to nonattainment" of a NAAQS in a downwind state.
- In 2011, EPA created the Transport Rule – sets emission reduction standards for "upwind" states based on air quality standards and to prevent exceedances of NAAQS in "downwind" states.
- EPA previously in 2005 attempted to implement the Transport Rule though the Clean Air Interstate Rule – regulated upwind services of sulfur dioxide and nitrogen oxides.
- In 2008, D.C. Circuit vacated CAIR as arbitrary and capricious but left the rule in place pending EPA revising of regulations.

Cross-State Air Pollution Rule (aka "Air Transport Rule")

- Coalition of state and local governments, industry and labor groups challenged the Transport Rule in the D.C. Circuit arguing that the Transport Rule created federal standards with no deference to the states in violation of federal law.
- The D.C. Circuit held that the Transport Rule violated federal law because Clean Air Act allows states to implement their own plan to curb air pollution.

Cross-State Air Pollution Rule (aka "Air Transport Rule")

- U.S. Supreme Court reversed in 6-2 opinion and held that the Clean Air Act supports EPA's contention that if the state implementation plan (SIP) is insufficient, the EPA has a mandate to create and enforce a federal implementation plan within the next two years unless the state revises the state SIP.
- The Court held that the Transport Rule was necessary for the EPA to fulfill its statutory requirement to balance the under and over control of emission standards

Michigan v. EPA, 576 U.S.

- U.S. Supreme Court analyzed whether EPA must consider costs when regulating pollution from power plants.
- In 1990 Congress amended the Clean Air Act to create new regulations for "hazardous air pollutants" emitted from stationary sources.
- An EPA study of emissions of hazardous pollutants from power plants concluded that regulation of coal and oil fired power plants was "appropriate and necessary" and promulgated minimum emission regulations ("floor standards").
- Clean Air Act states that EPA must enforce minimum emissions regulations and to consider costs when implementing more stringent emission standards.
- EPA concluded that "costs should not be considered" when determining whether power plants should be regulated.

Michigan v. EPA, 576 U.S.

- Group of non-profit organization, corporation and 23 states filed suit to challenge the EPA's refusal to consider costs when regulating power plants. U.S. District Court for District of Columbia upheld EPA's decision not consider costs.
- In a 5-4 decision, the Court ruled that EPA should have taken into account the cost to utilities before deciding whether to set limits for toxic air pollutants regulated in 2011. Justice Scalia held that EPA erroneously interpreted the Clean Air Act when it decided that costs should not be considered when regulating power plants, and that the EPA "must consider cost-including, most importantly, cost of compliance - before deciding whether the regulation is appropriate and necessary."

Michigan v. EPA, 576 U.S.

- The ruling may be seen as a retreat from the Court's prior administrative law jurisprudence, which generally gave deference to an agency's reasonable interpretation of an ambiguous statute.
- Justice Scalia ruled EPA erred in interpreting the "appropriate and necessary" requirement of the Clean Air Act because it was unreasonable to interpret the phrases as not requiring the EPA to consider all relevant facts, including cost of power plants.
- The cost to power plants is a relevant factor when deciding whether to regulate electric utility steam generating units and EPA should have considered the cost to power plants in making its decision

Big River Steel, LLC – The Three Front War

The Permit Appeal

- On September 18, 2013, ADEQ issued Permit No. 2305-AOP-RO to Big River Steel, LLC, for the operation of a greenfield steel mill in Mississippi County, Arkansas. Nucor Corporation and Nucor-Yamato Steel Company filed a third party request for Commission Review and Adjudicating Hearing.
- On March 20, 2014, the Administrative Hearing Officer issued a Recommended Decision discussing the evidence presented, the parties' arguments and recommended the issuance of the permit be affirmed. On April 25, 2014, the Arkansas Pollution Control and Ecology Commission adopted by Minute Order the Recommended Decision of the Administrative Hearing Officer.

The Permit Appeal

- Nucor appealed the Commission decision to the Mississippi County Circuit Court. Big River Steel moved to transfer the appeal to the Arkansas Court of Appeals which granted the motion. The Arkansas Court of Appeals affirmed the Commission decision stating that:
  - (a) The Arkansas Court of Appeals does not sit essentially as a circuit court, and that the statute to transfer the case to the Arkansas Court of Appeals was intended to expedite the process of bringing the Commission ruling forward for appellate review.
  - (b) The Arkansas Court of Appeals does not review the Commission ruling de novo, but reviews administrative appeals with great deference to agency expertise, based on all recognition that such agencies are better equipped by specialization, insight through experience and more flexible procedures to determine and analyze legal issues affecting them. The Commission ruling on the issuance of a regulatory permit was an exercise of executive function, hinging on executive discretion and was not a quasi-judicial ruling.

