NSR Update 2014 – Continuing Challenges and Uncertainty

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2014 Topics

- NSR Reform – Report Card
- Recent Key Court Decisions
  - *Source Aggregation - Summit Petroleum Corp. v. EPA (6th Cir. 2013)*
  - *Applicability - United States v. DTE Energy Co. (6th Cir. 2013)*
  - *Statute of Limitations – Several cases*
- Regional Consistency – resulting from Summit implementation
- GHG Issues
  - Supreme Court limits EPA's GHG PSD authority – emerging issues
  - Impact of GWP Revisions
  - Biomass GHG Emissions Deferral

NSR Reform

	Scorecard In Effect	Abandoned, Stayed Vacated or Revoked
10 yr Baseline Emissions Lookback	✔	
Actual to Future Actual Methodology	✔	DTE Impacts
Actual PALS	✔	
Clean Unit Test		X
Pollution Control Project Exclusion		X
Flexible Permitting and NSR Green Groups		X
RMRR Bright-Line Test		X
Project Aggregation Rule		X
Source Aggregation Policy	Summit Petroleum Discussion	

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NSR Reform Continued

	Scorecard In Effect	Abandoned, Stayed Vacated or Revoked
Hourly Test for EGUs		X
Reasonable Possibility Rule	✔	
Fugitive Emissions Rule		X
Deferral for GHG Emissions from Bioenergy		X

Court Decision on December 2002 Reforms

- Permissible interpretations of the CAA
  - Actual-to-future-actual applicability test
  - Use of 10-year lookback (5 years in some cases) – but you need records
  - Exclusion of unrelated emissions increases due to demand growth in future emissions projections
  - The abandonment of a provision authorizing states to use source-specific allowable emissions in measuring baseline emissions
  - Actuals based PALs

RMRR Decision

- Proposed in December of 2002
- Finalized in mid-2003
- Stayed by the Court in December, 2003
- Vacated by the Court in March, 2006
  - Contrary to the plain language of the Act, which defines a modification as: any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

RMRR Decision Language

➢ Court Ruling in the Vacature

- EPA's approach would ostensibly require that the definition of "modification" include a phrase such as "regardless of size, cost, frequency, effect," or other distinguishing characteristic. Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view.

RMRR Litigation

- No court decision has yet vacated the RMRR exemption in the 1980 NSR rule
  - Therefore, that exemption still appears valid
  - However, EPA policy allowing factors other than emissions increase to be used to avoid major modification status may be weakened
- Status of RMRR exemption
  - Current multifactor test (purpose, nature, extent, frequency, and cost) used by EPA
  - Still a question of whether "routine" is applied to the "individual unit" or the "source category"
- Recent example: PA v. Allegheny (W.D. Pa. Feb. 6, 2014)
  - "Routine in the industry" standard applied.
  - Project determined to be routine -- fact-intensive parsing of nature and extent, purpose, frequency, and cost.
  - Appealed to the 3rd Cir

Physical and Operational Changes

- Generally EPA has a very broad definition of Physical Changes or Changes in the Method of Operations (pccmo) - most projects are pccmo's
- Excludes Routine Maintenance, Repair and Replacement (RMRR)
- Exemptions for Certain Increases in Capacity or Availability if they can be accomplished with no pccmo
- One of the most misunderstood NSR concepts
  - Non-routine maintenance is a pccmo
  - Replacements in kind are typically pccmo's
  - Permit limit increases are pccmo's

RMRR: Five Factor Test

- No one factor is deciding
- Weight of factors not specified
- Probably NOT routine if:
  - Nature: Involves replacement of several major components,
  - Extent: Significantly enhances the present efficiency and capacity of the plant,
  - Purpose: Substantially extends the plant's useful economic life,
  - Frequency: Rarely performed on that unit (may be able to look to source category frequency), or
  - Cost: Is costly in both relative and absolute terms

