

EPA's Non-Hazardous Secondary Materials (NHSM) Rule

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NACWA's Challenge to the NHSM Rule

- Pending in the D.C. Circuit Court of Appeals
- Consolidated with 27 other cases
- Four primary legal concerns
 - Conflicts with Clean Air Act section 112
 - Conflicts with Clean Air Act section 129
 - Ignores RCRA's domestic sewage exclusion
 - Duplicative of Clean Water Act section 405

NHSM Rule Conflicts with CAA § 112

- Section 112(e)(5) of the Clean Air Act, entitled “Publicly owned treatment works,” requires that EPA promulgate emissions standards for POTWs pursuant to that section.
- Including sewage sludge in the NHSM Rule conflicts with that mandate by providing a basis to regulate sewage sludge incinerators (SSIs) under section 129 of the Clean Air Act.

NHSM Rule Conflicts with CAA § 129

- Section 129 of the Clean Air Act mandates emissions standards for commercial and industrial solid waste incinerators.
- Section 129(g)(6) specifically mandates the use of RCRA's definition of solid waste.
- The NHSM Rule impermissibly expands on the statutory definition

RCRA's Domestic Sewage Exclusion

- Under RCRA, solid waste includes “sludge from a waste treatment plant ... but does not include solid or dissolved material in domestic sewage.” 42 U.S.C. § 6903(27).
- EPA cannot overrule Congressional exemption of domestic sewage from the definition of solid waste.

NHSM Rule Duplicative of CWA

- Under RCRA, EPA has a non-discretionary duty to avoid duplication of other environmental statutes “to the maximum extent practicable.” 42 U.S.C. § 6905(b)(1).
- NHSM Rule duplicates the existing regulatory framework
 - emissions limitations under section 112 of the CAA;
 - sewage sludge disposal regulations under section 405 of the CWA

Current Status of NHSM Rule Litigation

- On October 14th, EPA announced its intent to revise the NSHM Rule.
 - Primarily focused on not disincentivizing biomass incineration
- Revisions to be promulgated with Boiler MACT and CISWI rules
- Based on EPA's announcement, industry petitioners requested a stay of the litigation until the proposal is published in the Federal Register.

Current Status of NHSM Rule Litigation

- On October 25th, EPA announced that the revised proposed rules would be delayed until the end of November.
- On November 1st, the Court ordered the litigation to be held in abeyance and directed the parties to file “motions to govern future proceedings” within 30 days after the final revised rule is published.
- Final rule is not expected before April/May 2012.

Current Status of NHSM Rule Litigation

- Based on the Oct. 14th letter, specific revised proposals appear to be:
 - Clarification that biomass is a traditional fuel and not a solid waste;
 - A petition process for determination of whether a nonhazardous secondary material is not a solid waste when burned;
 - A specific list of secondary materials, including resinated wood products, that are nonwastes when burned; and
 - Revisions to the legitimacy criteria.
- None of the revisions are likely to alter our primary litigation strategy.