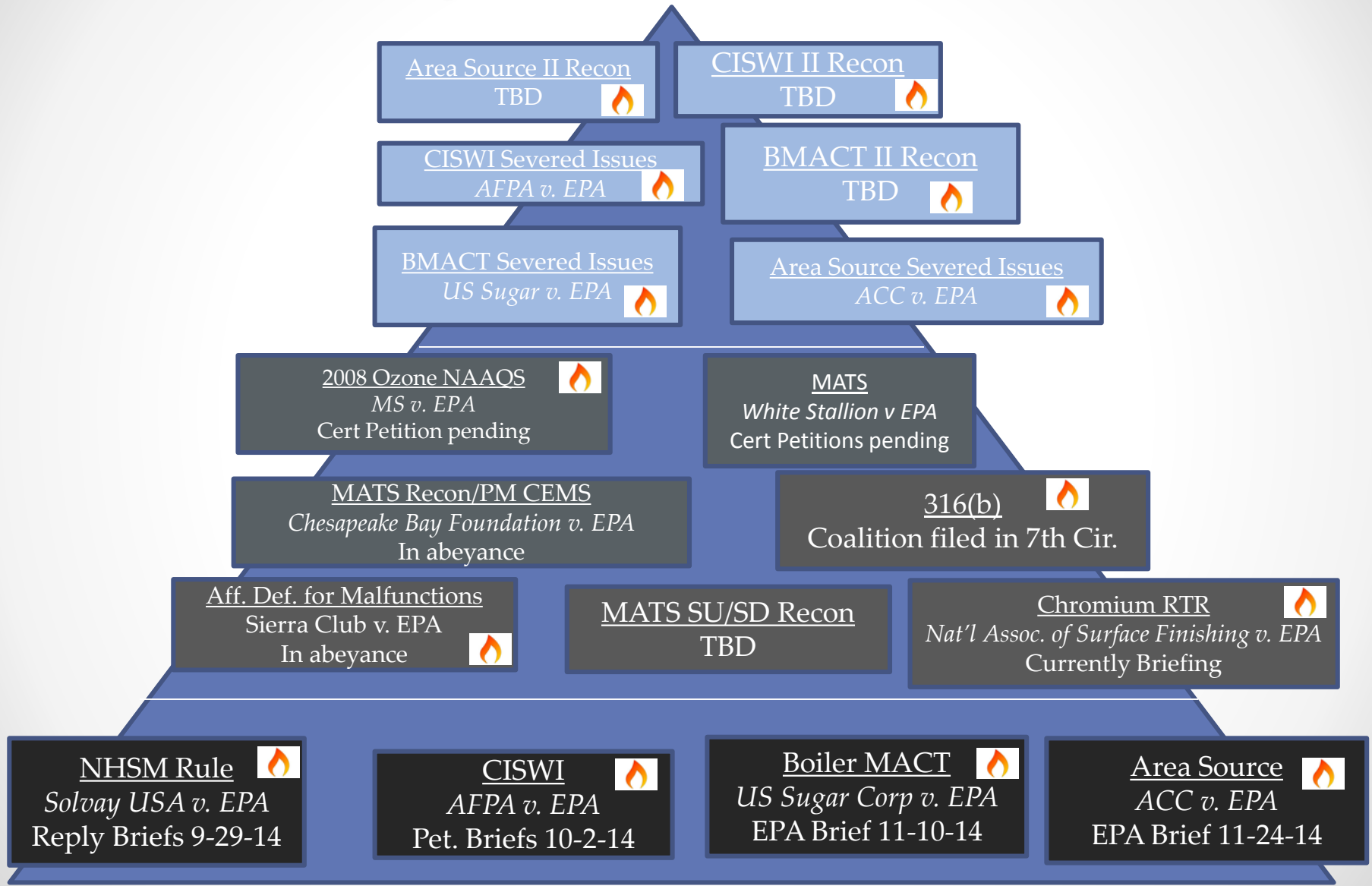


# Litigation and Regulatory Update

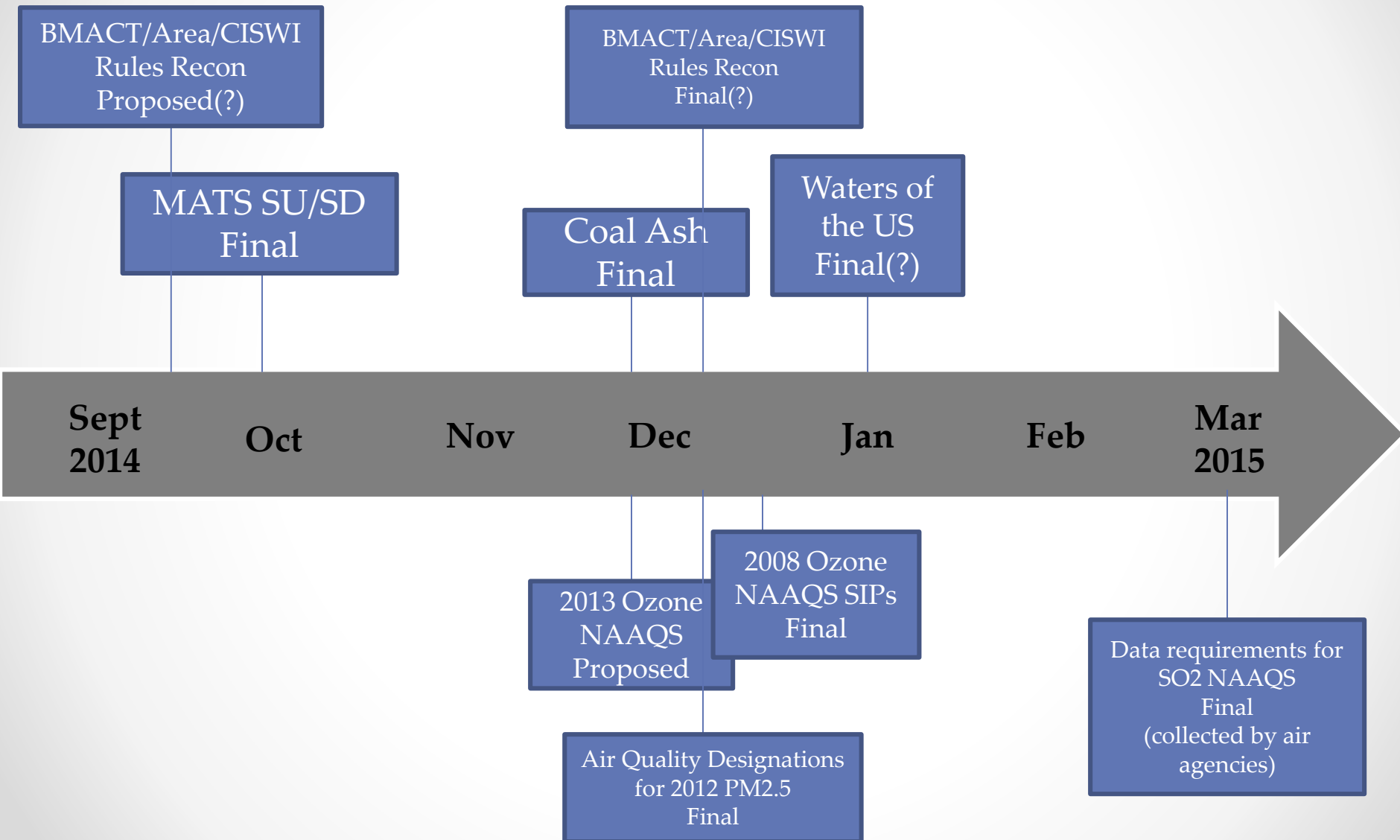
CIBO E&E Meeting  
September 9-10, 2014

Lisa M. Jaeger  
Bracewell & Giuliani, LLP

# Major Rules in Court



# Several Major Rules



# RCRA/Water Issues

## Coal Ash Rule by 12-19-14

- *Appalachian Voices et al. v. Jackson* (DC Dist. Ct. 12-0523)
- Court: EPA has mandatory duty to review/revise if necessary its Subtitle D rule
- Consent Decree: By 12-19-14, EPA must take final action on proposed Subtitle D rule