Aggregation & Summit Petroleum Corp. v. EPA

Summit Petroleum Corp. v. EPA

- U.S. Court of Appeals for the Sixth Circuit, August 7, 2012
- Involved the definition of "stationary source" and the question of whether/how oil and gas production operations should be aggregated for CAA permitting
  - Natural gas sweetening plant and 100 associated sour gas wells
  - 43 square miles, wells 500 ft. to 8 miles from the plant
- A stationary source consists of operations that:
  - Are under common ownership or control
  - Belong to the same 2-digit major SIC code
  - Are contiguous or adjacent

Summit Petroleum Corp. v. EPA

Case centered on what it means to be "contiguous or adjacent"

- EPA asserted that all operations should be aggregated into a single stationary source
- EPA asserted that the functional relationship of the various operations should be considered in deciding if the operations were contiguous or adjacent – operations were "truly interdependent"
- Summit argued that the term "adjacent" is unambiguous – requires physical proximity
- Court sided with Summit: "We conclude that both the dictionary definition and etymological history of the term 'adjacent,' as well as applicable case law, support Summit's position"

Current EPA Policy

- December 21, 2012 Guidance Memo – Summit decision applies only in the 6th Circuit (Michigan, Ohio, Tennessee and Kentucky)
- Remainder of Country – EPA will continue to apply its "longstanding practice of considering interrelatedness" in making stationary source decisions in other jurisdictions
- February 21, 2013 – NEDA/CAP petitioned the DC Circuit to review EPA's policy guidance, in part, based on EPA's Regional Consistency regulations
- December 6, 2013 – EPA brief argues guidance memo is not a final Agency action reviewable by the court
- May 30, 2014 – court invalidates EPA dual policies
  - Memo creates binding rules; memo inconsistent with Regional Consistency regs.
- October 2014 – EPA crafting an updated Regional Consistency policy excluding judicial rulings

United States v. DTE Energy Co.

United States v. DTE Energy Co.

- U.S. Court of Appeals for the Sixth Circuit, March 28, 2013
- Typical tube replacement NSR enforcement case
- First decision involving revised applicability provisions in the 2002 NSR reform rules
- At the district court (U.S. District Court for the Eastern District of Michigan):
  - Summary judgment ruling for DTE
  - Determination of whether projects at issue constitute a major modification is premature because EPA "may pursue [NSR] enforcement if and when post-construction monitoring shows a need to do so."

United States v. DTE Energy Co.

- Submitting pre-project notice one day before the project starts "is fully consistent with a project-and-report scheme."
  - And the "project-and-report scheme is entirely compatible with the statute's intent, which, as the EPA stated at oral argument, is 'to prevent increases in air pollution'"
- Purposefully managing post-project emissions is "entirely consistent with the statute and regulations."
  - Not "bad faith"
- Rejected EPA's argument that NSR is "designed to force every source to eventually adopt modern emission control technology."
  - Noted that EPA conceded at oral argument that sources are allowed "to replace parts indefinitely without losing their grandfathered status so long as none of those changes cause an emissions increase"

United States v. DTE Energy Co.

- Court noted that "[i]f a company's projections are later proven incorrect, EPA can bring an enforcement action," and "[a]n operator takes a major risk if it underestimates projected emissions" because it will face large fines and would have to install pollution control technology, which "will almost certainly be more expensive than installing pollution-control technology at the time of the modification."
  - Thus, court found that "operators have great incentives to make cautious projections."
- No realistic possibility that an operator will "surreptitiously increase its emissions" after the 5-year post-project reporting period.

United States v. DTE Energy Co.

- Sixth Circuit remanded the district court decision:
  - "The operator has to make projections according to the requirements for such projections contained in the regulations. If the operator does not do so, and proceeds to construction, it is subject to an enforcement proceeding."
- However, the Sixth Circuit upheld key elements of DTE's case:
  - "[I]f the agency can second-guess the making of the projections, then a project-and-report scheme would be transformed into a prior approval scheme."
- March 3, 2014 – District Court again limits EPA's review authority to essentially a cursory review
- On appeal again to the Sixth Circuit
  - Ruling "eviscerates" the NSR program.
- EPA seeking review in other Circuits (e.g., OG&E in OK)

Statute of Limitations Impacts

Four questions: (1) does the SOL apply; (2) what about injunctive relief; (3) is an alleged failure to get an NSR permit a single or continuing violation; (4) does nature of ownership matter?

