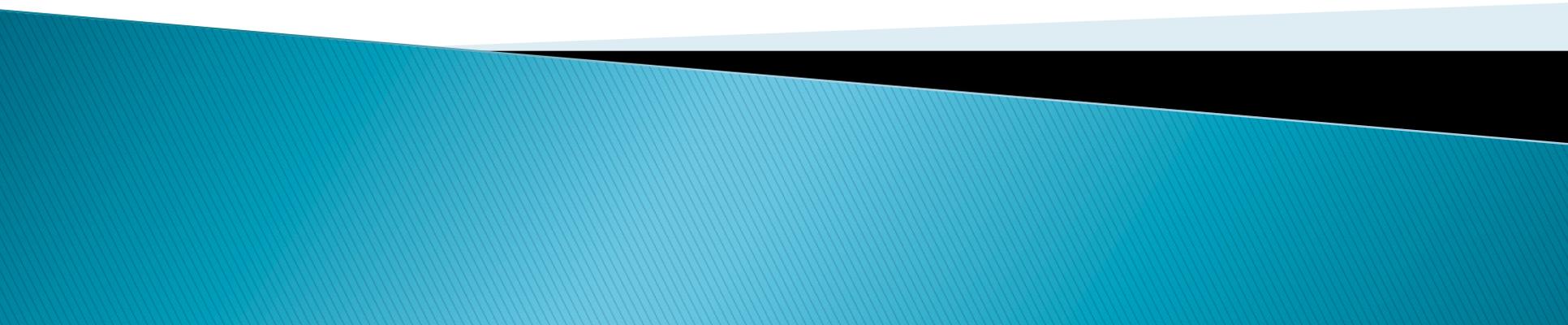


# Boiler MACT Litigation Update

CIBO E&E Meeting  
March 4-5, 2014

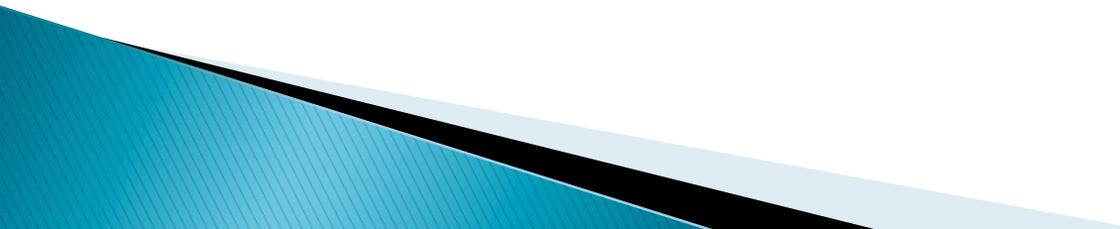
Lisa M. Jaeger  
Bracewell & Giuliani, LLP



# EPA Motions BMACT AREA CISWI

- ▶ **MOTION #1 Remand record & some limits**
- ▶ A. Remand record for 60 days (BMACT CISWI) to better explain variability analysis & review its application to limited data sets
- ▶ B. Remand specified MACT standards w/o vacatur (BMACT Area CISWI) for new & existing source limits based on 9 or fewer data points
- ▶ **MOTION #2 Stay briefing schedule**
  - BMACT: 30 days after 60-day remand of record
  - Area: 30 days after remand motion decision or April 11, whichever later
  - CISWI: 60 days after 60-day remand of record

# EPA Remand Motion Specific Limits

- ▶ **Area Source**
    - New and existing Hg and CO MACT standards
    - GACT standards not impacted
  - ▶ **Major Source**
    - 5 existing sources
    - 14 new sources
  - ▶ **CISWI**
    - 4 existing sources
    - 4 new sources
- 

# EPA REMAND – Considerations

- ▶ Party positions and court perspective
  - Sierra opposes BMACT CISWI remand, ok with Area.
  - Sierra ok with stay of briefing schedule
  - Industry took no position, reserved right to respond
  - Compliance date main issue for industry
  - Court unlikely to deny remand
- ▶ Timing implications of remand motion
  - Adds 3 months to BMACT briefing
  - As filed, puts Area brief ahead of BMACT brief
  - NHSM goes forward stand-alone

