

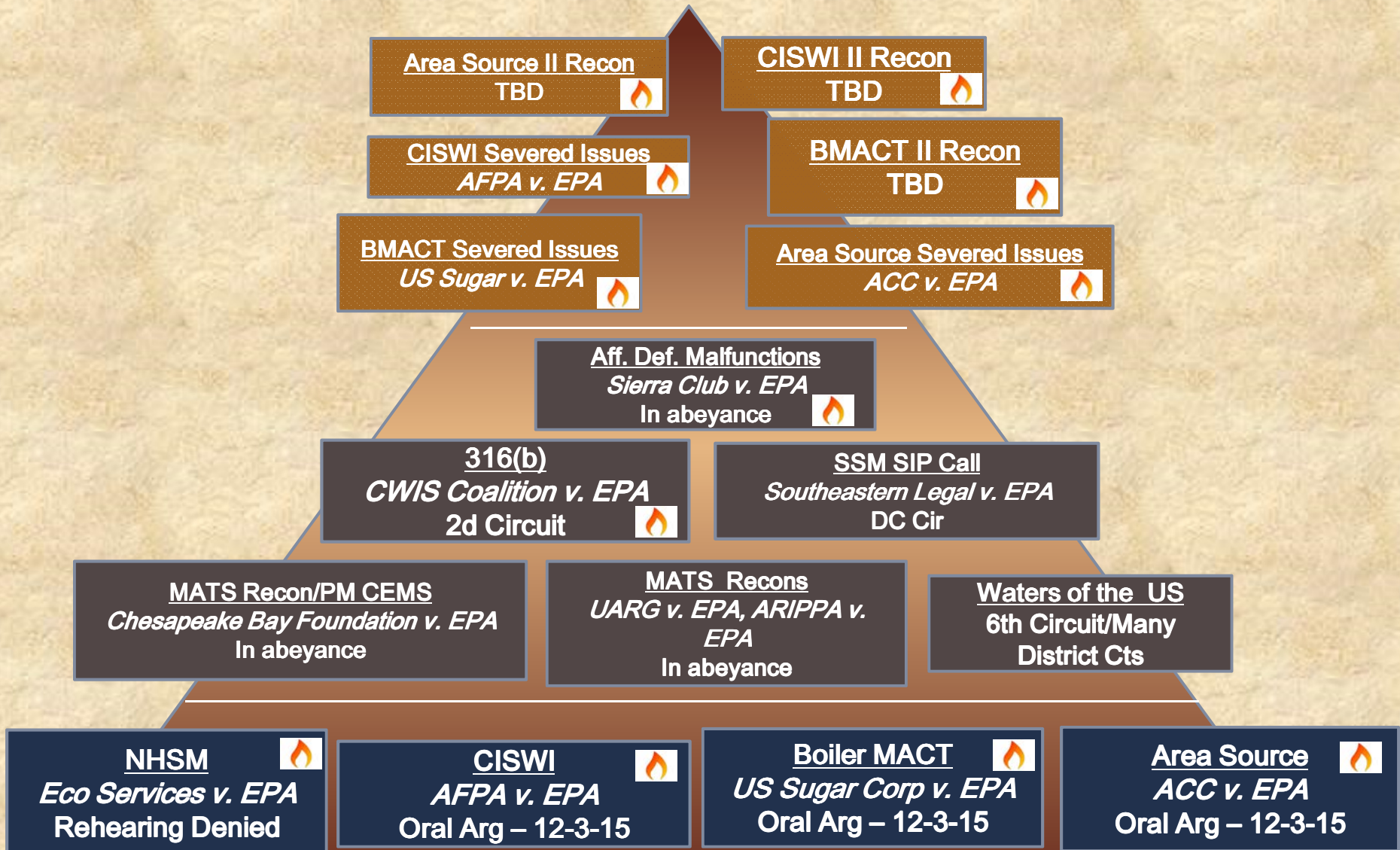
CIBO Annual Meeting Litigation & Regulatory Update



