

# 2020 Joint Conference

## Legal Issues with Nonattainment Area Designations

Kurt Kissling  
11.12.20

© 2020 Warner Norcross + Judd LLP  
These materials are for educational use only. This is not legal advice and does  
not create an attorney-client relationship.



Warner Norcross + Judd

# Presentation Overview

- The Key Clean Air Act Provisions
- Setting the National Ambient Air Quality Standards (“NAAQS”)
- NAAQS Designations
- Nonattainment (“NA”) Implementation
  - State Implementation Plan (“SIP”) requirements
  - New Source Review (“NSR”) permitting
- Takeaways

# The Key Clean Air Act Provisions

- §107 – Each state has primary responsibility for assuring air quality within the state, but ...
- §108 – EPA must list pollutants that cause or contribute to air pollution reasonably anticipated to endanger public health or welfare
- §109 – EPA must promulgate primary and secondary NAAQS for §108 pollutants
- §110 – SIP requirements and process

# Setting the NAAQS

- Primary NAAQS – protect public health, adequate margin of safety
- Secondary NAAQS – protect public welfare (e.g., nature, visibility)
- Five-year review cycle for each NAAQS ... technically
- The *current* process uses an integrated science assessment, a risk/exposure assessment, and a policy assessment
- Review by the Clean Air Scientific Advisory Committee (“CASAC”)
- EPA proposes the NAAQS, has public comment, then finalizes the NAAQS in the Federal Register
- Litigation over the NAAQS usually follows

# Setting the NAAQS

- Carbon Monoxide (CO) & Lead (Pb): M.I.A.
- NO<sub>2</sub> and SO<sub>2</sub> NAAQS: Primary NAAQS kept in 2018 and 2019, respectively, and secondary NAAQS under review
- PM<sub>2.5</sub> and Ozone: The game-changers
  - PM<sub>2.5</sub> – Draft Final Rule at OMB (as of 11/4)
  - Ozone – Draft Final Rule soon expected at OMB

# NAAQS Designations

- States and tribes propose area designations for NAAQS compliance (i.e., attainment, unclassifiable, or nonattainment) to EPA
  - Area size varies by pollutant (i.e., local vs regional)
  - Potential adjustments for exceptional events or international contribution
- EPA notifies the state if it disagrees
- EPA proposes designations, publishes for public comment, and then finalizes
- Parties inevitably sue EPA

# NAAQS Designations

- *Clean WI v EPA, 964 F.3d 1145 (D.C. Cir. 2020)*
- Challenged EPA designations for the 2016 ozone NAAQS, with DC Circuit upholding and remanding some designations
- Ottawa County (MI), which EPA designated as “attainment,” was remanded for further explanation
  - Located between two NA (now partial) counties in Allegan and Berrien
  - Violating Allegan monitor in Holland, across the street from Ottawa
  - The 5-factor analysis of potential contribution to nearby nonattainment was not adequately explained by EPA
  - Ottawa still tentatively “attainment” pending the remand
  - Unclear what will happen ... or when

# NA Implementation - SIPs

- Subsequent presenters will address the requirements for the SIP (e.g., RACM)
- Increasing number of legal challenges
  - *Sierra Club v EPA* (3<sup>rd</sup> Cir 2020) – vacates and remands EPA’s approval of PaDEP’s NO<sub>x</sub> RACT limit for power plants
  - *Sierra Club v EPA* (DC Cir pending) – panel seems skeptical of interprecursor trading (NO<sub>x</sub>-VOC)
  - *CBD v EPA* (10<sup>th</sup> Cir pending) – challenge to EPA’s approval of CO’s SIP re potential O<sub>3</sub> contribution to UT and NM and use of 2023 target (despite a 2020 compliance deadline)



# NA Implementation – NSR Permits

- Part 19 Rules applicable in MI for SO<sub>2</sub> and ozone (i.e., NO<sub>x</sub> and VOCs)
- Lowest Achievable Emission Rate
- Compliance certification
- Emission reduction credits / offsets
- Net air quality benefit
- Alternatives analysis

# Takeaways

- The NAAQS program desperately needs fixing (e.g., NA fees, 5-year review cycle, limited cost/benefit, multi-pollutant efficiency, monitoring vs modeling), but is it plausible?
- Local vs regional/national strategies
  - Limited tools for regional pollutants
  - Transport becoming harder to ignore (*NY v EPA*)
  - Looking beyond stationary sources
- What is needed to cope with long-term NA?
- Might we see new pollutants targeted (e.g., PM<sub>0.1</sub>, ammonia, H<sub>2</sub>S, GHGs, black carbon)?

# Conclusion

Thank you!

Kurt Kissling, Partner  
kkissling@wnj.com  
248.784.5142



Warner Norcross + Judd



# Kurt A. Kissling

kkissling@wnj.com | 248.784.5142

- Environmental attorney who specializes in permitting, compliance, enforcement and advocacy related to the Clean Air Act and state and local counterparts
- Counsels clients across many industries: agribusiness, automotive, cement, chemical, consumer products, ethanol, glass, lead smelting, manufacturing, mining, petroleum, pulp and paper, steel, remediation, utility, waste-to-energy and wood products