- In *US v. EME Homer City Generation L.P.* Court of Appeals confirmed failure to obtain a PSD permit is a point in time violation and not a continuing violation; neither current nor prior owner can be held liable (in part due to the nature of the sale).
- Consistent with 7th Circuit decision (2013) *United States of America, et al. v. Midwest Generation et al.*
- Also consistent with 8th Circuit (2007) and 11th Circuit (2010) decisions that the lack of a PSD permit is not a continuing violation.
- 7th Circuit rejected EPA's bid for a rehearing September 20, 2013.
- 3rd Circuit denied EPA's bid for a rehearing December 13, 2013.

GHG Issues

- Supreme Court Review – UARG v. EPA
- Clean Power Plan – 111(b) and 111(d) implications
- Impact of GWP Revisions
- Biomass GHG

Supreme Court Grant of Cert

- The issue that was reviewed:

  "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."

- Impact – The court ruled EPA went beyond its authority, GHG emissions are not sufficient to trigger PSD applicability

  The Clean Air Act neither compels nor permits EPA to adopt an interpretation of the Act requiring a source to obtain a PSD or Title V permit on the sole basis of its potential GHG emissions.

- If PSD is triggered by another pollutant then GHG BACT is still required

  EPA reasonably interpreted the Act to require sources that would need permits based on their emission of conventional pollutants to comply with BACT for GHGs.

- But, what is trigger level? Will EPA adopt new de minimis levels?

