

Boiler MACT Litigation Update

CIBO E&E Meeting
June 10-11, 2014

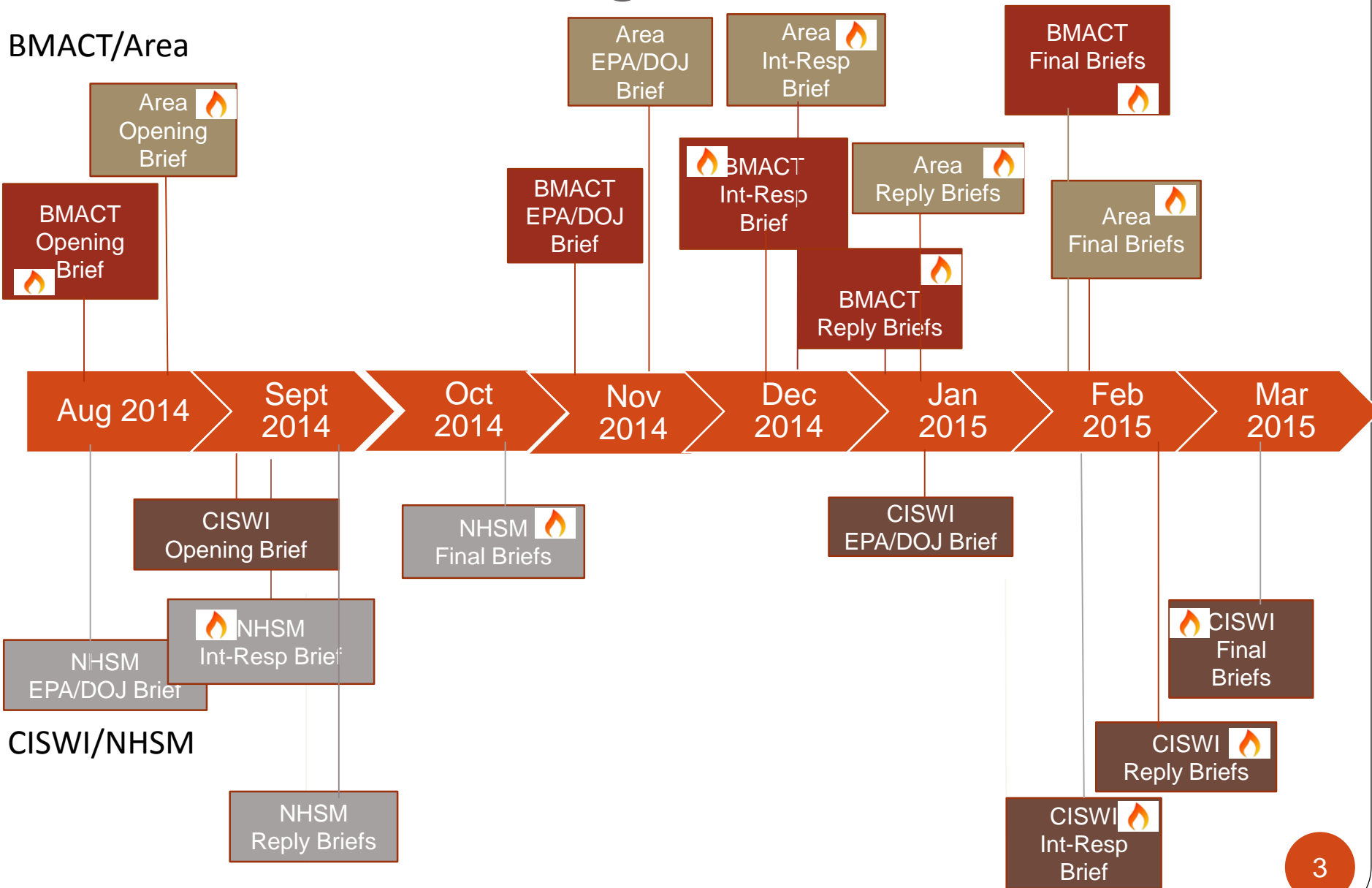
Lisa M. Jaeger
Bracewell & Giuliani,
LLP