## Effluent Limitations Guidelines Rule by 9-30-15

- Rule proposed 6-7-13. CIBO filed comments 9-20-13.
- Deadline case *Defenders of Wildlife v. EPA* (DC Dist. 10-1915)
  - Final rule 9-30-15, conditioned on final action on RCRA CCR Subtitle D by 12-19-14 (consent decree)
- FOIA case *Environmental Integrity Project v. SBA* (DC Dist. 13-1962)
  - Claim: Utility industry, via SBA and OMB, influenced process, weakened the proposed rule
  - Summary Judgment Motions 12-5-14

# Water Issues

## 316(b) Water Intake Structure Rule (final 8-15-14)

- Covers EGUs and industrial facilities that withdraw >2 MM gallons of water/day and use ~25% of that for cooling (1,065 plants)
- Judicial challenges pending – Clean Water Act forum lottery
  - ENVs filed in 1st, 2nd, 9th Circuits
  - UWAG filed in 5th Circuit
  - API filed in 7<sup>th</sup> Circuit
  - CIBO/CWIS Coalition filed in 4th Circuit

## Definition of “Waters of the US”

- Proposed 4-21-14. Comments due 10-20-14.

# Social Cost of Carbon

## CIBO joined comment coalition

- 11-2013: Agencies set SCC at \$37/metric ton (2010: \$24/metric ton)
- 2-26-14: Coalition filed comments
  - OMB/interagency working group did not make data publicly available
- Comments in 5 DOE efficiency standards relying on new SCC analysis

## NEPA Social Cost of Carbon Case

- *High Country Citizens' Alliance v. US Forest Service* (CO Dist 13-1723)
- NEPA analysis for coal mine lease actions
- Agencies must explain the decision to NOT consider SCC in NEPA
  - Does not say agencies MUST consider SCC

# MATS Supreme Court

## *Michigan v. EPA*

- When considering whether a rule is “appropriate” EPA must consider costs

## *UARG v. EPA*

- Whether EPA's rulemaking decision, which expressly did not consider costs, is reasoned decision making.

# GHG Supreme Court

*UARG v. EPA* decision 6-23-14

- EPA cannot require PSD or Title V permits based only on GHG emissions
- EPA can require facilities needing permits anyway to analyze BACT for GHG emissions above a minimal level.
- BACT analysis *must* consider energy, economic, environmental considerations, *cannot* require redesign or reduced electricity demand



# GHG Supreme Court

EPA's interpretation "would bring about an *enormous and transformative expansion* in EPA's regulatory *authority* without clear congressional authorization....*We expect Congress to speak clearly* if it wishes *to assign to an agency decisions of vast 'economic and political significance.'*"

# GHG Supreme Court

“[I]n EPA’s assertion of [regulatory] authority, we confront a singular situation: an *agency laying claim to extravagant statutory power over the national economy while* at the same time strenuously *asserting that the authority claimed would render the statute ‘unrecognizable to the Congress that designed’ it.* ... it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.”