111(b) Proposed Standards for New EGUs

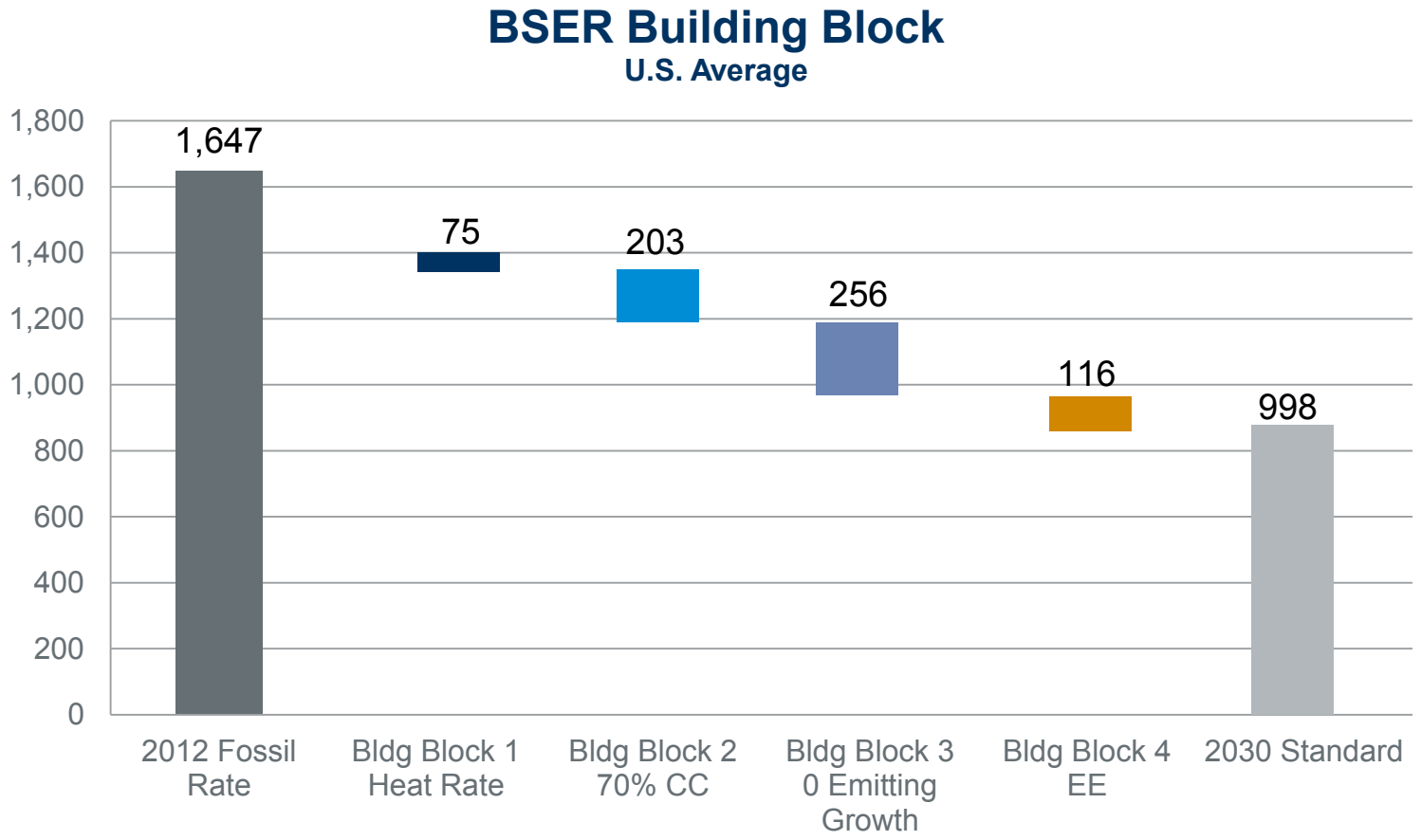
- Natural gas-fired stationary turbines
  - 1,000 lb CO2/MWh gross for larger units (> 850 mmBtu/hr)
  - 1,100 lb CO2/MWh gross for smaller units (≤ 850 mmBtu/hr)
- Utility boilers and integrated gasification combined cycle (IGCC) units
  - 1,100 lb CO2/MWh gross limit on a 12-operating month period; or
  - 1,000-1,050 lb CO2/MWh gross over a 84-operating month (7-year) compliance period in exchange for a lower limit of gross.
- Either of the utility boiler/IGCC limits would require a new utility boiler or IGCC unit to incorporate some form of CCS technology
- Proposed rule excludes liquid oil-fired turbines and units which only burn biomass fuels (up to 10% coal mixed)

The Section 111(d) Standards

BSER defined based on 4 "Building Blocks" requiring both inside the fenceline and outside the fenceline measures