October 22, 2015

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Major Rules in Court



Boiler MACT Issues Briefed

US Sugar Corp. v. EPA (11-1108)

Issue	Party	Oral Arg
CO limit arbitrary, should have work practice	ind	
Energy Assessment illegal beyond the floor	ind	
Malfunctions must be accounted for in standards	ind	
Rejection of HBEL for HCl unsupported by record	ind	
Pollutant-by-pollutant for oil & stoker coal irrational	ind	
UPL does not reflect emission limit actually achieved	env	
CO illegal surrogate – no correlation, other controls possible	env	
Subcategories based on fuel illegal	env	x
Can't exclude gas co-fired biomass units from floor	env	

Area Source Issues Briefed

ACC v. EPA (11-1141)

Issue	Party	Oral Arg
Energy Assessment beyond scope, not legal standard	ind	
Malfunctions must be accounted for in standards	ind	
GACT standards must be “generally available” controls	env	
Temporary boiler exemption illegal	env	x
112c6 requires MACT for oil/biomass for Hg, POM	env	
Work practices for coal not consistent with 112d	env	x
Title V exemption for synthetic minors illegal	env	x

CISWI Issues Briefed

AF&PA v. EPA (11-1125)

Issue	Party	Oral Arg
Waste variability not included in identifying best performing SRIs	ind	
Pollutant-by-pollutant for small remote incinerators illegal	ind	
Need emissions averaging across CISWI units	ind	X
EPA has authority in 129 to do work practice standards	ind	
SSM periods must be accounted for in standards	ind	
Records required to prove non-waste materials	ind	
Cant exempt or defer standards for some categories (eg burn-off ovens)	env	
Rule treats modified CISWI as existing CISWI	env	X
UPL / UL does not reflect actual emission limit achieved	env	
30-day averaging for units with CEMS means lower standards	env	
EPA should have set beyond the floor standards	env	5

Oral Argument Format

3 CASES

- Major Source
- Area Source
- CISWI Incinerator

ORDER OF ARGUMENT

- Industry Petitioners
- Environmental Petitioners

- EPA Respondent
 - Industry Intervenor supporting EPA
 - Environmental Intervenor supporting EPA

- Industry rebuttal
- Environmental rebuttal



Boiler MACT Issues on EPA Reconsideration

US Sugar Corp. v. EPA (13-1256) in Abeyance

Rule due out “late Oct 2015”

Issue
Startup/Shutdown definitions
CO limits based on 130 ppm
Continuous Parametric-Monitoring System
Clarifying changes
Affirmative defense

Area Source Issues on EPA Reconsideration

Acc v. EPA (13-1258) in Abeyance
Rule due out “mid Feb 2016”

Issue
Startup
Alternative monitoring for Hg, PM
Limited-use subcategory and standards
Clarifying changes
Affirmative defense

CISWI Issues on EPA Reconsideration

AFPA v. EPA (13-1257) in Abeyance

Rule due out “late Oct 2015”

Issue
CEMS data during SU/SD
PM limit for waste-burning kilns
Affirmative defense
Fuel variability/energy recovery units

NHSM Rule

Eco Services v. EPA (No. 11-1189)

EPA NHSM RULE UPHELD

OTHER MATERIALS, RULES / CASES PENDING:

- ❑ Construction and demolition wood, RR ties, paper recycling residuals
 - EPA proposed to treat as NHSM
 - rule at OMB July 2015, final Nov 2015(?)
 - *Treated Wood Council v. EPA* (14-1201) in abeyance

- ❑ Other treated wood
 - rulemaking ongoing
 - *Treated Wood Council v. EPA* (14-1202) in abeyance

Other Active Cases



SSM Cases

Rule/Case	Description	Status
BMACT, Area, CISWI	Affirmative defense severed and put into reconsideration cases Proposal: delete aff defense	Recon rule proposed Final Fall 2015
<i>Sierra v. EPA</i> (DC Cir. 14-1110)	9-rule Affirm Defense 9 §112 and §129 rules	In abeyance Interventions pending Admin Petition granted
SSM SIP Call <i>Southeastern Legal Foundation v. EPA</i> (DC Cir. 15-1166)	36 States SIPs called	Deadline for corrective SIP 11-22-15 Motions to consolidate pending

