EPA Administration Transition

Legal Standards for Changing Policy
Roadmap

What is the Law?
- Constitutional and Statutory Framework
- Supreme Court case law

What are the possibilities?
- Executive/Administrative
  - Overview of specific rules at issue
- Other branches
Part 1

What is the law?
Legislative – Art. I; make the law
Executive – Art. II; carry out the law
- Administrative – power delegated to the executive by Congress
Judicial – Art. III; decide what is the law (judicial review)

Separation of Powers
The reviewing court shall:

- Compel agency action unlawfully withheld or unreasonably delayed
- Hold unlawful and set aside agency action, findings, and conclusions found to be—
  - Arbitrary, capricious, an abuse of discretion, not in accordance with law
  - Contrary to constitutional right, power, privilege, immunity
  - In excess of statutory jurisdiction, authority, or limitations, or short of statutory right
  - Without observance of procedure required by law
  - Unsupported by substantial evidence in a case subject to §§ 556 and 557
  - Unwarranted by the facts to the extent the facts are subject to trial de novo by the reviewing court

Clean Air Act, 42 U.S.C. §§ 7604 and 7607
Standard of Review: The deference an appellate court affords the decision of a district court, jury, or agency.


Question of law or fact

Standards of Review
Standards of Review

Question of Law

Question of Fact

Mixed Question of Law and Fact

Arbitrary?
Standards of Review: Administrative Law

**Substantial Evidence**
- Question of Fact
  - Universal Camera

**Arbitrary and Capricious**
- Question of Fact
  - Overton Park

**Statutory Interpretation**
- Question of Law
  - Chevron
- Skidmore
- Seminole Rock
- Mead

**Catch-All**
- Vermont Yankee
- State Farm
- FCC
Questions of Law
“Bubble concept” & “Stationary Source,” CAA Amendments of 1977 (permit program for NA areas)

“[Was] EPA’s decision to allow states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single ‘bubble’ [] based on a reasonable construction of the term ‘stationary source.’” at 840.

Chevron, U.S.A. v. N.R.D.C.
Has Congress spoken directly to the precise question at issue?

Yes; Unambiguous:

Determine if the agency differed from Congress’s clearly expressed command.

No; Ambiguous or Silent

Determine whether the agency’s interpretation is based on a permissible construction of the statute.
Catch-All Arbitrariness Review
“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”

An agency must “display awareness that it is changing position.”

“[O]f course the agency must show that there are good reasons for the new policy.”

An agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better . . .” at 515.

Massachusetts v. EPA (GHG in USSC) – Arbitrariness
West Virginia v. EPA (CPP in D.C. Circuit) – Arbitrariness
Utility Air Regulatory Group v. EPA (GHG Rulemakings in USSC) – Statutory Interp/Chevron
New Jersey v. EPA (Mercury Delisting case in D.C. Circuit) - Statutory Interp/Chevron
White Stallion Energy Center, LLC v. EPA (MATS case in D.C. Circuit) – Statutory Interp/Chevron
Michigan v. EPA (MATS case in USSC) – Statutory Interp/Chevron
North Carolina v. EPA (CAIR in D.C. Circuit) - Statutory Interp/Chevron AND Arbitrariness
EME Homer City v. EPA (CSAPR in USSC) - Statutory Interp/Chevron

Standards of Review:
Seminal and Recent CAA Cases
Part 2

What are the possibilities?
Possibilities:
Executive and Administrative
President is empowered by Statute or Constitution to issue EOs

EOs are binding on executive agencies and officials

Executive Order
7/11/2011 – EPA submitted a draft final rule “Reconsideration of the 2008 Ozone Primary and Secondary NAAQS” for review by the Office of Information and Regulatory Affairs

9/2/2011 – OIRA letter to EPA

- President Obama instructed OIRA to return the rule to EPA; Obama did not support finalizing the rule at that time
- Based on Executive Orders 13563 and 12866

10/26/2015 – Current, 2015 Ozone standard finalized

2008 Ozone NAAQS:
Background
Current Status of Rules
Rules Currently in Question (Not exhaustive)

- 2015 Ozone NAAQS
- Clean Power Plan
- GHG NSPS for EUGs
- O&G Sector NSPS (methane)
- MATS
- MSW Landfill Rule
Regulatory Status