# CAA 111(d) ESPS for EGUs

Proposed 6-2-14. Comments 10-16-14

CIBO in NAM Coalition -- Draft Comments

- Beyond the scope of CAA §111(d)
  - Restructures entire energy sector
  - Regulates beyond affected source category (BMACT)
- Irreparable harm due to 2020 initial compliance
  - States must act immediately 2020 initial compliance
  - Will speed coal-fired EGU retirements
  - Other sectors affected: trade exposed, energy intensive
  - ? Institutional , commercial/residential
  - ? Non-trade exposed industrial?
  - \* Need technical help

# CAA 111(d) ESPS for EGUs

- §111(d) and §112 mutually exclusive
  - Plain language: no dual regulations
  - Policy
  - Precedent
- Need category-specific endangerment finding
  - Cannot use Title II significant contribution finding
- EPA §111(b) and §111(d) rules unrelated, inconsistent
  - §111(b) covers fossil-fired EGUs
  - ESPS more stringent, covers different sources
- State authority usurped
  - States set §111(d) standards, not EPA
  - EPA binding emission targets illegal
  - Federal Power Act authority to States (and FERC)
  - Inconsistent treatment of sources across states illegal

# CAA 111(d) ESPS for EGUs

- State targets not based on BSER
  - BSER (best system of emission reduction) source-based
  - Cannot effectively ban coal-fired EGUs
  - Not based on beyond-the-fenceline, nuclear, renewables
  - Not based on collective coal/gas fired sources
- EPA cannot regulate Building Blocks 2-4
  - EPA assumptions incorrect re heat rate efficiency, NGCC, capacity nuclear construction/retirement, renewable generation, demand-side EE, State-specific limitations
- Only fossil-fired EGUs can have mandatory reductions under §111(d)
  - No authority for Blocks 2-4 reductions from uncovered sources
  - States lack authority to regulate sources to meet targets

# CAA 111(d) ESPS for EGUs

- EPA SIP standards cannot exceed EPA FIP authority
  - Sources regulated beyond §111(d) scope
  - Emission targets depend on energy-related actions
- Modified/Reconstructed Sources cannot be subject to §111(b) and §111(d)
- Simple-cycle turbines: exclude them or adjust rule
- Cost/benefit is arbitrary

# CAA 111(d) ESPS for EGUs

- SIPs should give EGUs compliance flexibility
- Compliance timeframes for SIPs unreasonable
  - Multi-year compliance periods good
- Implementing rules must come first
  - EE and renewable credit measurement system
  - Biomass and carbon neutrality accounting framework
  - Small business impacts must be analyzed
  - Credit system linked to any future non-EGU GHG NSPS
  - Coordinate credit reductions with air permit requirements

# CAA 111(d) ESPS for EGUs

- GHG NSPS should not expand beyond EGUs
  - EPA planning for GHG NSPS for other sectors including refining, pulp/paper, solid waste landfills, iron/steel, CAFOS, cement.
  - Other categories do not significantly contribute
  - Energy exposed sectors will cause carbon leakage
  - Generic BSER not possible for these categories
  - NSPS for other categories must credit sources
- Long-term emission reduction targets do not account for dynamic energy supply sector
- CHP contribution to emission reduction must be recognized
  - Fix calculation of useful thermal output
  - Voluntary opt-in to §111(d) and exempt from future NSPS?
  - §111(b) and §111(d) rules should exclude CHP units at affected EGUs