MATS Rule

- ❑ *White Stallion v. EPA* (DC Cir 12-1100)
 - SCT sent case back to DC Cir
- ❑ Next steps:
 - DC Cir ordered motions to govern
 - Tri State emergency motions denied
- ❑ EPA:
 - Reissue rule by April 2016
 - Will seek remand w/o vacatur from DC Cir (leaving MATS Rule in place)
- ❑ Other MATS cases (in abeyance):
 - *UARG v. EPA* (DC Cir 15-1013, 1015, 1016) (4-hour startup exemption and SU/SD work practice)
 - *ARIPPA v. EPA* (DC Cir 15-1180) (waste coal)



CWA § 316(b) Rule

Cooling Water Intake Structure Coalition v. EPA (2d Cir. 14-4645)

- ❑ IND petitioners: CWIS Coalition (includes CIBO), UWAG, Entergy, API
- ❑ ENVs are intervenors for EPA
- ❑ IND Issues
 1. Applicability threshold too low
 2. Intake structure requirements lack authority
 3. “New units” at existing facilities unlawful
 4. USFWS and NMFS roles in NPDES permits unlawful
 5. Facilities below 125 mgd threshold data collection
- ❑ Briefing scheduled to start Nov. 2015
- ❑ Riverkeeper: motion to stay briefing schedule

CWA Waters of the U.S.

- ❑ Jurisdictional issues: multiple challenges filed in D Cts and in Cir Cts
- ❑ Cir Ct cases combined
 - Sixth Cir injunction blocks rule nationwide (*Ohio v. USACE* (15-3799))
- ❑ D Ct cases not combined
 - ND Dist Ct blocks rule in 13 states: ND, AK, AZ, AR, CO, ID, MO, MT, NE, NV, SD, WY, NM
 - Challenges still pending in D Cts: D. Minn., S.D. Tex. (2), S.D. Ga., N.D. Ok. (2)
- ❑ Next steps:
 - Sixth Cir consider whether it has jurisdiction
 - If yes, it will consider the merits of the case
- ❑ Any action on the rule may have to wait until SCT rules on jurisdictional issues

Coal Ash Rule

USWAG v. EPA (D.C. Cir. 15-1219)

- ❑ IND petitioners: USWAG, EEI, NRECA, APPA, Beneficial Reuse Management, City of Springfield MO, AES Puerto Rico
- ❑ ENVs are intervenors for EPA
- ❑ IND issues:
 - inactive surface impoundments; closure of existing unlined surface impoundments; release response; mandatory safety assessments; definitions (“CCR landfill”; “beneficial use”); qualifications for “alternative closure”; consideration of costs
- ❑ Schedule:
 - Motions re: briefing schedule due 10/19
 - Briefing late Dec. 2015/early 2016
 - Oral argument Fall 2016
 - Decision likely early 2017

Other Cases to Come



Utility GHG Rules

- CPP and NSPS Lawsuits in D.C. Cir.
 - late December 2015(?) (60 days from publication)
 - Issues:
 - The “legislative glitch” issue: CAA Section 111(d) v. 112
 - Extent of EPA authority under 111(d)
 - Need category-specific endangerment finding
 - Regulating beyond the fence-line
 - Definition of BSER
 - Federalism