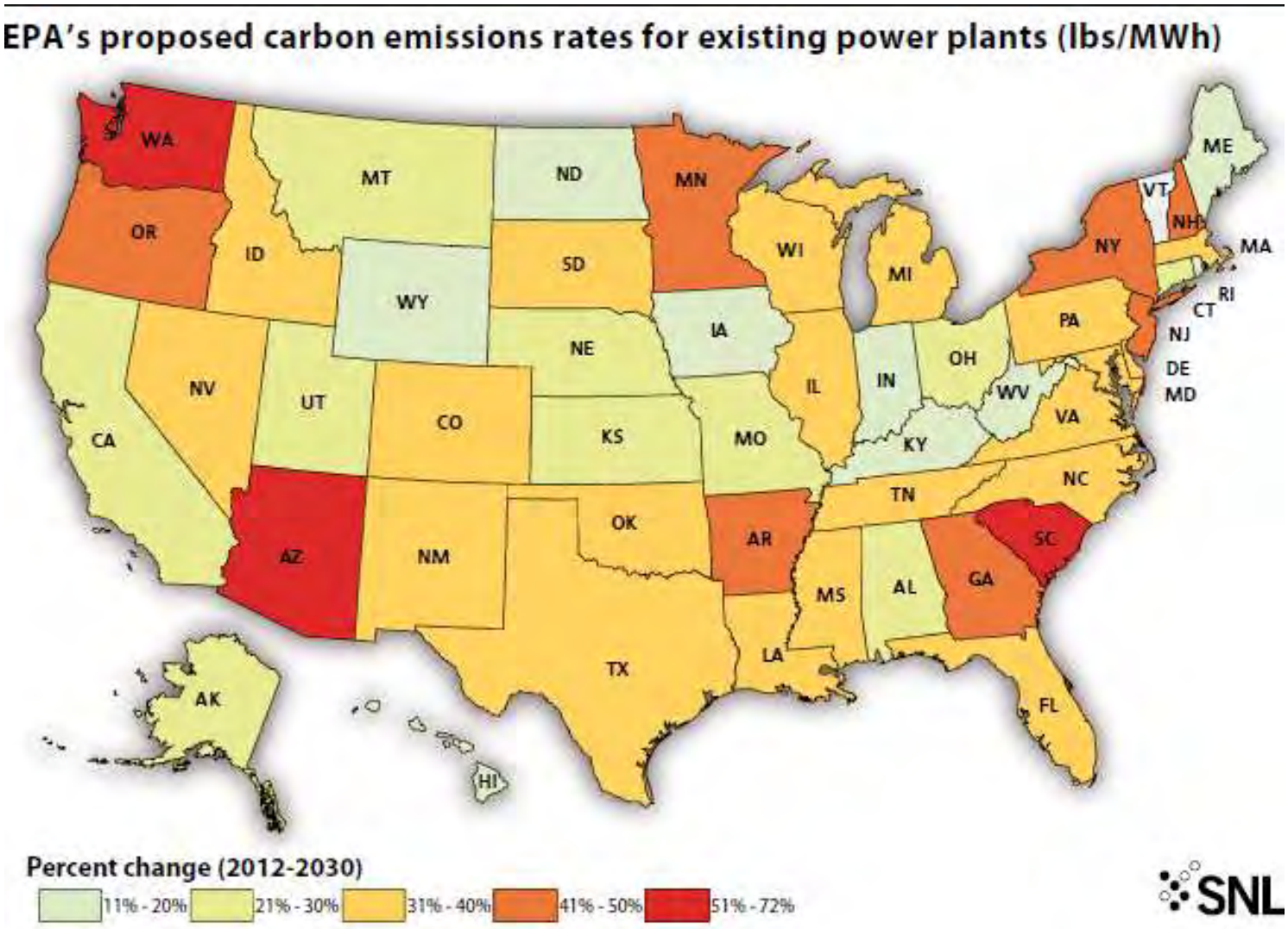
- Block No. 1 – 6% efficiency improvement for coal-fired power plants
- Block No. 2 – Redispatch/fuel switching assuming combined cycle units can run at 70% of available hours displacing coal
- Block No. 3 – Zero-emitting generation growth
- Block No. 4 – Demand-side EE based on energy savings of 1.5% per year

