

# Challenges to U.S. EPA GHG Regulatory Authority

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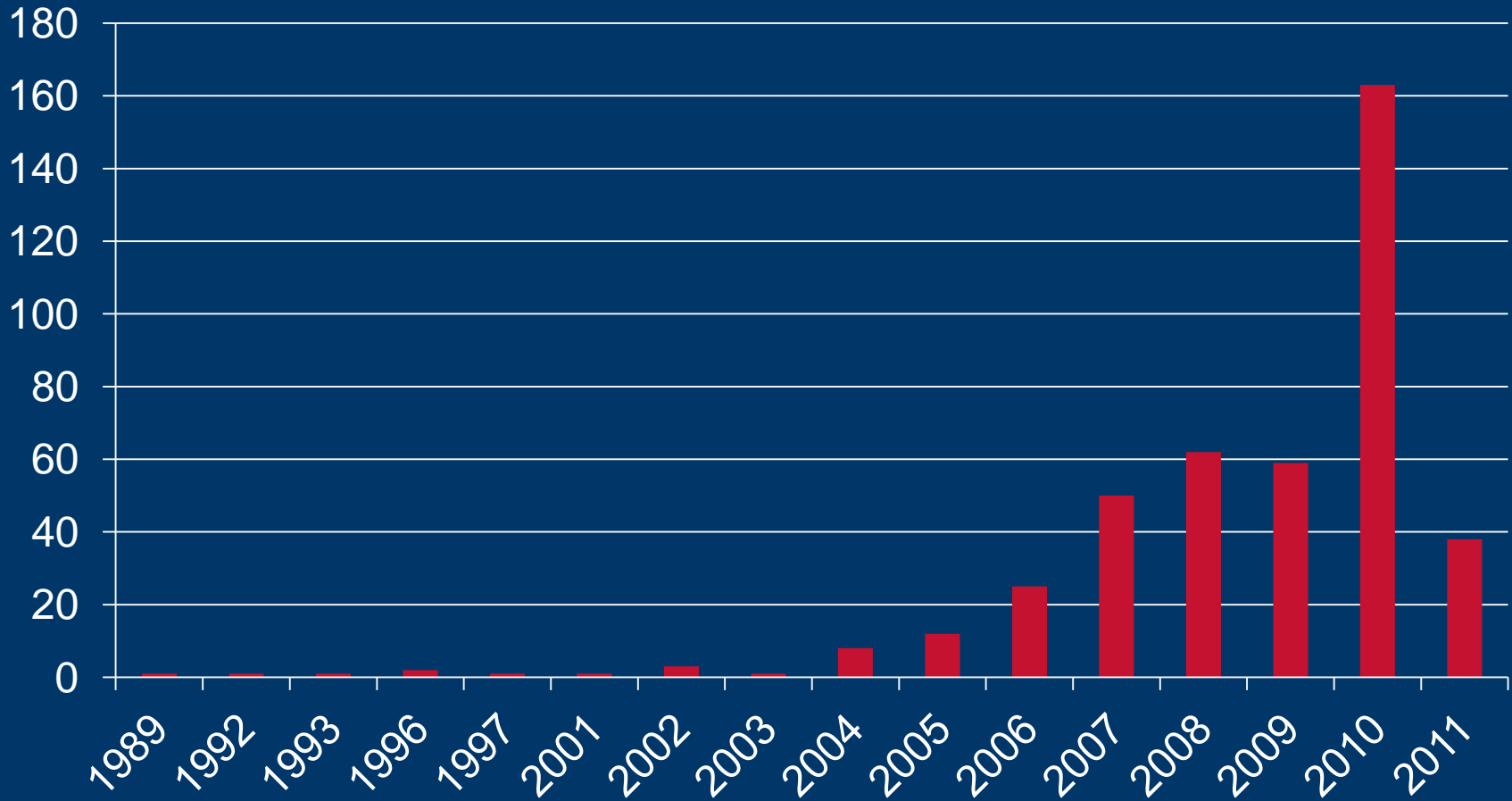
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September 2011