Briefing Schedule

Case No.	Pet Opening Briefs	Resp. Brief	Resp-Int Briefs	Pet Reply Briefs	Deferred Appendix	Final Briefs
11-1108 BMACT	8-12-14	11-10-14	12-17-14 (ENV) 12-10-14	1-14-15 (ENV) 12-24-14	1-28-15 (ENV) 1-7-15	2-11-15 (ENV) 1-21-15
11-1141 Area Source	8-26-14	11-24-14	12-24-14	1-21-15 (ENV) 1-7-15	2-4-15 (ENV) 1-21-15	2-18-15 (ENV) 2-4-15
11-1189 NHSM	4-28-14	8-4-14	9-2-14	9-29-14	10-14-14	10-28-14
11-1125 CISWI	10-2-14 (ENV) 9-18-14	1-16-15 (ENV) 1-2-15	2-9-15 (ENV) 2-2-15	2-24-15 (ENV) 2-17-15	3-2-15 (ENV) 2-24-15	3-6-15 (ENV) 3-3-15

BMACT II Briefing Timeline

BMACT/Area



PC MACT

NRDC v. EPA (DC Cir. No. 10-1371)

- Vacated affirmative defense for malfunctions
- Ok to reset compliance date although only pm limit changed; different dates “irrational” “absurd”
- Upheld less stringent pm standard. EPA: 112d7 is not antibacksliding bar, ok to adjust limits up or down
- Beyond the floor “cost” can be “cost effective”



MATS

White Stallion v. EPA (DC Cir. No. 12-1100)

- No CFB/waste coal subcategories ok; beyond the floor lignite with ACI achievability is “difference of opinion”
- Emissions averaging ok without 10% discount
- Monitoring alternatives (CPMS still pending) ok: quarterly performance test & every 3 years for low emitters
- HBEL discretionary under CAA
- EPA may combine major & area sources
- UPL not criticized by court
- Best performer data to set floors - best of the best ok

BMACT Litigation – What Issues?

- **PC and MATS Decisions – is BMACT different?**

- HBEL not mandatory
- Less stringent standards ok
- Subcategories as EPA decides
- Monitoring alternatives ok
- Compliance timeframe ok
- Floor setting dataset ok
- Beyond the floor cost effectiveness ok
- UPL (on remand) maybe ok

- **BMACT Industry Petitioners Opening Brief (so far)**

- Pollutant-by-pollutant
- Malfunction work practice standards
- Energy assessment
- CO work practice standards
- Emissions averaging should not have 10% penalty
- HBEL

BMACT Litigation – What Issues?

- **Area Source Industry Petitioners**
 - Malfunction work practice standards
 - Energy assessment
- **CISWI**

NHSM – Industry Petitioners Brief

- Presumption of “discard” for firm-to-firm transfers of alternative fuels for combustion illegal & arbitrary
- C&D wood, RR ties, treated wood: illegal to identify as “waste” alternative fuels with non-waste features
- Possible future classification as fuel does not cure illegality
- Inconsistent with RCRA goals & will cause environmental & economic harm
- Sewage sludge cannot be “solid waste” due to domestic sewage sludge exclusion
- RCRA requirement to not duplicate CWA regulation

NHSM –ENV Petitioners Brief

- Statement of the Case
 - EPA's efforts to exempt certain burning from Congress's framework
 - Practical effect of EPA's exclusions
- Rule is inconsistent with RCRA
 - EPA Unlawfully Deems Discarded Materials Not to Be Discarded
 - RCRA definitions distinguish between “material” recovered from solid waste and “energy” recovered from solid waste.
 - Having tried but failed to insert an exemption for energy-recovery units into the Clean Air Act, EPA now seeks to insert one into RCRA
- Interpretation of RCRA & CAA together is arbitrary
 - Unclear whether definitions apply only when material is combusted
 - Unclear whether rule applies for CAA 129 purposes only
 - Unclear whether rule relies solely on CAA for contaminant concerns