# BMACT Briefing Issues

- ▶ CO Work Practice for coal-fired boilers – MAYBE
  - EPA data support work practice standard for organic HAP from coal-fired boilers
  - Numeric CO limit for coal-fired units is unsupported by organic HAP data
- ▶ Energy Assessment
  - EA illegally regulates equipment, systems and operation that are not boiler or process heater
  - EA not justified as a beyond the floor standard
    - Costs
    - Non-air quality health and environmental impacts
    - Energy requirements
  - EA not justified as a work practice

# BMACT Briefing Issues

- ▶ **Malfunction**
  - EPA did not account for malfunctions when setting limits, but this is required by CAA §112
  - EPA cannot set a numeric limit for malfunctions and must do work practice standards
  
- ▶ **Simultaneous Achievability MAYBE**
  - Must base on performance of actual existing unit
    - No single heavy oil-fire unit can simultaneously achieve the new source standards
  - Coal stoker limits not based on avge performance
    - Only 2 of 400 existing coal stoker sources can simultaneously meet all standards

# BMACT Briefing Issues

- ▶ Operating Limits MAYBE
  - Issue includes fuel parameters
  - Illegal beyond the floor requirement because EPA did not meet beyond-the-floor requisites
    - Costs
    - Non-air quality health and environmental impacts
    - Energy requirements
- ▶ HBEL
  - EPA illegally switched positions by removing health-based limitations for HCl

# Area Source Briefing Issues

## ▶ Energy Assessment

- EA illegally asserts authority over equipment, systems and operation beyond boiler and process heater “affected source”
- EA not justified as beyond the floor standard
  - Costs
  - Non-air quality health and environmental impacts
  - Energy requirements
- EA not justified as work practice

## ▶ Malfunction

- EPA did not account for malfunctions when setting limits, but this is required by CAA §112
- EPA cannot set a numeric limit for malfunctions and must do work practice standards

# CISWI Briefing Issues

- ▶ UPL

# NHSM Briefing Issues

## ACC/API coordination

- ▶ Transfer of material illegally constitutes discard (ACC API USWAG MIRC)
- ▶ Sewage sludge (NACWA)
  - Contrary to RCRA to treat as waste
  - Illegally fails to integrate RCRA & avoid duplication of CWA regulation
  - EPA failed to consider combustion in SSIs recycling
- ▶ Additional nonwaste materials, i.e., C&D wood, pulp and paper residuals, railroad ties, likely treated wood