111(d) – National Averages in Perspective



Approximately 1/3 of the Reduction Due to Gas

Emission reductions to achieve State goals



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Global Warming Potential

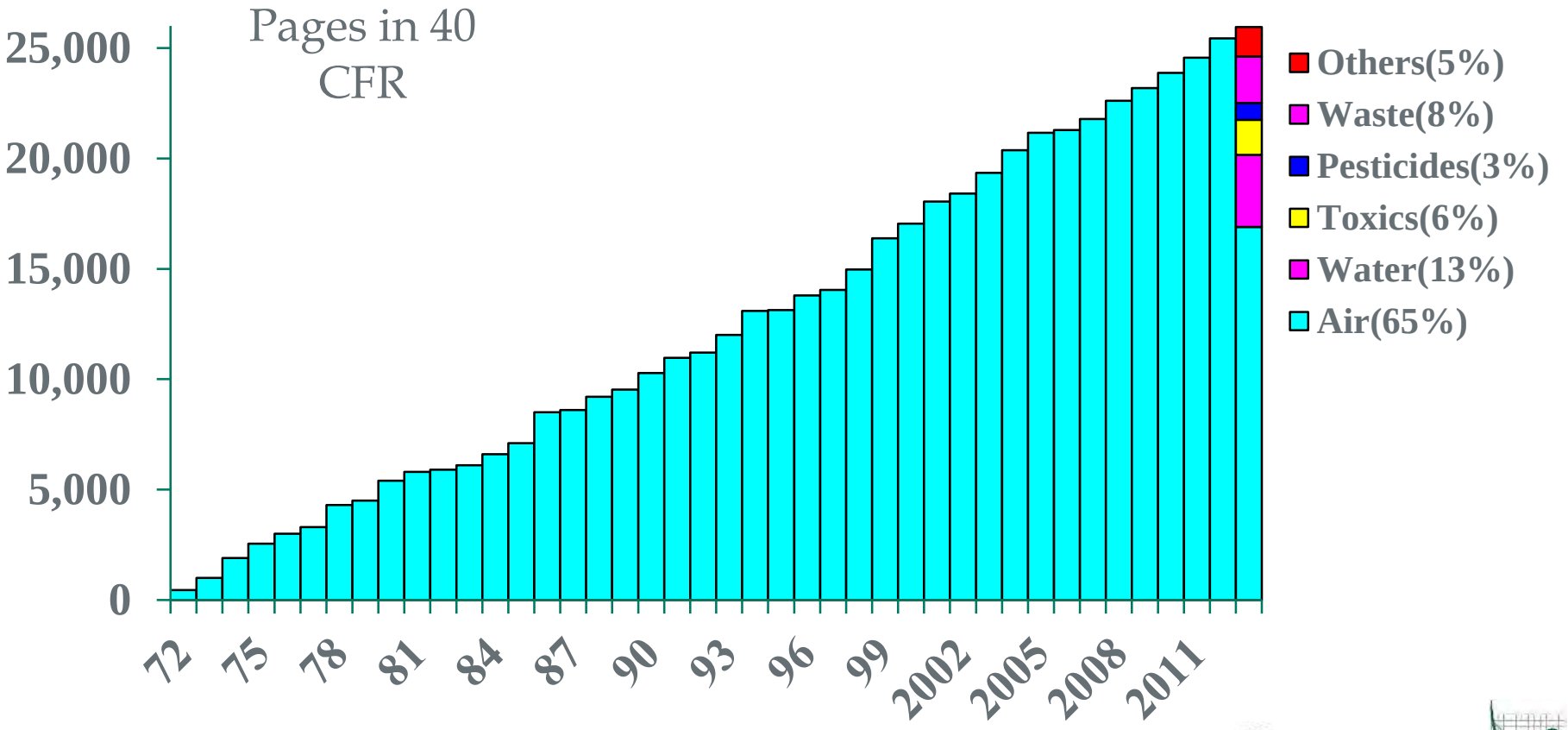
- Nov. 29, 2013 - EPA finalized revisions to the Global Warming Potential for some of the GHG and adding certain F-GHG
- PSD impacts - Tailoring Rule references 40 CFR 98 for GWP
- Changes include:
  - Methane from 21 to 25
  - Nitrous oxide from 310 to 298
  - Sulfur hexafluoride from 23,900 to 22,800
  - Several HFC and PFC plus 26 additional F-GHG are proposed to be added

Biomass GHG Emissions

- July 12, 2013 – DC Circuit Court of Appeals vacated EPA's Deferral Rule which exempted biogenic GHG emissions from regulation for three years
- Court ruled that EPA had no authority to grant a deferral
- Biogenic emissions count towards PSD thresholds

Growth of U.S. EPA Regulations

Almost 26,000 Pages in 2013!!



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NSR Protection

- Address aggregation issues prospectively
- Address SSM emissions prospectively
- Use the five-factor test to clearly document why a project is RMRR, or
- Clearly document why projected future actual emissions are not significantly increased
  - EPA ignores system impacts
  - Consistent with fuel budgets
- Consistent with Acid Rain Plans
- Understand GHG BACT Issues and Address CCS on Cost

For More Information

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