

**ORAL ARGUMENT NOT YET SCHEDULED****UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**


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**NATIONAL ASSOCIATION OF  
CLEAN WATER AGENCIES,**

**Petitioner,**

**v.**

**U.S. ENVIRONMENTAL  
PROTECTION AGENCY and BOB  
PERCIASEPE, ACTING  
ADMINISTRATOR, U.S.  
ENVIRONMENTAL PROTECTION  
AGENCY,**

**Respondents.**

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**CASE No. 13-1152 (consolidated  
with Nos. 13-1156, 13-1157, 13-  
1158, 13-1159, 13-1160, 13-1162,  
13-1164, 13-1165)**

**PRELIMINARY NON-BINDING STATEMENT OF ISSUES OF  
THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES**

Pursuant to the Clerk's order of May 2, 2013, the National Association of Clean Water Agencies ("NACWA") hereby submits its preliminary non-binding statement of issues. NACWA's Petition seeks review of the U.S. Environmental Protection Agency's final agency action entitled "Non-Hazardous Secondary Materials That Are Solid Waste, Final Rule," 78 Fed. Reg. 9112-9213 (Feb. 7, 2013) (hereinafter the "NHSM Rule"). This Final Rule was issued after the U.S. Environmental Protection Agency proposed to reconsider certain aspects of its

final agency action entitled “Identification of Non-Hazardous Secondary Materials That Are Solid Waste, Final Rule,” 76 Fed. Reg. 15456-15551 (Mar. 21, 2011).

The NHSM Rule identifies which non-hazardous secondary materials, when used as fuels or ingredients in combusting units, are defined as “solid waste” under the Resource Conservation and Recovery Act (RCRA).

The following is a preliminary list of issues that NACWA may raise. NACWA reserves the right to modify the list of issues addressed as well as to address these and other issues in more detail in future pleadings.

1. Whether the NHSM Rule, which identifies which non-hazardous secondary materials are solid wastes when used as fuels or ingredients in combustion units under sections 2002(a)(1) and 1004(27) of RCRA, 42 U.S.C. §§ 6912(a)(1) and 6903(27), as applied to sewage sludge, contravenes RCRA, is ultra vires, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

2. Whether the NHSM Rule contravenes the domestic sewage exclusion, RCRA § 1004(27), 42 U.S.C. §§ 6903(27), which excludes sewage from the definition of solid waste, and therefore contravenes RCRA, is ultra vires, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

3. Whether the NHSM Rule, which concludes that sewage sludge combusted is “discarded” and is therefore a solid waste, contravenes RCRA, is ultra vires, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

4. Given the comprehensive regulatory scheme provided by section 405 of the Clean Water Act, 33 U.S.C. § 1345, and 40 C.F.R. Part 503, whether the NHSM Rule contravenes RCRA’s mandate in section 1006(b) that EPA integrate RCRA requirements with and avoid duplication of Clean Water Act requirements, and therefore is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

5. Given the comprehensive regulatory scheme provided by section 112(e)(5) of the Clean Air Act, 42 U.S.C. § 7412(e)(5), whether the NHSM Rule contravenes RCRA’s mandate in section 1006(b) that EPA integrate RCRA requirements with and avoid duplication of Clean Air Act requirements, and therefore is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

6. Whether EPA’s failure to determine, without consideration and use of sufficient and reliable data, that sewage sludge is a legitimate fuel when combusted in sewage sludge incinerators or other combustion units, contravenes RCRA, is

arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

7. Whether EPA's failure to determine, without consideration and use of sufficient and reliable data, that sewage sludge is being recycled for beneficial uses when combusted in sewage sludge incinerators or other combustion units contravenes RCRA, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

8. Whether EPA's failure to determine, without consideration and use of sufficient and reliable data, that sewage sludge is not a solid waste when combusted in sewage sludge incinerators or other combustion units contravenes RCRA, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

9. Whether EPA's methodology for establishing what constitutes a legitimate fuel, which among other flaws ignores the clean energy value of sewage sludge and the critical infrastructure role of wastewater treatment, contravenes RCRA, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

10. Whether EPA's failure to consider the full regulatory, air quality and energy impacts of the NHSM Rule – including the forced diversion of sewage sludge to

landfills and farms and the full impacts on small entities – contravenes RCRA, Executive Orders 12866 and 13563, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

11. Whether EPA's failure to sufficiently clarify "contained gaseous material" for purposes of identifying which non-hazardous secondary materials are solid wastes when used as fuels or ingredients in combustion units contravenes RCRA, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

12. Whether EPA's failure to provide adequate notice and an opportunity for comment on requirements in the final NHSM Rule contravenes RCRA, the Administrative Procedure Act, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

13. Whether EPA's failure to provide adequate notice and an opportunity for comment on requirements in the NHSM Rule that were not reconsidered between March 2011 and February 2013 contravenes RCRA, the Administrative Procedure Act, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

This 3rd day of June, 2013.

Respectfully submitted,

/s/ Jonathan E. Wells

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Preliminary Non-Binding Statement of Issues of the National Association of Clean Water Agencies has been served on all registered counsel through the CM/ECF system this 3rd day of June, 2013.

\_\_\_\_\_/s/ Jonathan E. Wells

Jonathan E. Wells