Utility GHG Rules

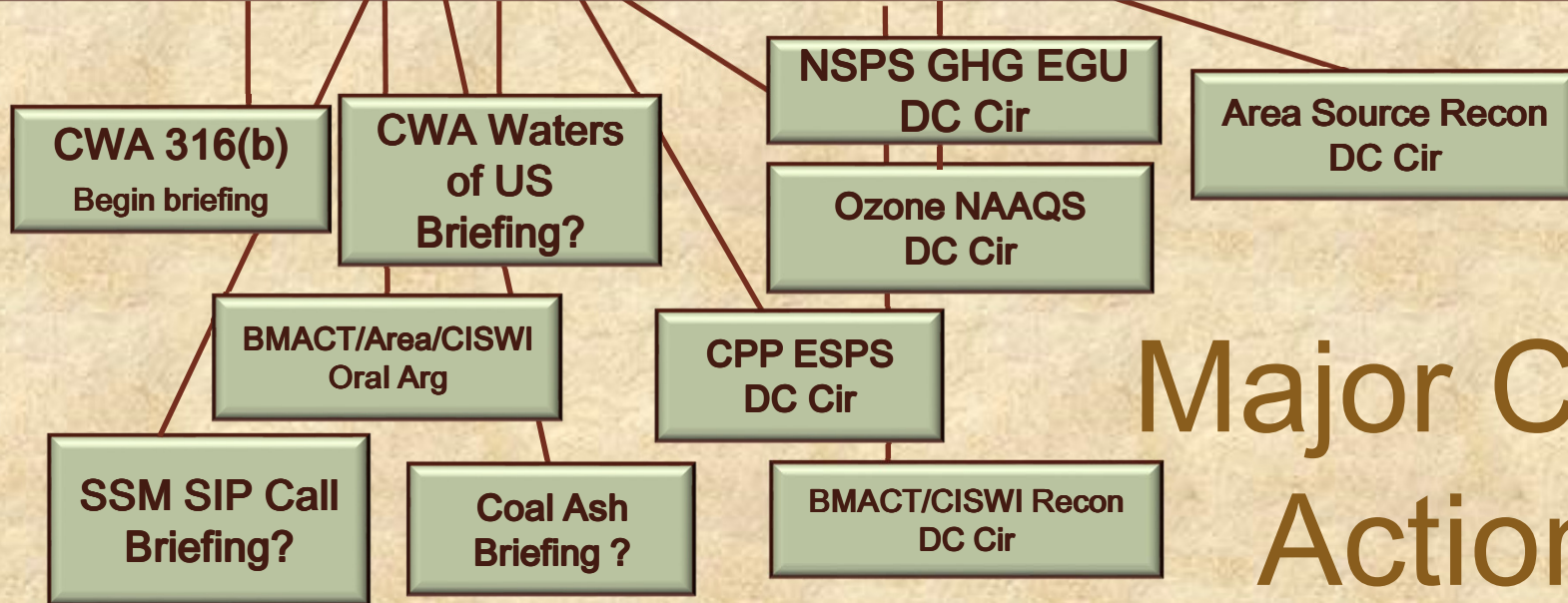