The Permit Appeal

- The Arkansas Court of Appeals dismissed all of Nucor's claims of procedural error and stated that the court recognized the specialization and experience of the Commission on these matters and, due to limited review, affirmed the Commission's ruling.

The Citizen Suit

- Nucor filed suit in U.S. District Court, Eastern District, under the Clean Air Act seeking an injunction to halt construction of the steel mill alleging the permit failed to comply with applicable PSD requirements, failed to satisfy BACT requirements, the permit application was flawed and the permit failed to include federally enforceable limits for $PM_{2.5}$. Nucor contended that the Clean Air Act (Section 7604(a)(1)) authorizes a citizen suit whenever the state permitting authority erroneously concludes that an applicant has met the requirements for a PSD permit, and therefore a permit should have not been issued.

The Citizen Suit

- U.S. District Judge Leon Holmes granted Big River's Motion to Dismiss stating that Nucor's suit was in effect a collateral attack on the Big River permit, which is not authorized by the Clean Air Act. Judge Holmes ruled that a federal court has no supervisory authority over, nor jurisdiction to hear appeals from a state administrative agency, and was without jurisdiction to review the decision of the state agency to grant a PSD permit to Big River Steel.
- Judge Holmes noted that Nucor has its right to appeal to the Arkansas Court of Appeals under Title V, has the right to petition the EPA to object to the permit issued to Big River Steel, and has the right to seek judicial review if EPA declines to object to the issuance of the permit. Judge Holmes' ruling on the Motion to Dismiss is on appeal to the Eighth Circuit Court of Appeals.

Nucor v. EPA

- On October 9, 2013, Nucor Steel Arkansas and Nucor-Yumato Steel Co. filed a petition with the Administrator of EPA requesting she object to the Clean Air Act permit issued to Big River Steel by ADEQ, stating the permit failed to comply with the Clean Air Act.
- The Clean Air Act provided that if the Administrator of the EPA does not object within 45 days after a Title V has been issued, the Administrator may be petitioned within 60 days following the end of the EPA's 45 day review period.

Nucor v. EPA

- Nucor has requested the Administrator to timely object to the permit for Big River Steel and revoke and remand to ADEQ for compliance with regulatory requirements and seek injunctive relief to prevent the construction of the Big River Steel facility.
- The Administrator of EPA has failed to object to the Big River Steel permit within the required timeframe. Nucor has subsequently filed suit in U.S. District Court (District of Columbia) against EPA alleging the administrator of EPA has failed to approve or deny Nucor's petition and seeks to compel the Administrator to make a decision regarding Nucor's request. EPA claims Nucor does not have standing to bring this action. This litigation is pending.

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WALTER WRIGHT

CLEAN AIR ACT – WRIGHT

Can Air Monitoring Data Developed by Environmental Consultants for a Client be Obtained in Litigation Discovery?

- Environmental consultants and other independent professionals often develop documents and data for their clients.
- A question that sometimes arises is whether this information can be obtained by another party through discovery or other means.
- A Pennsylvania Court in *Haney v. Range Resources – Appalachia, LLC* held that the Defendant natural gas operator could not object to discovery of ambient monitoring of other evaluations undertaken on its behalf by its consultant in regards to a drilling site.
- The Court held the Defendant had failed to provide any meaningful evidence that the consultant was retained in anticipation of litigation in preparation for trial.
- The Court also noted that even if the consultant had been engaged as an expert consultation in anticipation of litigation, it also had been retained in other non-expert rules for certain functions that natural gas sites for the lawsuit began.

CLEAN AIR ACT – WRIGHT

Can Air Monitoring Data Developed by Environmental Consultant for a Client be Obtained in Litigation Discovery? (continued)

The decision serves as a reminder that companies that have relationships with environmental consultants must carefully delineate the work and tasks associated with litigation support and the formulation of expert opinions to document engagements with separate and specific contracts.

CLEAN AIR ACT – WRIGHT

Did an Oklahoma Power Plant that Failed to Obtain a PSD Permit Continue to Violate the Clean Air Act for Statute of Limitation Calculation Purposes?

- The Sierra Club ("Sierra") brought a Clean Air Act ("CAA") citizen suit action seeking penalties for Oklahoma Gas and Electric ("OG&E") alleged failure to obtain a PSD permit for boiler modification.
- Sierra filed its action more than five years (SOL) after construction initiated.
- The 10th Circuit Court of Appeals held OG&E's failure to obtain the PSD permit was a violation that accrued at commencement of the boiler modification (more than five years)
- Rejected Sierra argument that OG&E committed a new, discrete violation on each day of unpermitted modification.