- 12/19/16 – Extended comment period to 2/13/17
- 11/17/16 – Proposed NA Area designations and SIP requirements
- 10/26/15 – Final rule

Litigation Status

- Murray Energy Corporation v. USEPA, D. C. Cir. Case No. 15-1385
  - D.C. Cir. voluntarily rescheduled oral arguments from 2/16/17 to 4/19/17

2015 Ozone NAAQS
Clean Power Plan (111d)

Regulatory Status
- 1/11/17 – denial of petitions for reconsideration
- 6/30/2016 – proposed CEIP design details
- 2/9/2016 – USSC grants stay of CPP pending D.C. Cir. decision

Litigation Status
- State of West Virginia, et al v. EPA, D.C. Cir. Case No. 15-1363
- Oral args held 9/27/2016
- Decision from the court?
Carbon Pollution Standards for EGUs
Regulatory Status

6/3/2016 – final rule modifying OOOO and OOOOa, reducing methane, inter alia

Litigation Status

North Dakota v. EPA, D.C. Cir. Case No. 16-1242
Briefing has not begun

O&G Sector NSPS (methane)
Regulatory Status

- 4/25/2016 – Supplemental finding that it is appropriate and necessary to regulate HAPs from utilities (final rule)
- Ongoing compliance obligations for industry

Litigation Status

- Murray Energy Corp. v. USEPA, D.C. Cir.
  Case No. 16-1127
- Currently in briefing

Mercury Air Toxics Standard
MSW Landfill Rule

{ Regulatory
  - Effective date: 10/28/2016
  - 8/29/2016 – Final NSPS
  - 8/29/16 – Final Emissions Guidelines

{ Litigation
  - Nat’l Waste & Recycling Assoc., et al v. EPA, D.C. Cir. Case No. 16-1371
    - Challenge to emissions guidelines only
    - No briefing schedule; looks like parties are still joining
Possible Next Steps
Litigation
- “Refuse to defend rules”
- i.e., settle the case by (1) entering into a CD, or (2) voluntary remand (ask court to remand rules for reconsideration and revision)

Administrative
- Reconsider rules on remand
- Petitions for reconsideration (grant existing or voluntarily reconsider)
- Formal Rulemaking
  - Need reasonable basis for relaxing rule; document basis in formal rulemaking; notice and comment period
- Informal rulemaking

Trump EPA
- Petitions for reconsideration
- Litigation
  - Catch-All Arbitrariness Standard
  - Question of Fact
  - Question of Law
    - Rulemakings (formal and informal)

3rd Parties
Possibilities: Congress

- Agencies must submit final rules to both houses of Congress
- Congress may adopt a joint resolution of disapproval to nullify the final regulation
  - Time limits
- Submit joint resolution to President

Congressional Review Act: Overview
“Effective Date” – delayed 60 days after submitted to Congress or published in the Federal Register, whichever is later

Legislative Consideration Period –
- Either House or Senate must introduce the joint resolution within 60 calendar days (of continuous session) from the date the final rule is received (i.e., 60 “session days”)
  - Excluding days either house is adjourned more than 3 days during a session of Congress

Congressional Review Act: Time Limits
Congressional Research Service (Library of Congress) projected cutoff date = rules promulgated after sometime early June (6/13?).

Potential Rules:

- O&G NSPS Updates (5/12/2016 signature date)
- CSAPR Update (9/7/2016 signature date)
- NSPS Municipal and Solid Waste Landfills (7/14/2016 signature date)

CRA:
Rules potentially subject to review
- Regulatory Accountability Act, HR 5
- REINS Act, HR 26
- Midnight Rules Relief Act, HR 21*

Other lawmaking...
### U.S. House Partisan Breakdown

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<th>After the 2016 Election</th>
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### U.S. Senate Partisan Breakdown

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<tr>
<td><strong>Total</strong></td>
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<td><strong>100</strong></td>
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</table>
“Administrative law is not for sissies . . .”

Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 511