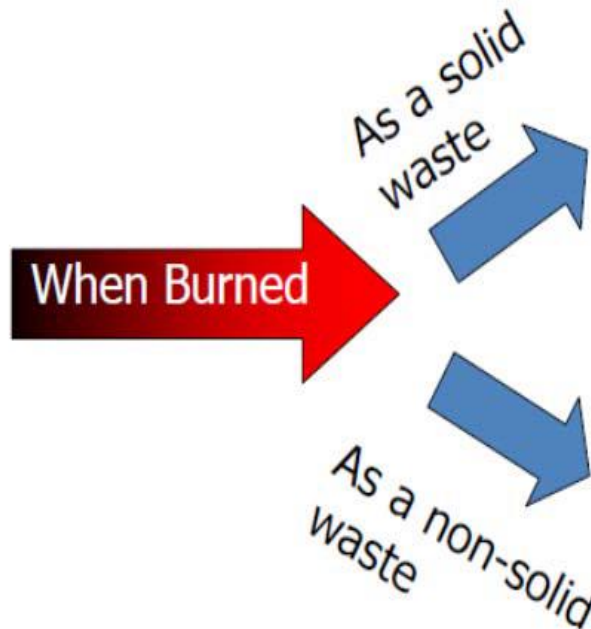


It is difficult to distinguish “clean” construction and demolition wood from other materials, including contaminated wood.

SECONDARY MATERIALS

Like...

Biomass
Construction debris
Scrap tires
Scrap plastics
Spent solvents
Used tires
Coal Refuse
Foundry Sand
Sewage Sludge
Wood manufacturing material



The Combustion Unit
is regulated under...

CAA 129

CAA 112

FYI: "Secondary materials" are the byproducts of a manufacturing or commercial process. They also include both consumer and industrial materials that are no longer used for their original purpose.

Flow Chart for Determining Whether Non-Hazardous Materials Used as Fuel In Combustion Units are Solid Waste