## Introduction of Baker & Daniels LLP

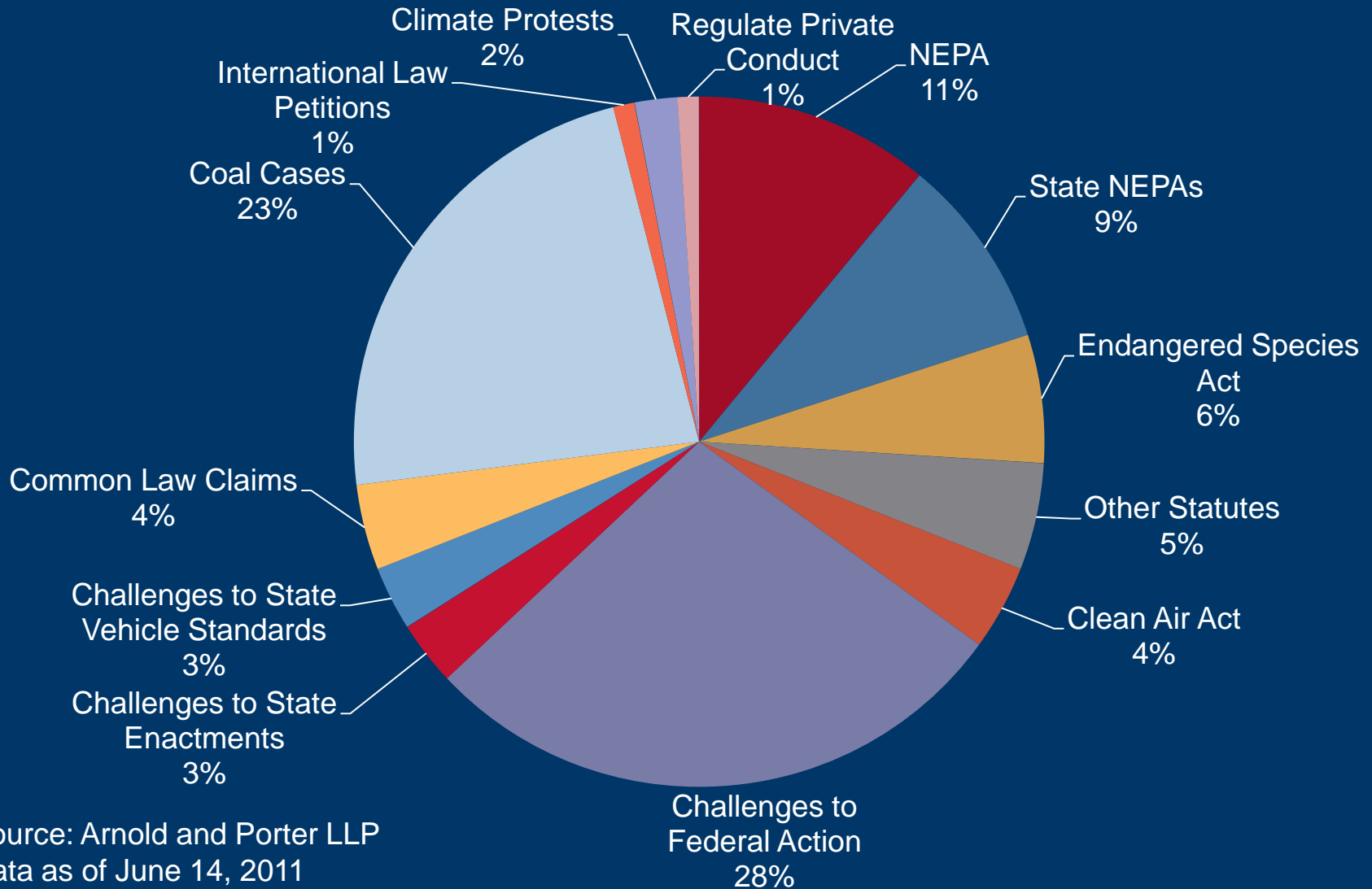
- Over 370 lawyers and consulting professionals in Indiana, Washington DC, Chicago & China
- B&D Consulting is a division of Baker & Daniels
- Advocacy before Congress & Administration on the Clean Air Act, DOE and EPA programs and federal tax law
- Professional services provided to Utilities, Manufacturers, Fossil Fuel and Renewable Fuel Companies and NGO's
- Announced potential merger with Faegre & Benson LLP