# Briefing Schedule

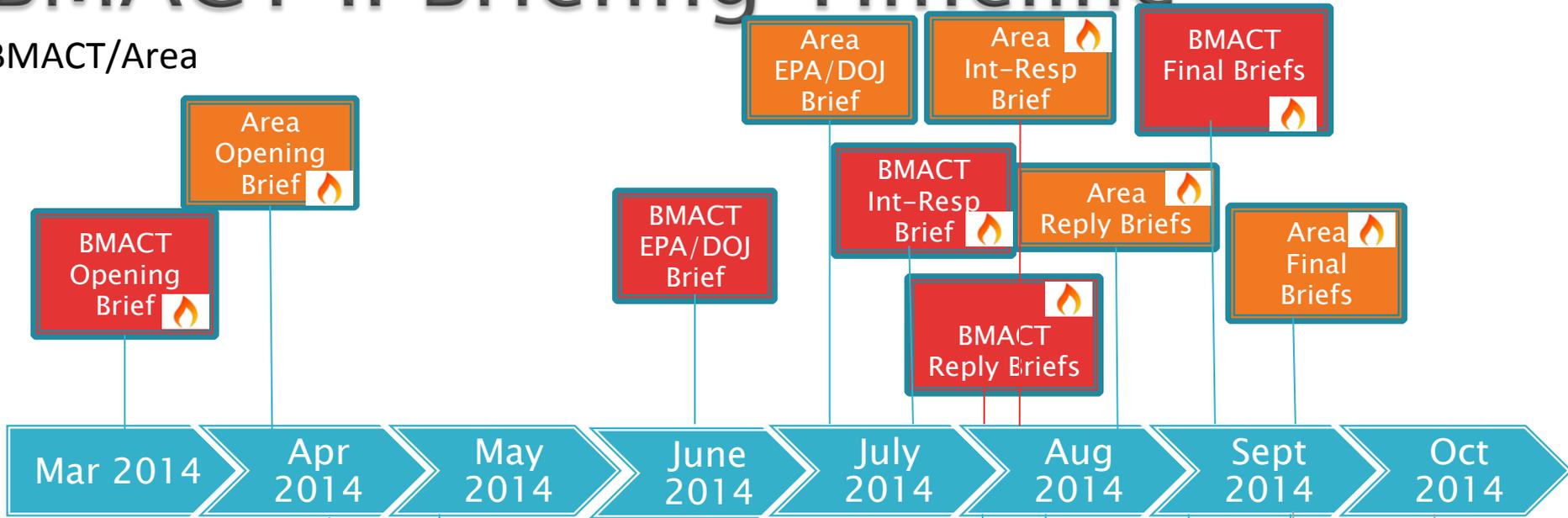
<b>Case No.</b>	<b>Pet Opening Briefs</b>	<b>Resp. Brief</b>	<b>Resp-Int Briefs</b>	<b>Pet Reply Briefs</b>	<b>Deferred Appendix</b>	<b>Final Briefs</b>
11-1108 BMACT	3-28-14	6-26-14	7-28-14	8-11-14	8-25-14	9-9-14
11-1141 Area Source	4-11-14	7-10-14	8-11-14	8-25-14	9-8-14	9-22-14
11-1189 NHSM	4-28-14	8-4-14	9-2-14	9-15-14	9-29-14	10-14-14
11-1125 CISWI	5-5-14	8-18-14	9-15-14	9-29-14	10-6-14	10-14-14

# Briefing Format

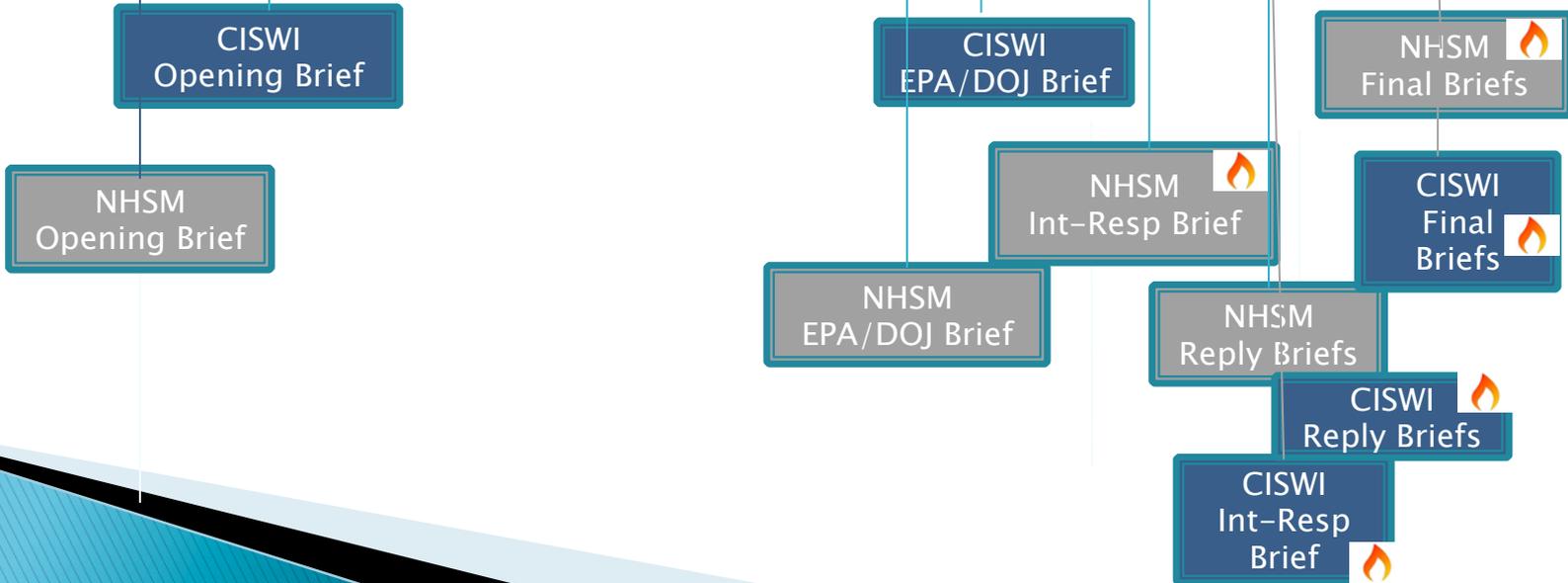
<b>Brief</b>	<b>Word Limit</b>
Industry Pet and Environmental Pet Opening	11,200 words each
Julander Opening (BMACT & AS)	2,800 words
EPA Response	25,200 (BMACT & AS) 22,400 (CISWI & NHSM)
Environmental and Industry Resp-Int	7,000 words each
Industry and Environmental Pet Reply	5,600 words each
Julander Reply (BMACT & AS)	1,400 words