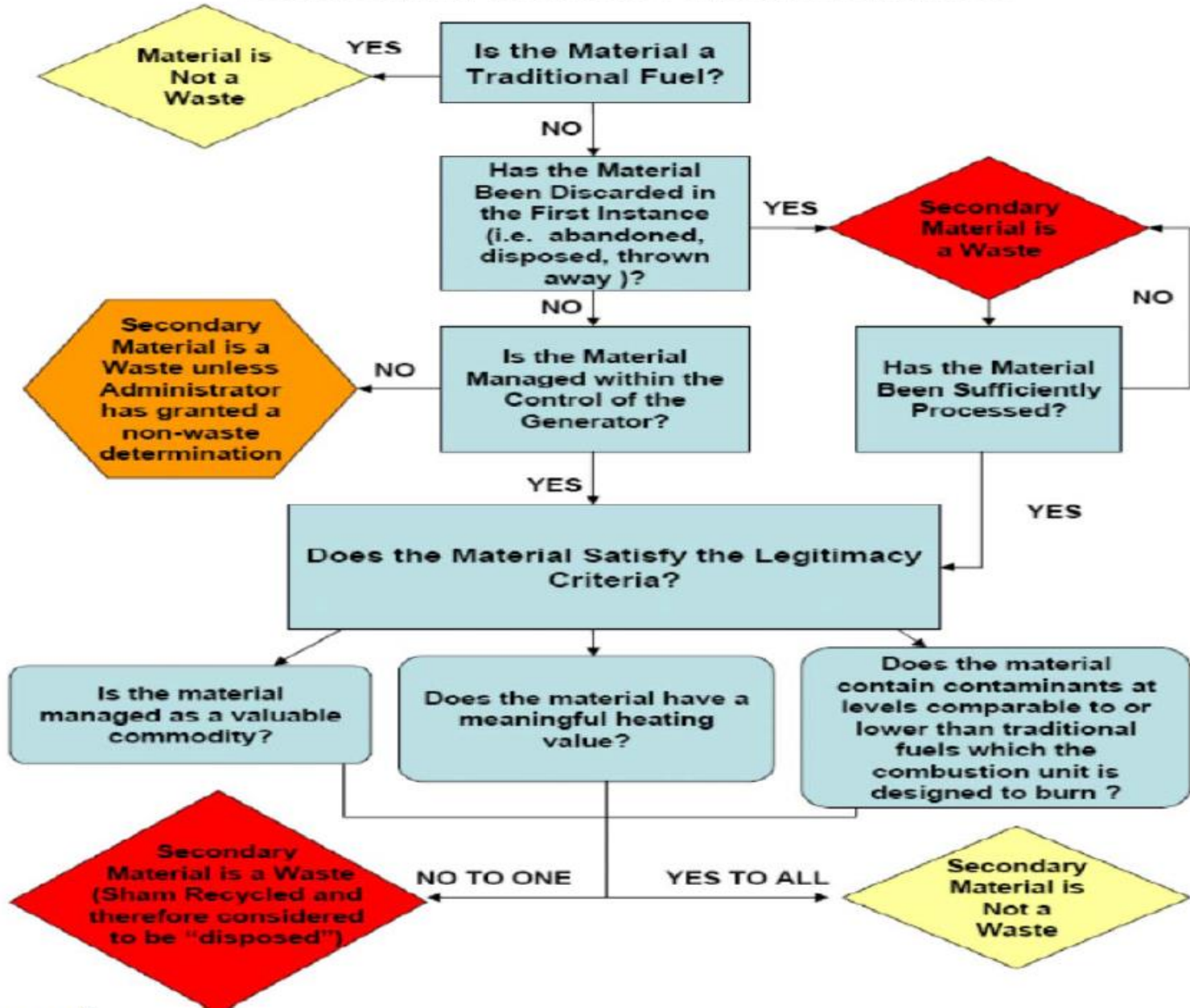


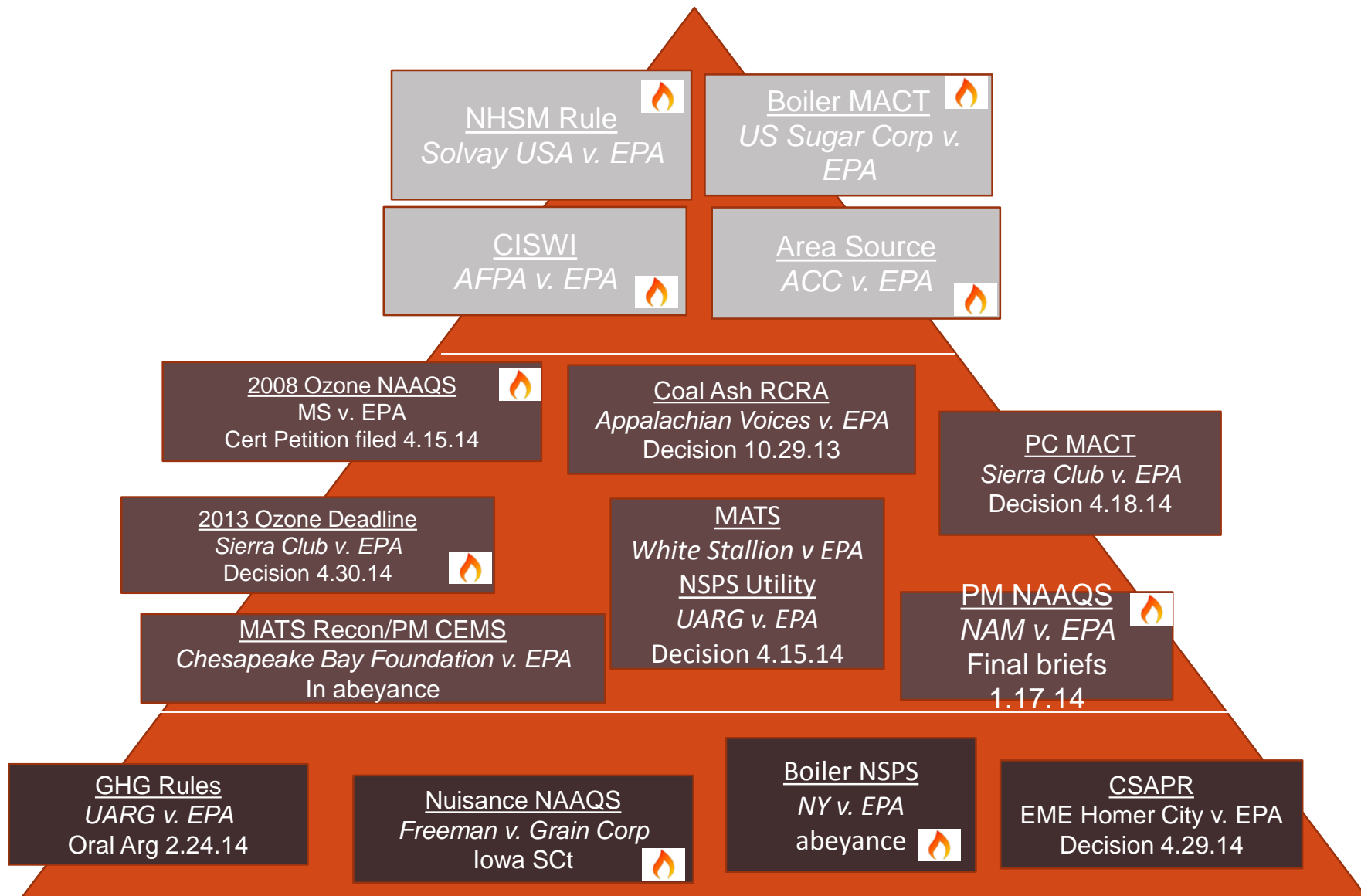
Fig 3⁸

NHSM Supplemental Proposed Rule

- **Comments due 6-13-14**
- **C&D Wood**
 - Include C&D wood in general, resinated wood and CCA-treated wood, wood recovered from disaster debris
 - Oppose certification requirement
- **Paper Recycling Residuals (PRR)**
 - Expand category to include PRR burned off-site
 - Support heating value determination
 - Include old corrugated cardboard rejects (OCC)
- **Creosote-Treated Railroad Ties (CTRT)**
 - Include CTRTs in general, expand category, adjust “designed to burn” definition
 - Oppose long-term storage statement and determination that CTRTs appropriate only for units “designed to burn” biomass & fuel oil