# CAA 111(d) ESPS for EGUs

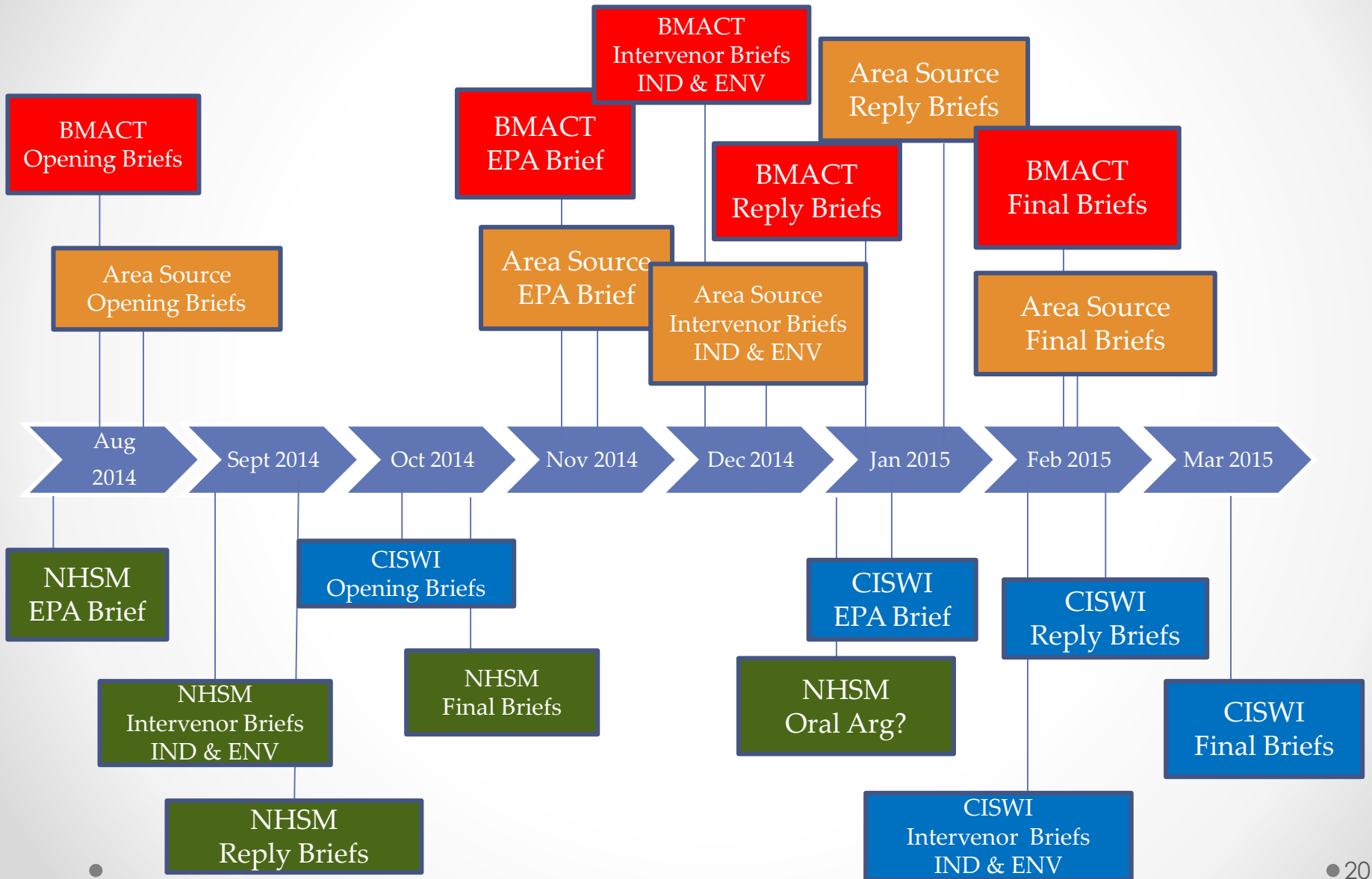
- Mass-based emission target
  - We support because adds flexibility
  - Must be better defined in a rule
  - Need notice/comment on mass-based conversion, criteria, assumptions
- Date for crediting prior GHG reductions – **proposal date?**
- Data deficiencies for commenting –
  - Not all IPM model runs have data
  - Other deficiencies?
- Biomass/Carbon neutrality
  - Cannot comment on NSPS treatment until EPA completes revised Accounting Framework
- EPA cannot rely solely on facilities funded under EPA Act 2005