# BMACT II Briefing Timeline

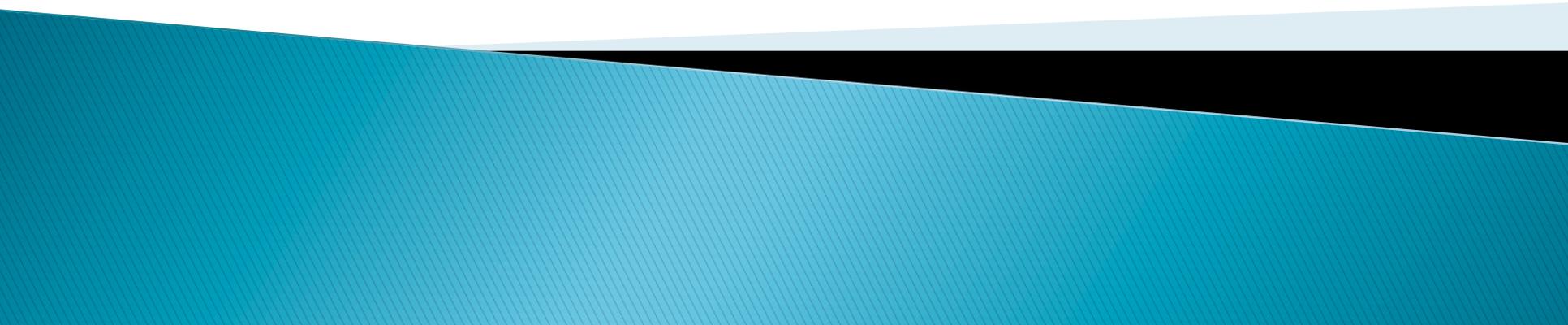
BMACT/Area



CISWI/NHSM



# Litigation and Regulatory Update



# MATS Oral Arg Overview

- ▶ ***White Stallion v. EPA*** (DC Cir. 12–1100)
  - Argued 12–10–13
  - Panel: Garland, Rogers, Kavanaugh
  - Main issue: 112(n) appropriate & necessary
  - Issue Overlap with BMACT
    - Subcategories
    - Emissions averaging illegal (Sierra)
    - PM monitoring alternatives illegal (Sierra)
    - CEMS units tighter standard or do periodic test
    - Achievability
    - Fuel switching
    - Area sources: no GACT (and no finding)

# CSAPR Oral Arg Overview

- ▶ ***EPA v. EME Homer City Generation*** (U.S. 12–1182)
  - Argued 12–10–13
- ▶ Is a state excused from adopting a SIP until after EPA quantifies good neighbor obligations?
  - EPA said “No”
- ▶ No jurisdictional discussion
- ▶ Upwind states: no authority to impose obligations without notice
- ▶ CAA doesn't give EPA authority to create cost-based method of calculating obligations
- ▶ Scalia seemed sympathetic to industry
- ▶ Roberts: What would EPA's plan be if States wanted to initiate an action plan on their own?