Litigation and Regulatory Update

MAJOR RULES IN COURT

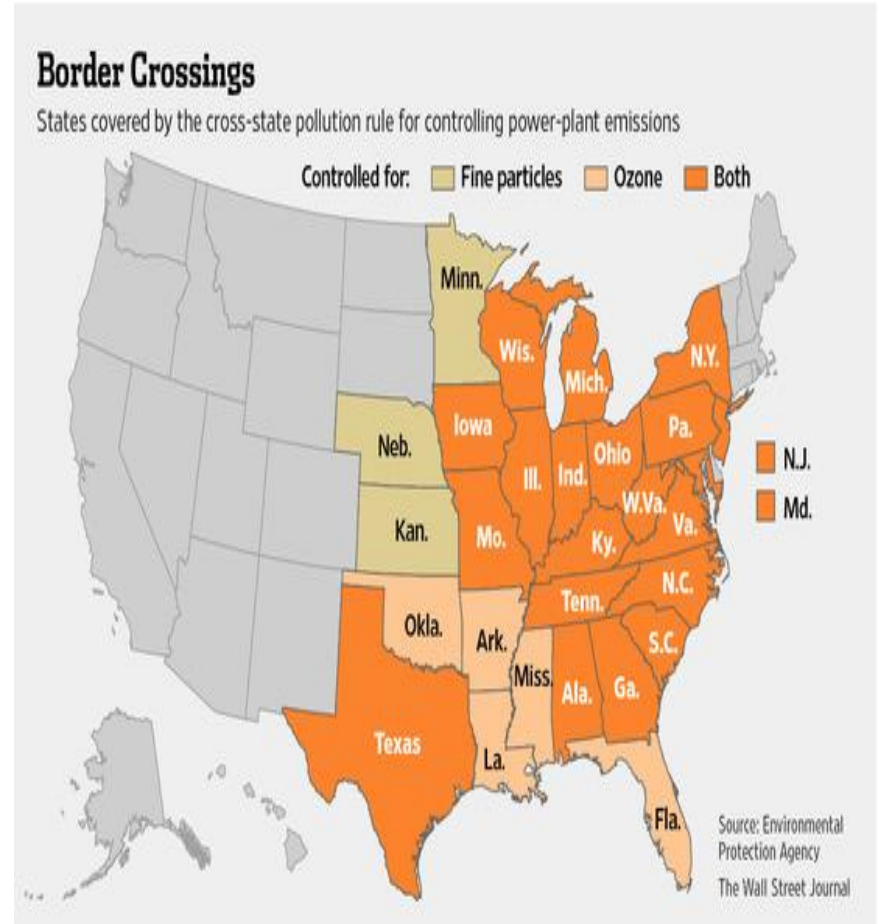


ACTION IN THE COURTS



CSAPR

- ***EPA v. EME Homer City Generation*** (SCt No.12-1182)
- Rule upheld 6-2, goes back to DC Circuit
- 28 states must reduce emissions of SO₂ and NO_x
- Upheld FIP simultaneous with disapproval of state SIPs
- EPA's emission reduction allocation method is "permissible construction of the statute"
- Upwind States may challenge emissions regulations below 1% threshold



2013 Ozone NAAQS

- ***Sierra Club v. EPA*** (NDCA No. 13-2809)
- Deadline suit
- CIBO included in Ozone Intervention Group
 - Motion to intervene denied 10-2013
- Proposed: 12-1-2014
- Final: 10-1-2015

Coal Ash

- ***Appalachian Voices et al. v. Jackson*** (DC Dist. Ct. No.12-0523)
- Consent decree approved
- 12-19-14: Final subtitle D regulations to be signed



ELGs

- CIBO filed comments 9-20-13
- ***Defenders of Wildlife v. EPA*** (DC Dist. Ct. No. 10-1915)
- Consent decree approved
- 9-30-15: Final to be signed



NO₂ & SO₂ Secondary NAAQS

- ***Center for Biological Diversity v. EPA*** (DC Cir. No. 12-1238)
- Although secondary SO₂ and NO₂ standards did not address acid rain deposition, EPA decision not to revise standard upheld
- OK to not promulgate a standard because EPA could not make a reasoned judgment based on the science and explained the multiple uncertainties with the Aquatic Acidification Index.



“Major Source” Aggregation Decision

- ***NEDACAP v. EPA*** (DC Cir. No. 13-1035)
 - Whether EPA can use different air permitting criteria in different parts of the country
 - 2012 memo vacated
 - “Creates a standard that gives facilities located in the 6th Circuit a competitive advantage” – causes competitive injury
- **EPA December 2012 memo**
 - CAA and EPA regulations require uniformity in permitting criteria
 - Regional Consistency requirement
- ***Summit Petroleum Corp. v. EPA*** (6th Cir. No. 09-4348)
 - Held: EPA’s policy of determining whether sources are adjacent by looking at whether sources are functionally related is unreasonable

