EARTHJUSTICE

VIA EMAIL AND CERTIFIED MAIL – RETURN RECEIPT REQUESTED

August 19, 2021

Michael S. Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Notice of Citizen Suit Concerning Clean Air Act Deadlines for Large Municipal Waste Combustor Standards

Dear Administrator Regan,

This letter constitutes notice under 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54 that East Yard Communities for Environmental Justice, Ironbound Community Corporation, and Sierra Club intend to commence suit against the Administrator of the U.S. Environmental Protection Agency ("EPA") for EPA's failure to "review and revise" its performance standards and other requirements for solid waste incineration units with capacity greater than 250 tons per day combusting municipal waste ("large municipal waste combustors" or "large MWCs") by the deadline set forth in the Clean Air Act,[1] for EPA's failure to act on a related administrative petition, and for EPA's failure to act on a related reconsideration petition, as set forth below. These failures constitute "failure[s] of the Administrator to perform an[] act or duty under [the Clean Air Act] which is not discretionary with the Administrator" within the meaning of the Clean Air Act citizen suit provision.[2]

I. ORGANIZATIONS PROVIDING NOTICE.

The following organizations hereby provide notice of their intent to sue:

East Yard Communities for Environmental Justice
2317 South Atlantic Boulevard
Commerce, California 90040
(323) 263-2113

Ironbound Community Corporation
317 Elm Street
Newark, NJ 07105

[1] 42 U.S.C. § 7429(a)(5).
[2] *Id.* § 7604(a)(2).

(973) 465-0555

Sierra Club
2101 Webster St Suite 1300
Oakland, CA 94612
(415) 977-5500

For decades, these organizations have advocated to reduce the adverse impacts that large MWCs impose on environmental justice communities.[3] Their members and staff live, work, and recreate near some of the largest MWCs in the country. These groups are concerned about the large quantity of air emissions permitted by EPA's lax and outdated large MWC standards. Among all polluting facilities in their communities, large MWCs are some of if not *the* highest emitters of the pollutants regulated under EPA's standards, such as particulate matter, hydrogen chloride, oxides of nitrogen, lead, and mercury.[4]

II. CLEAN AIR ACT PROVISIONS REQUIRE EPA TO "REVIEW AND REVISE" LARGE MWC STANDARDS.

Clean Air Act Section 7429 requires EPA to establish "performance standards and other requirements pursuant to section 7411 of [the Clean Air Act] and this section" for new and existing solid waste incineration units by statutory deadlines that vary per each category of incinerator.[5] Once these standards are established, the Act then requires EPA to review and revise the standards at 5-year intervals, providing,

> Not later than 5 years following the initial promulgation of any performance standards and other requirements under this section and section 7411 of this title applicable to a category of solid waste incineration units, and at 5 year intervals thereafter, the

[3] *See* Ana Isabel Baptista & Adrienne Perovich, *U.S. Municipal Solid Waste Incinerators: An Industry in Decline* at 15 & App. E, Tishman Env't and Design Ctr. (May 2019), https://static1.squarespace.com/static/5d14dab43967cc000179f3d2/t/5d5c4bea0d59ad00012d220e/1566329840732/CR_GaiaReportFinal_05.21.pdf (noting that 79% of U.S. municipal solid waste incinerators are located in environmental justice communities, and that between 67% and 83% of the twelve incinerators that emit the most nitrogen oxides, sulfur dioxide, lead, mercury, particulate matter, and carbon monoxide are located in environmental justice communities, depending on the pollutant).

[4] 42 U.S.C. § 7429(a)(4); Earthjustice & Vermont Law School Environmental Advocacy Clinic, *New Jersey's Dirty Secret: The Injustice of Incinerators and Trash Energy in New Jersey's Frontline Communities* at 9, https://earthjustice.org/sites/default/files/files/nj-incinerator-report_earthjustice-2021-02.pdf (noting that the large MWCs in Newark and Camden, New Jersey, are the largest emitters of these five pollutants in their respective counties).

[5] 42 U.S.C. § 7429(a)(1).

> Administrator shall review, and in accordance with this section and section 7411 of this title, revise such standards and requirements.[6]

The Act's deadline for EPA to promulgate its first performance standards and other requirements for large MWCs was November 15, 1991 – the earliest deadline among all categories of incinerators.[7] With review and revision no later than every 5 years, EPA should be conducting it sixth such review and revision of the large MWC standards by now. Nonetheless, as explained in the next section, EPA has reviewed the large MWC standards only once.