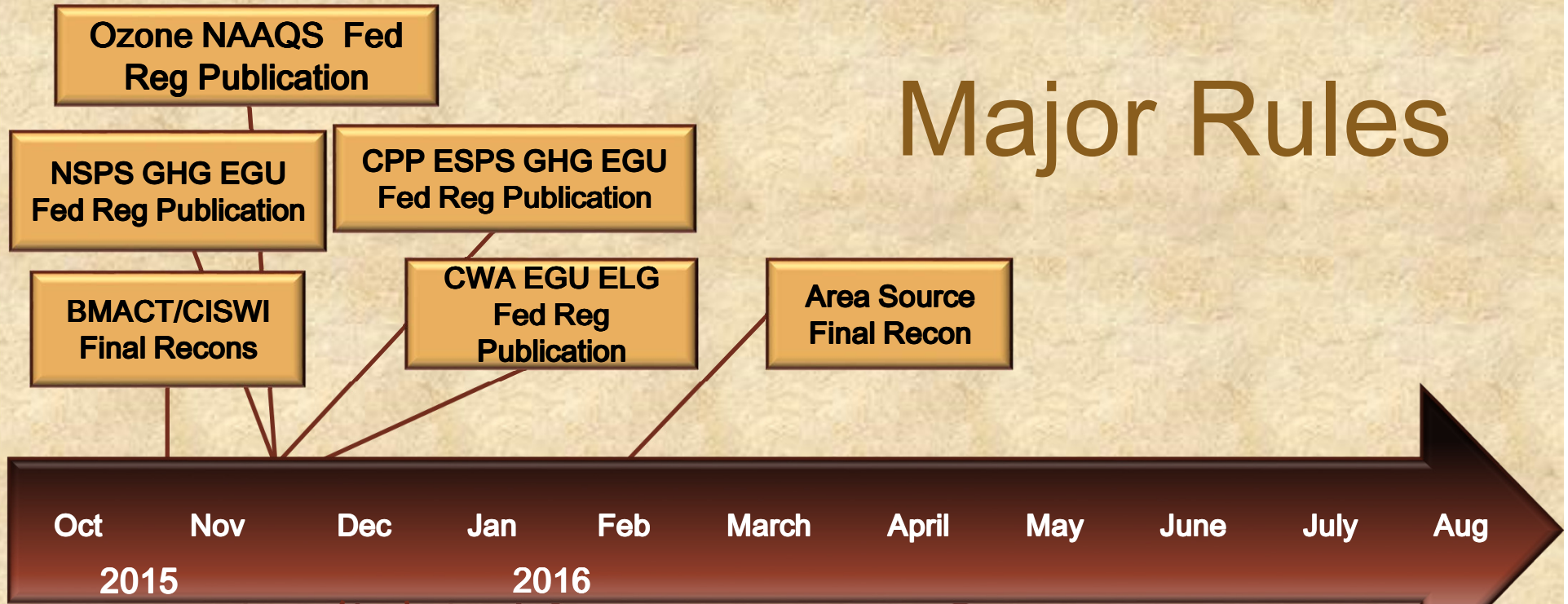
Clean Power Plan – Net-Electric Sales issue