- ***GenOn Power v. Bell***
denied

US Supreme Court: cert

- Amicus brief filed in SCt
- Whether the CAA preempts state common law nuisance claims that would impose separate emissions restrictions and expose otherwise compliant companies to liability for their emissions
- Petition for Cert denied

- ***Mingo Logan Coal v. EPA*** ***US Supreme Court: cert denied***

- Amicus brief filed in SCt
- DC Circuit ruled that EPA may veto CWA permits issued under § 404 “whenever” the determination of unacceptable adverse effect is made, per statutory text
- Petition for Cert denied

- ***AFPM v. Corey***

US Supreme Court

- Amicus brief filed in SCt
- Whether California’s LCFS is unconstitutional because it discriminates against out-of-state fuels and regulates interstate and foreign commerce that occurs wholly outside of California.

- ***National Association for Surface Finishing v. EPA*** (DC Cir. 12-1459)
 - Chromium risk & technology review
 - Whether when setting an 8-year residual risk MACT standard, EPA must reset the MACT floor
 - Could set precedent for future MACT RTRs

ANOTHER POTENTIAL CASE

- ***Anthony v. Georgia Gulf Lake Charles LLC*** (LA SCt)
 - Whether chemical exposure liability can be established without demonstrating any actual exposure to a particular chemical
 - Louisiana law – causation requires actual proof of exposure



GHG NSPS for New EGUs

- Comments submitted 5-9-14
- Carbon Capture and Sequestration required
- Combined Cycle Combustion Turbines firing natural gas need no add-on controls
- Simple Cycle Combustion Turbines capped at 33% capacity factor



Kemper Facility – Kemper County, MS

GHG NSPS for Existing EGUs

- 120-day comment period from Fed. Reg. publication
 - Comments due mid-October... right before 2014 midterms
- State plans due 6-30-16 with possible 1-year extension
 - EPA must approve or disapprove plan; EPA must make plan for state if state doesn't submit or EPA disapproves plan
 - Multi-state plans due 2018
- First reductions begin 2020
- Cost Estimates
 - EPA: \$7.3-\$8.8 billion
 - Chamber: \$289 billion in higher electricity costs through 2030

GHG NSPS for Existing EGUs

- Litigation
 - Final Rule - nearly certain
 - EPA approval or disapproval of state plans – likely
 - EPA-mandated plans for individual states - likely
- Non-EGUs can be subject to state plans
 - EPA suggests this means utility cooperatives, but rule not clear
- 111(d)
 - Must have 111(b) (New Source) rule prior to 111(d)
 - EPA: either of two CAA 111(b) rules will be predicate – GHG NSPS for new fossil EGUs or GHG NSPS for modified/reconstructed fossil EGUs

316(b)

CIBO Comment	Outcome in Final Rule
Applicability threshold should be 50 MGD	Applicability threshold at 2 MGD
More flexibility in impingement standards	Addition of 5 compliance alternatives
Use of Actual Intake Flow in the rule (instead of design intake flow)	Allows for the use of AIF in some circumstances.
Costs exceeding the benefits	Total compliance cost of the rule is \$275 million

- Potential ESA issue: State drafts 316(b) permit → sends copy to the US Fish and Wildlife Service and the National Marine Fisheries Service → Services can make recommendations on permit → States must include those recommendations in the permit

Waters of the US

- Comments due 7-21-14
 - Extension requests likely
- Most seasonal and rain-dependent streams jurisdictional
- Wetlands adjacent to wetlands jurisdictional
 - Adjacent – “bordering, contiguous or neighboring”
- Certain waters will be evaluated through case specific analysis
- Largely adopts Kennedy opinion in *Rapanos* – “significant nexus”



DOE Social Cost of Carbon

- Coalition comments submitted to OMB
- Subsequent comments submitted to DOE
 - Commercial Ice Makers
 - Commercial Washing Machines