CLEAN AIR ACT – WRIGHT

Clean Air Act Preemption of State-Law Tort Claims

- A question that periodically arises is whether the Clean Air Act ("CAA") preempts State-Law nuisance, tort or other common law claims?
- Preemption might arise from:
  - U.S. Constitution Supremacy Clause
  - Did Congress intend CAA preempt such claims?
- Two 2015 decisions
  - *SCISCO v. Enbridge Gathering, L.P.* (Texas Court of Appeals says CAA did not preempt nuisance and trespass claims against natural gas compressor stations seeking damages [emission standard alteration not sought].)
  - *Freeman v. Grain Processing Corp.* (Iowa Supreme Court says CAA did not preempt tort claims arising from air emissions at a corn, wet milling facility.)

CLEAN AIR ACT – WRIGHT

- 2015 FEDERAL COURT DECISION ADDRESSING WHETHER CERTAIN OIL AND GAS OPERATIONS SHOULD BE AGGREGATED FOR CLEAN AIR ACT PERMITTING PURPOSES

The Federal Environmental Protection Agency in certain states had historically directed companies to aggregate emissions from sources disbursed over multiple square miles of operations for purposes of permitting under the CAA requiring treatment of sources as a single stationary sources when facilities are:

- Under common control
- Belong to the same industrial group (e.g., oil and gas production)
- Are located on one or more contiguous or adjacent properties

The Sixth Circuit Court of Appeals in 2012 in *Summit Petroleum* held that EPA should only determine whether sources are "contiguous" or "adjacent" based on physical proximity as opposed to functional interrelatedness.

CLEAN AIR ACT – WRIGHT

2015 Federal Court Decision Addressing Whether Certain Oil and Gas Operations Should be Aggregated for Clean Air Act Permitting Purposes (continued)

- In *Pennsylvania Future v. Ultra Resources, Inc.* in 2015 a federal court in Pennsylvania addressed whether the company's eight compressor stations within approximately five-square mile area constituted a separate facility or should have been aggregated as a single facility for air permitting purposes.
  - None of the compressor stations individually had the potential to emit more than 100 tons per year of NOx collectively (but together had the potential to exceed 100 tons per year)
- A citizen suit group argued the compressor station should have been aggregated because they were both physically proximate and functionally interrelated.

CLEAN AIR ACT – WRIGHT

2015 Federal Court Decision Addressing Whether Certain Oil and Gas Operations Should be Aggregated for Clean Air Act Permitting Purposes (continued)

The Federal District Court looked at Pennsylvania Department of Environmental Protection guidance on the issue and concluded the compressor stations were neither physically proximate nor functionally interrelated.

The Court did cite language in the Pennsylvania guidance document referencing the possibility of functional interrelatedness by it being appropriate evaluation factor.

CLEAN AIR ACT – WRIGHT

Does the U.S. Environmental Protection Agency Have a Mandatory Duty to Regulate Ammonia and Hydrogen Sulfide as Criteria Pollutants Under the CAA?

Plaintiffs brought a citizen suit under the CAA alleging that EPA unreasonably delayed fulfilling its non-discretionary duty to regulate air pollutants emitted from animal feeding operations ("AFOs") under the CAA.

The D.C. Circuit Court of Appeals in *Cook vs. Environmental Protection Agency at Tulsa* noted that a citizen may bring action against the agency under the CAA:

- When it is alleged a failure of the Administrator to perform any act or duty under the CAA which is not discretionary with the Administrator.

The Court held that the Plaintiff had not identified any non-discretionary act or duty that EPA Administrator had failed to perform.

CLEAN AIR ACT – WRIGHT

Does the U.S. Environmental Protection Agency Have a Mandatory Duty to Regulate Ammonia and Hydrogen Sulfide as Criteria Pollutants Under the CAA? (continued)

The Court noted that the CAA required the Administrator to "list an air pollutant upon a finding that emissions of the pollutant in the Administrator's judgement, caused or contributed to air pollution which may recently be anticipated to endanger public health and welfare.

The Court found that the Plaintiff had not alleged that the Administrator had made an endangerment finding and rejected the argument that clear evidence had been offered that air pollutants from AFOs endangered public health and welfare (stating "scientific evidence alone - - - cannot give rise to mandatory duty to regulate").

Does the U.S. Environmental Protection Agency Have a Mandatory Duty to Regulate Ammonia and Hydrogen Sulfide as Criteria Pollutants Under the CAA? (continued)

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