This requirement to review and revise applies to "any performance standards and other requirements under this section [7429] and section 7411" and must be conducted "in accordance with this section [7429] and section 7411."[8] Section 7429 specifies that, for new incinerator units, the emission reductions required under such standards "shall not be less stringent than the emissions control that is achieved in practice by the best controlled similar unit;" and that for existing incinerator units, the emission reductions "shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category."[9] These minimum requirements on the stringency of the emission standards are commonly known as "MACT floors."[10]

The distinct Clean Air Act rulemaking provisions of Section 7607(d) set forth that if the public raises relevant objections to a final rule whose grounds arose "after the period for public comment (but within the time specified for judicial review)," then "the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed."[11] These provisions specifically apply to "the promulgation of any requirement for solid waste combustion under section 7429."[12]

In addition to these Clean Air Act provisions, the generally applicable provisions of the Administrative Procedure Act require "[e]ach agency [to] give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[13] In addition, "each agency shall proceed to conclude a matter presented to it" "within a reasonable time."[14]

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[6] *Id.* § 7429(a)(5).
[7] 42 U.S.C. § 7429(a)(1)(B).
[8] *Id.* § 7429(a)(5).
[9] *Id.* § 7429(a)(2).
[10] *See* Standards of Performance for Municipal Waste Combustors, 60 Fed. Reg. 65,387, 65,391 (Dec. 19, 1995).
[11] 42 U.S.C. § 7607(d)(7)(B).
[12] *Id.* § 7607(d)(1)(D).
[13] 5 U.S.C. § 553(d).
[14] *Id.* § 555(b).

III. EPA'S PROMULGATION OF 2006 LARGE MWC STANDARDS AND SUBSEQUENT PROCEEDINGS.

EPA established initial standards for large MWCs on December 19, 1995,[15] and has since reviewed and revised those standards only once, on May 10, 2006.[16] EPA's proposed rule for the 2006 large MWC standards did not propose a recalculation of the MACT floors that EPA had used in the 1995 standards.[17] During the public comment period, Earthjustice submitted an administrative petition that, among other points, sought that EPA redo these MACT floors because of D.C. Circuit rulings that the method that EPA used in 1995 to calculate the MACT floors was not permissible under the Clean Air Act.[18] Despite this petition, EPA finalized the 2006 large MWC standards without recalculating the MACT floors.

Sierra Club subsequently petitioned for review of these large MWC standards in the D.C. Circuit.[19] In that proceeding, EPA moved for voluntary remand, stating that after its "re-examin[ation]" of the administrative petition, the Agency concluded that the MACT floors it used in 1995 and 2006 are "not consistent" with the D.C. Circuit precedent.[20] Because of this, EPA stated that it "intends to grant th[e] [Earthjustice] administrative petition and initiate a rulemaking to re-analyze the floors in the 1995 rule."[21] Based on these representations, the D.C. Circuit granted EPA's request to voluntarily remand the 2006 large MWC standards so that the Agency could redo the standards.[22] The court noted that, in the event of EPA's delay in complying with the remand to redo the standards, "the appropriate remedy . . . is mandamus."[23] To date, EPA has neither revised its 2006 large MWC standards nor formally granted the administrative petition, despite its representations to the court that it would do both.

In addition to the D.C. Circuit proceeding, in 2006, Sierra Club submitted a petition under Clean Air Act section 7607(d)(7)(B) for EPA to reconsider four discrete aspects of the Final Rule that

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[15] Standards of Performance for Municipal Waste Combustors, 60 Fed. Reg. 65,387 (Dec. 19, 1995).
[16] Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 71 Fed. Reg. 27,324 (May 10, 2006).
[17] *See* Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 70 Fed. Reg. 75,348 (proposed Dec. 19, 2005).
[18] Earthjustice, Comment Letter on Proposed Rules for Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Stationary Sources: Large Municipal Waste Combustors (Feb. 2006) (attached to EPA Mot. for Voluntary Remand, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir. Nov. 9, 2007) (attached as Attachment 1)).
[19] *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir.).
[20] EPA Mot. for Voluntary Remand, Att. 1 at 8; EPA Reply in Further Support of Its Motion for Voluntary Remand, *Sierra Club v. EPA*, No. 06-1250, at 3 (D.C. Cir. Dec. 6, 2007) (attached as Attachment 2).
[21] EPA Mot. for Voluntary Remand, Att. 1 at 8; EPA Reply in Further Support of Its Motion for Voluntary Remand, Att. 2 at 3.
[22] Order, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir. Feb. 15, 2008) (attached as Attachment 3).
[23] *Id*. (citing *Natural Resources Defense Council v. EPA*, 489 F.3d 1364, 1375 (D.C. Cir. 2007)).

arose after the comment period.[24] EPA accepted the first three issues for reconsideration and issued a notice of reconsideration on March 20, 2007, asking for public comments on the three issues within 30 days.[25] EPA never finalized the reconsideration of these three points, nor did it ever indicate whether it accepted or rejected the fourth point (concerning emission limits for lead) for reconsideration.