# Number of Climate Cases Filed



Source: Arnold and Porter LLP, Data as of June 14, 2011

# Number of Filed Climate Cases: 434



Source: Arnold and Porter LLP  
 Data as of June 14, 2011

# Intersection between EPA and NREA

1. Endangerment Finding
2. Tailoring Rule
3. Cross-State Air Pollution Rule
4. Coal Ash
5. CO<sub>2</sub> Sequestration
6. MACT Rules
7. Mercury Rule
8. Water Quality
9. Carbon Dioxide

# Summary of the Key Rules

## 1. Endangerment Finding

- GHGs “endanger public health and welfare”

## 2. Tailoring Rule

- Large stationary sources subject to GHG permitting under Prevention of Significant Deterioration (PSD) and Title V programs of Clean Air Act (CAA)
- Began January 2, 2011, for sources already subject to permitting for non-GHG emissions
- On July 1, 2011, GHG permitting began for large sources even if not subject to permitting for non-GHG pollutants

## 3. Cross-State Air Pollution Rule

- Will require states to improve air quality by reducing power plant emissions

# Summary of the Key Rules

## 4. Coal Ash

-Coal Combustion Residuals are residues from the combustion of coal in power plants and captured by pollution control technologies, like scrubbers. EPA is proposing to regulate for the first time coal ash to address the risks from the disposal of the wastes generated by electric utilities and independent power producers.

## 5. CO<sub>2</sub> Sequestration

-Carbon sequestration is long-term storage of carbon dioxide or other forms of carbon to either mitigate or defer global warming.

## 6. MACT Rules

-Maximum Achievable Control Technology requires affected sources to meet specific emissions limits that are based on the emissions levels already achieved by the best-performing similar facilities.

# Summary of the Key Rules

## 7. Mercury Rule

-The Clean Air Mercury Rule was built on the Cross-State Air Pollution rule to significantly reduce emissions from coal-fired power plants -- the largest remaining sources of mercury emissions in the country.

## 8. Water Quality

- Section 316 (a) – water cooling intake systems
- Section 316 (b) – heated discharges into U.S. waters

## 9. Carbon Dioxide

- EPA recently issued a final action related to certain data elements reported under EPA's Greenhouse Gas Reporting Program.
- The purpose of the rule is to collect accurate and timely GHG data to inform future policy decisions.

# EPA Lawsuits

- Cases are largely consolidated
- *Coalition for Responsible Regulation (CRR) v. Environmental Protection Agency (EPA)*
  - Three separate pieces of consolidated litigation with same name
    - ◆ *Docket 09-1322: Endangerment Finding*
    - ◆ *Docket 10-1092: Tailpipe Rule*
    - ◆ *Docket 10-1073: Timing Rule/Tailoring Rule*
- Court can strike down one lawsuit (e.g. Timing/Tailoring Rules) but keep another (e.g. Endangerment Finding)
- Cases are heard before U.S. Court of Appeals for the District of Columbia

# Outcome of Legal Challenges

- Often it is unclear who wins and loses
- It is unclear whether courts will remove all force of law from the regulations or maintain the regulations until EPA issues valid replacements
- One may win the legal case but lose the regulatory battle

# State Implementation Plans

- States fighting implementation of Tailoring Rule
  - Texas refused to develop a state implementation plan (SIP) to issue GHG permits
  - Seven states failed to correct inadequate SIPs
- Texas and Wyoming leading challenges; industries also filed suits
  - EPA did not provide enough time for changes
  - EPA's decision to impose a federal implementation plan unlawful