# Boiler MACT Litigation Update

# 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	8-12-14	11-10-14	12-17-14	1-14-15	1-28-15	2-11-15
11-1141 Area Source	8-26-14	11-24-14	12-24-14	1-21-15	2-4-15	2-18-15
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	1-16-15	2-9-15	2-24-15	3-2-15	3-6-15

# BMACT II Briefing Timeline



# BMACT Case

## *US Sugar v. EPA (11-1108)*

IND	ENV
<p><b>ENERGY ASSESSMENT</b></p> <ul style="list-style-type: none"> <li>Covers sources beyond category</li> <li>Not “beyond the floor”</li> <li>Not work practice standard</li> </ul> <p><b>FLOORS</b></p> <p>Pollutant by pollutant, not “achieved”</p> <ul style="list-style-type: none"> <li>New heavy oil fired</li> <li>Existing stoker coal fired</li> </ul>	<p><b>CO SURROGATE for OHAP</b></p> <ul style="list-style-type: none"> <li>Surrogate must reflect best performers</li> <li>2-part test for reasonable surrogate: control               <ol style="list-style-type: none"> <li>indiscriminately captures HAP</li> <li>only method to reduce</li> </ol> </li> <li>CO fails: 1. not all OHAP captured and 2. other methods to reduce</li> <li>No substantive EPA response</li> </ul>

# BMACT Case

## *US Sugar v. EPA (11-1108)*

IND	ENV
<p><b>MALFUNCTION WORK PRACTICE</b></p> <p>EPA failed to set either</p> <ul style="list-style-type: none"><li>• Numeric limits that account for malfunction periods</li><li>• Work practice standards</li></ul> <p><b>CO NUMERIC LIMITS</b></p> <ul style="list-style-type: none"><li>• Data support work practice for CO</li><li>• No substantive EPA response</li></ul> <p><b>HBEL for HCl</b></p> <ul style="list-style-type: none"><li>• 2004 HBEL arbitrarily abandoned</li></ul>	<p><b>FLOORS</b></p> <p><b>Subcategories</b></p> <ul style="list-style-type: none"><li>• 36 subcats means weaker standards</li><li>• Fuel-based illegal, “designed to burn” = 10% , can switch fuels</li></ul> <p><b>Best performers</b></p> <ul style="list-style-type: none"><li>• Excluded if co-firing fuel / gas</li></ul> <p><b>UPL (18 pages)</b></p> <ul style="list-style-type: none"><li>• Remand rationale does not help</li></ul>

# Area Source Case

## *ACC v. EPA (11-1141)*

IND	ENV
<p><b>ENERGY ASSESSMENT</b></p> <ul style="list-style-type: none"><li>• Covers sources beyond category</li><li>• Not “beyond the floor”</li><li>• Not work practice standard</li><li>• Not lawful GACT standard</li></ul>	<p><b>MACT FOR LISTED SOURCES</b></p> <ul style="list-style-type: none"><li>• §112(c)(6) sources listed for POM/Hg (oil biomass) (or (c)(9) delist)</li><li>• Temporary boilers (oil wood coal) (or (c)(9) delist)</li><li>• Urban HAP, GACT not justified</li></ul> <p><b>WORK PRACTICE STANDARDS</b></p> <p>§112(h) must be consistent with MACT</p> <ul style="list-style-type: none"><li>• Tune up gets 1% Hg reduction</li><li>• Su/Sd work practice gets ? reduction</li></ul>