# PM NAAQS Oral Arg Overview

- ▶ ***NAM v. EPA*** (DC Cir. 13–1069)
  - Argued 2–20–14
  - Panel: Tatel, Brown, Kavanaugh
  - Main discussion: must be requisite to protect public health with adequate margin of safety
    - After Oz NAAQS case, maybe not
    - CASAC advice carries weight
    - EPA may rely more on certain evidence
- ▶ Judges deferred to EPA's scientific judgment, but questioned near-road air monitoring requirement

# GHG Supreme Court Overview

- ▶ ***UARG v. EPA*** (U.S. 12–1146)
  - Argued 2–24–14
  - Decision expected June 2014
- ▶ Argument: GHGs are not a pollutant for purposes of PSD
- ▶ Justices split, Justice Kennedy key
- ▶ Possible outcome: Only sources subject to PSD for a non-GHG pollutant would need to permit for GHG
- ▶ Timing: impact of decision not likely to be immediate – states may need time to revise SIPs

# Ozone NAAQS

## ▶ 2008 Ozone NAAQS

- *MS v. EPA* (DC Cir. No. 08-1200)
- 1 hour 75 ppb standard, primary/secondary same
- Oral argument Nov. 2012
- Decision: secondary remanded, all other issues denied
- Petition for rehearing filed by States
  - Decision was amended 12-11-13
  - Amended 1 sentence re health and human safety.
- UARG considering seeking Supreme Court review

## ▶ 2013 Ozone NAAQS

- *Sierra Club v. EPA* (N.D.CA 13-2809)
- Deadline suit – CIBO intervened
- Motion for Summary Judgment hearing on 4-8-14

# Coal Ash

- ▶ ***Appalachian Voices v. EPA*** (DC Dist. No. 12-0523)
  - Proposed Consent Decree filed 1-29-14
    - Proposed rule due 12-19-14 for subtitle D regs

# NSPS GHGs

- ▶ **NSPS GHG – New EGUs**
  - Proposed: 79 Fed. Reg. 1430 (Jan. 8, 2014)
  - Comments due 5–9–14 (extended from 3–10–14)
    - Extension not likely to affect existing source proposal
    - CIBO working with industry coalition on comments
- ▶ **NSPS GHG – Existing EGUs**
  - To be proposed 6–1–14, per consent agreement
  - EPA outreach to design program for existing sources: [www2.epa.gov/carbon-pollution-standards](http://www2.epa.gov/carbon-pollution-standards)
- ▶ **NSPS for Refineries**
  - Possible mid–2014 proposal, no set date

# Social Cost of Carbon

- ▶ EPA changed without notice and comment its method of calculating the social cost of carbon. This affects the regulatory impact analysis of EPA's rules.
  - ▶ CIBO joined coalition comments on multiple rules that relied on this new methodology.
  - ▶ EPA finally agreed to take comment on the OMB Technical Support Document with the revised methodology.
  - ▶ CIBO joined coalition comments 2-26-14.
- 

# Other Rules

- ▶ 316(b)
  - Final rule delayed until 4-17-14
- ▶ Effluent Limitations Guidelines
  - *Defenders of Wildlife v. Jackson* (DC Dist. 10-1915)
    - Deadline suit
    - Consent decree deadline for final rule: 5-22-14
    - EPA will miss this deadline, per EPA
    - NOTE: timing may roughly coincide with coal ash rule due 12-14-14.