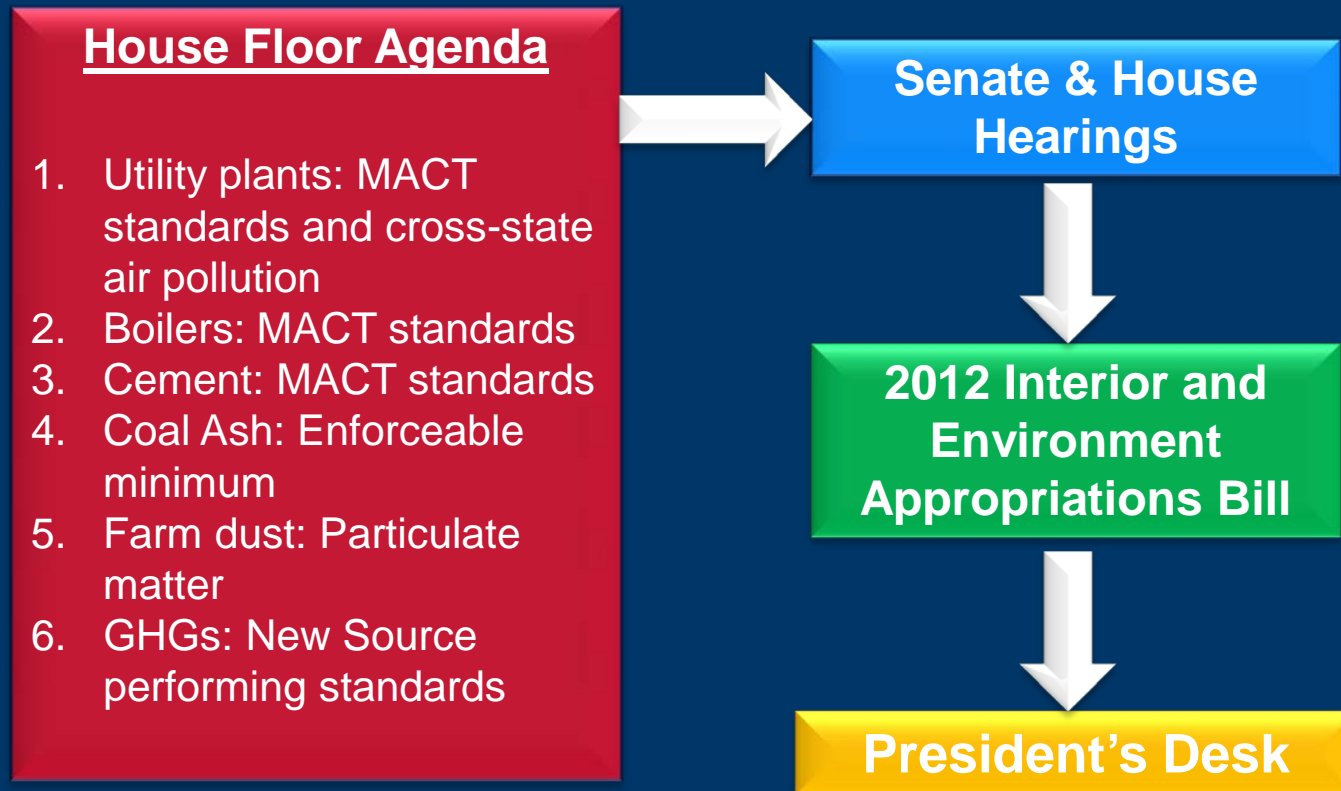
# GHG Reporting Rules

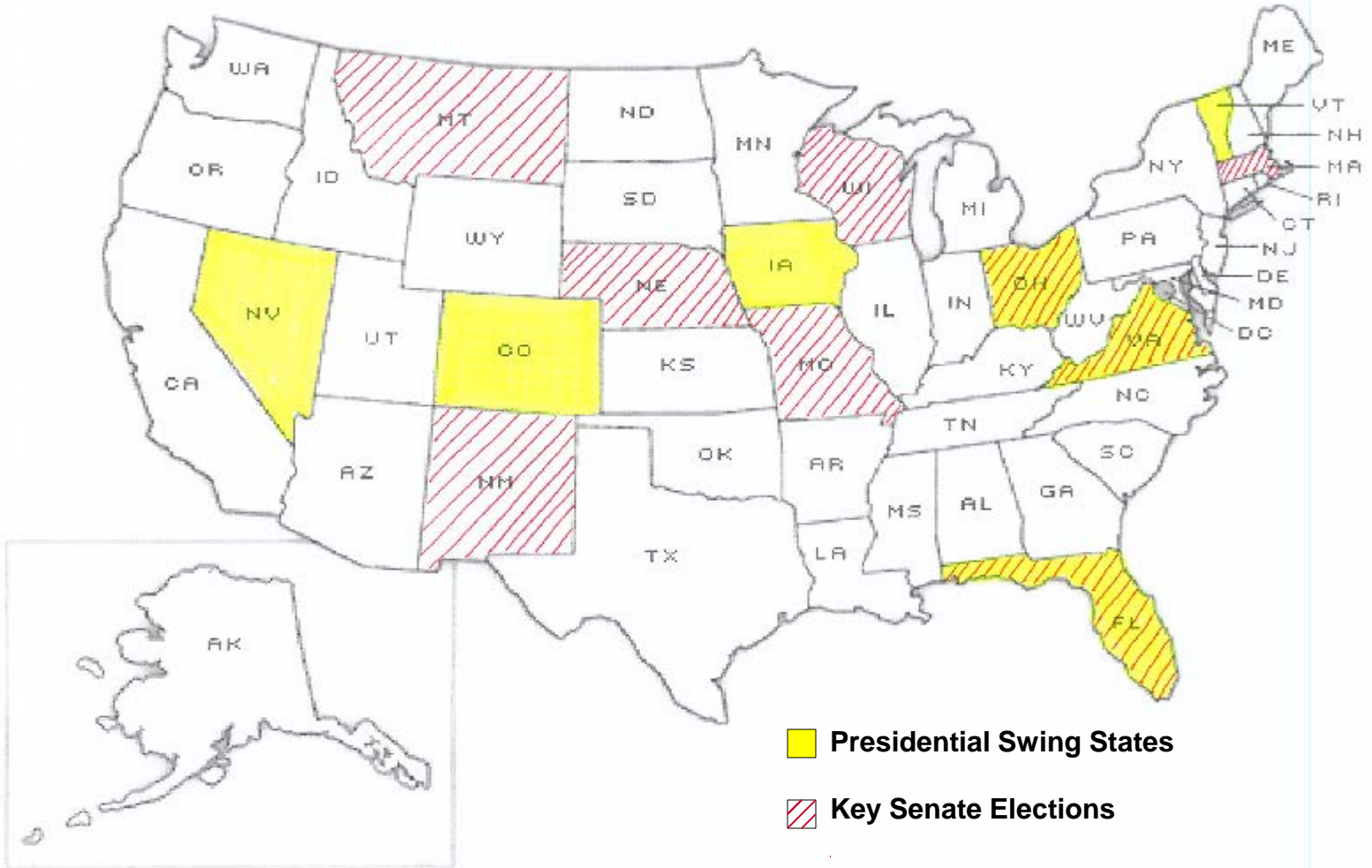
- Current lawsuits pending
  - Three cases: reporting from oil and natural gas sectors
  - One case: reporting of fluorinated gases
- Concern about valuable proprietary data being compromised, as well as feasibility of tracking emissions
- Settlement agreements likely
  - Six settled lawsuits already on GHG reporting
  - EPA announced final rule for GHG reporting from oil and gas sectors that takes industry concerns into consideration
    - ◆ Will make settlement agreement more likely

## *AEP v. Connecticut*

- In a June 20, 2011 unanimous decision the Supreme Court held the Clean Air Act displaced the plaintiffs' federal common law claims of nuisance based on carbon dioxide emissions
- The Court found that because the EPA was currently engaged in rulemaking for GHG emissions the “prescribed order of decision making” was for the issue to be first taken up through CAA rules and then -if needed- to be secondarily taken up by federal courts

# Intersection between US Congress and NREA





# Any Questions?

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