**Summary of Non-Hazardous Secondary Materials (NHSM) Case Respondent Brief**

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

**Arguments**

I. RCRA does not require that all NHSM be classified as solid waste when combusted

-If materials are not disposed of, thrown away, or abandoned they are not solid wastes and not subject to RCRA.

 -Materials can be reused in an ongoing manufacturing or industrial process.

 -EPA exercised discretion in the definition of “discarded” by creating the legitimacy criteria to distinguish between product fuel use and energy recovery

 -Containment alone does not make material a non-waste

II. EPA reasonably determined that materials processed from solid waste that meet the legitimacy criteria are not solid waste

-Definition of “processing” – during processes the non-hazardous waste is still considered a waste subject to any applicable federal or state requirements

-Congress limited the provision to hazardous wastes and did not intend to restrict the use of non-hazardous wastes as fuels and therefore there is no provision in RCRA prohibiting the production of product fuels from non-hazardous solid wastes

 -Congress intended EPA to develop methods for production of fuels from solid waste

- ENVs rely on cases that are not applicable. None of the cases addressed the status of materials produced from processing solid waste.

III. EPA reasonably classified on-spec used oil and clean cellulosic biomass as traditional fuels

 -Materials are defined as “traditional fuels” and products, and not NHSM or solid wastes

-Petitioners claim that EPA improperly determined that on-spec used oil and clean cellulosic biomass should be traditional fuels and not alternative “traditional” fuels.

-used oil, prior to processing, does not fit the definition of “discarded,” same with cellulosic biomass

IV. EPA reasonably determined that tires managed under tire collection programs are not solid waste

-Level of contaminants in tires is comparable to the coal they replace and also seen as a valuable product and therefore not discarded.

-ENVs claim that tires are discarded when removed from a vehicle—EPA says that the actual nature of the transaction of tires makes them a valuable product.

 -Congress intended that EPA find ways to promote alternative fuels

V. The distinction between NHSM combusted by the generator for energy recovery and NHSM transferred to another entity for combustion for energy recovery is reasonable

- It is appropriate to take different approaches to materials used for energy recovery by either the generator or a third party

-If the material meets the legitimacy criteria, it has been saved rather than discarded.

-The recipient of the transferred fuels may not have the same incentive to manage the material as a useful product, and therefore material is determined to be a solid waste unless EPA finds that it will be used as a product fuel.

-Court gave EPA the ability to resolve uncertainty in favor of minimizing health risks (which is the reason behind the blanket classification of transferred materials as solid wastes)

-Industry uses paper recycling residuals as an example, but EPA says that example is unripe because the proposed NHSM supplemental rule is not final.

VI. The legitimacy criteria are reasonable

-Legitimacy criteria are used to distinguish between combustion as a product fuel and combustion for “discard”

 -It is necessary to compare the levels of contaminants in the NHSM to those in traditional fuels that the material could replace in order to use it as a product fuel

 -EPA says that the petition process exists so that facilities can submit information about a specific material that may not be listed, but should be.

VII. Industry petitioners’ claims regarding construction and demolition wood, railroad ties and other treated wood are prudentially unripe

-Claims unripe because those materials are being considered in the proposed NHSM supplemental rule.

VIII. Sewage sludge is not statutorily excluded from regulation as a solid waste

 -EPA did not exclude sewage sludge from the definition of solid waste when combusted.

 -Court decision in *NACWA v. EPA* implied that sewage sludge combusted in SSIs is a solid waste

 -Sewage sludge is not “domestic sewage” because the sludge comes from a municipal wastewater treatment plant

 -This Court already rejected the claim that Congress intended the CWA to regulate sewage sludge.

-Because EPA is required under RCRA to determine whether sewage sludge is a solid waste when combusted for energy recovery, EPA also has the discretion to determine whether those combustion units are regulated under CAA §112 or 129.