- ❑ CPP § 60.5845 covers:
 - units > 250 MMBtu/hr that serve a generator \geq 25 MW
- ❑ CPP § 60.5850 exempts:
 - Steam generating unit with limit on annual net-electric sales of 1/3 of potential electric output, or 219,000 MWh or less
 - CHP with limit on annual net-electric sales of design efficiency multiplied by potential electric output, or 219,000 MWh (whichever is greater), or less
- ❑ PROBLEM
 - The definition of "net-electric sales" should exclude simultaneous purchase and sale of electricity by CHPs
 - The definition is missing from CPP, but included in NSPS
- ❑ FINAL NSPS § 60.5580
 - Net-electric sales means: gross electric sales minus purchased power of the thermal host EGU or facilities
- ❑ EPA(?): 111(b) is correct, 111(d) should be the same

CWA EGU Effluent Limitations Guidelines

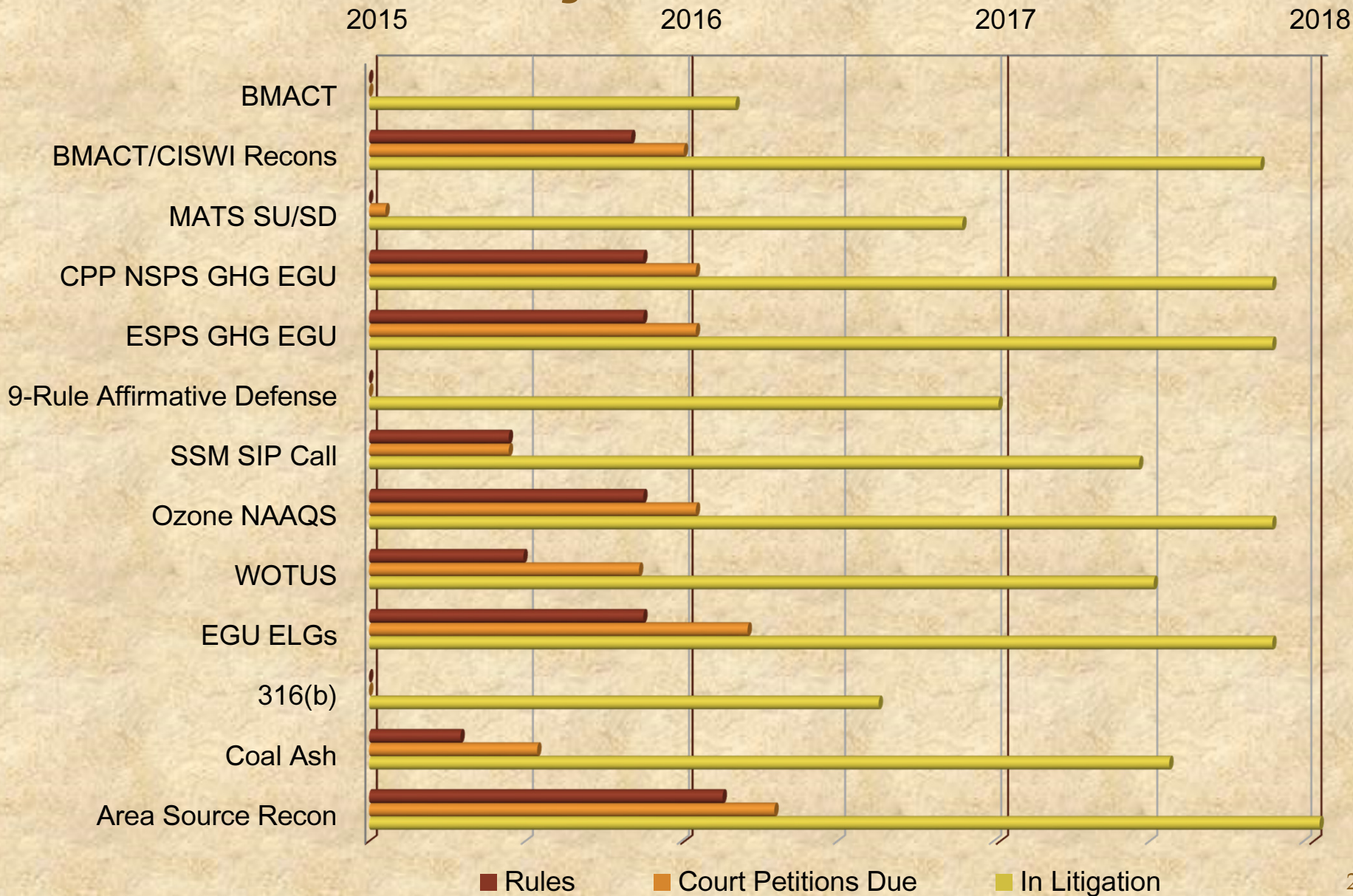
- ❑ Final Rule 9/30/15 (pre-publication)
- ❑ Lawsuits early 2016 (120 days from publication)
- ❑ Proposed rule: 4 “preferred” options
 - Final rule adopted a fifth approach
- ❑ CIBO comments not resolved in final rule:
 - Applicability
 - Isolating wastewater streams
 - Reclassifying low-volume waste sources
 - Facilitating re-use
 - Daily loads as permit conditions
 - Record deficient

Major Rules



Major Court Actions

Major Rules



Major Rules in Litigation

Rule	CIBO Role
BMACT/Area Source/CISWI	In lawsuit (lead role)
SSM SIP Call	Actively following
MATS	Actively following
Cooling Water Intake Structure	In lawsuit (CWIS coalition)
Coal Ash	Actively following
Waters of the U.S.	Actively following
Ozone NAAQS	Decision needed by Dec. 1 (?)
Clean Power Plan	Decision needed by Dec. 15 (?)
GHG NSPS	Decision needed by Dec. 15 (?)
EGU Effluent Limitation Guidelines	Decision needed by Dec. 15 (?)
BMACT/CISWI Recons	Decision needed by Nov. 20 (?)
Area Source Recon	Decision needed by Apr. 1 (?)