# Area Source Case

## *ACC v. EPA (11-1141)*

IND	ENV
<p data-bbox="162 446 658 489"><b>MALFUNCTION WORK PRACTICE</b></p> <p data-bbox="162 618 687 661">EPA failed to set either</p> <ul data-bbox="162 704 875 1003" style="list-style-type: none"><li data-bbox="162 704 875 832">• Numeric limits that account for malfunction periods</li><li data-bbox="162 875 875 1003">• Work practice standards for malfunctions</li></ul>	<p data-bbox="929 446 1348 489"><b>GACT STANDARDS</b></p> <p data-bbox="929 532 1628 661">Should be generally available controls</p> <ul data-bbox="929 704 1702 832" style="list-style-type: none"><li data-bbox="929 704 1702 746">• Eg fabric filter for new coal PM</li><li data-bbox="929 789 1702 832">• Eg ESP, multicyclone, fab filter</li></ul> <p data-bbox="929 875 1773 1089">Do not achieve 75% cancer risk and no reason for rejecting generally available</p> <p data-bbox="929 1132 1074 1175"><b>TITLE V</b></p> <p data-bbox="929 1218 1773 1346">T V not “unnecessarily burdensome” for synthetic area sources</p>



# CISWI Case

## *AFPA v. EPA (11-1125)*

- Industry **DRAFT** Opening Brief
  - Due 10-2-14
  - Floors for small remote incinerators
    - Variability in incinerated material not accounted for in selecting Best Performers
    - Best Performers selected on Pollutant-by-Pollutant basis
  - Malfunctions should have work practice standards
  - Emissions averaging across CISWI units at a facility should be allowed
  - Recordkeeping requirement in CISWI to prove a boiler has not burned solid waste

# NHSM Case

## *Solvay v. EPA (11-1189)*

ENV ISSUE	EPA RESPONSE	INTERVENOR	REPLY
<ul style="list-style-type: none"> <li>• Classification of discarded materials</li> <li>• After material is discarded, cannot be processed into non-waste fuel</li> </ul>	<ul style="list-style-type: none"> <li>• Materials that meet legitimacy criteria are not solid waste</li> <li>• On-spec used oil &amp; cellulosic biomass are traditional fuels</li> <li>• Tires in tire collection programs not solid waste</li> </ul>	<ul style="list-style-type: none"> <li>• IND args about transferred materials and certain wood and paper wastes lack merit</li> <li>• RCRA does not bar sewage sludge from being solid waste</li> </ul>	

# NHSM Case

## *Solvay v. EPA (11-1189)*

IND ISSUE	EPA RESPONSE	INTERVENOR	REPLY
<ul style="list-style-type: none"> <li>• Firm-to-firm transfer</li> <li>• Alt fuels as wastes</li> <li>• Future rulemaking for alt fuels</li> <li>• Inconsistent with RCRA</li> <li>• C&amp;D Wood/CTRT</li> <li>• Sewage Sludge</li> </ul>	<ul style="list-style-type: none"> <li>• Transferred materials should be treated as solid waste (unless EPA decides otherwise)</li> <li>• Legitimacy criteria reasonable</li> <li>• C&amp;D Wood/CTRT under recon</li> <li>• Sewage sludge not excluded from reg as solid waste</li> </ul>	<ul style="list-style-type: none"> <li>• Discard does not mean use or combustion</li> <li>• Classification of “scrap tires,” used oil, pulp and paper residuals, C&amp;D debris, and other traditional fuels as non-waste consistent with RCRA</li> </ul>	

# Other MACT Cases CIBO has Joined

- 9-Rule Affirmative Defense
  - *Sierra Club v. EPA* (DC Cir. 14-1110)
  - In response to PC MACT decision
  - Seeks to re-open 9 § 112 and § 129 rules to vacate affirmative defense provisions
  - CIBO in intervenor coalition
  - In abeyance
- Chromium Risk & Technology MACT Review
  - *Nat'l Assoc. for Surface Finishing v. EPA* (DC Cir. 12-1459)
  - Whether when setting an 8-year residual risk MACT standard, EPA must reset the MACT floor
  - Could set precedent for future MACT RTRs

# NHSM Supplemental Proposal

- Submitted comments 6-13-14
  - EPA should expand use of CTRTs
- Data Collection
  - Focused on actual use of CTRTs
  - Shows that several sources burn CTRTs in ways not covered by proposal
  - Will be translated into supplemental documentation in record
- Expected final rule – Early 2015