IV. EPA'S VIOLATIONS OF THE CLEAN AIR ACT.

East Yard Communities for Environmental Justice, Ironbound Community Corporation, and Sierra Club hereby provide notice of their intent to commence suit for four distinct violations of the Clean Air Act.

First, EPA has failed to comply with the 5-year review and revision requirement of the Clean Air Act. EPA's most recent review and revision of its large MWC standards was completed on May 10, 2006, over 15 years ago.[26] EPA's review and revision of these standards is thus more than 10 years overdue, since EPA's deadline was May 10, 2011.[27] This is a violation of the "review and revise" provision of Clean Air Act,[28] and constitutes a "failure of the Administrator to perform an[] act or duty under [the Clean Air Act] which is not discretionary" within the meaning of the Clean Air Act citizen suit provision.[29]

Second, EPA has failed to update the MACT floors used in the 1995 and 2006 large MWC standards – floors that EPA admitted were inconsistent with the law over a decade ago. This is a violation of EPA's requirement to review and revise "any performance standards and other requirements under [section 7429] and section 7411 . . . in accordance with [section 7429] and 7411,"[30] and constitutes a "failure of the Administrator to perform an[] act or duty under [the Clean Air Act] which is not discretionary" and "agency action unreasonably delayed" within the meaning of the Clean Air Act citizen suit provision.[31]

Third, EPA has failed to respond to the Earthjustice administrative petition – despite the petition being before the Agency for over 15 years, and despite EPA's representations to the D.C. Circuit

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[24] Sierra Club, Petition on Final Rule for Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, (July 7, 2006) (attached as Attachment 4).
[25] Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 72 Fed. Reg. 13,016 (March 20, 2007).
[26] *See* Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 71 Fed. Reg. 27,324 (May 10, 2006).
[27] 42 U.S.C. § 7429(a)(5).
[28] *Id.* § 7429(a)(5).
[29] *Id.* § 7604(a)(2).
[30] *Id.* § 7429(a)(5).
[31] *Id.* § 7604(a).

in 2007 that it "intends to grant th[e] administrative petition."[32] This is a violation of EPA's duty to "conclude a matter presented to it,"[33] and constitutes a "failure of the Administrator to perform an[] act or duty under [the Clean Air Act] which is not discretionary" and "agency action unreasonably delayed" within the meaning of the Clean Air Act citizen suit provision.[34]

Fourth, EPA has failed to finalize its reconsideration of the issues raised in the Sierra Club petition for reconsideration under section 7607(d)(7)(B) – despite EPA having closed public comment on the reconsidered issues over 13 years ago. This is a violation of EPA's duty to "conclude a matter presented to it,"[35] and constitutes a "failure of the Administrator to perform an[] act or duty under [the Clean Air Act] which is not discretionary" and "agency action unreasonably delayed" within the meaning of the Clean Air Act citizen suit provision.[36]

East Yard Communities for Environmental Justice, Ironbound Community Corporation, and Sierra Club may commence a citizen suit to compel EPA to perform any or all of the above acts or duties at any time beginning 60 days from the postmark date of this letter.[37] In addition to the above violations, we also hereby notify EPA of our intent to file a petition for writ of mandamus in the D.C. Circuit for EPA's failure to finalize the reconsideration of the large MWC standards that EPA represented to the court it would undertake.[38]

East Yard Communities for Environmental Justice, Ironbound Community Corporation, and Sierra Club are willing to discuss effective remedies for the violations identified above that may avoid the need for further litigation. If you wish to pursue such discussion, please promptly contact counsel below so that negotiations may timely commence. Counsel will not delay filing a complaint in federal court if no such communication is received before the end of the notice period.

Date: August 19, 2021

Sincerely,

/s/ Jonathan J. Smith
JONATHAN J. SMITH
JASMINE CRENSHAW

[32] EPA Mot. for Voluntary Remand, Att. 1 at 8; EPA Reply in Further Support of Its Motion for Voluntary Remand, Att. 2 at 3.
[33] 5 U.S.C. § 555(b).
[34] 42 U.S.C. § 7604(a).
[35] 5 U.S.C. § 555(b).
[36] 42 U.S.C. § 7604(a).
[37] *Id.* § 7604(b); 40 C.F.R. § 54.2(d).
[38] *See* Order, Att. 3 at 1 ("the appropriate remedy for an agency's delay in issuing a final decision is mandamus.").

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Counsel for East Yard Communities for Environmental Justice, Ironbound Community Corporation, and Sierra Club

CC: Melissa Hoffer, Acting General Counsel, Office of the General Counsel, EPA
Joseph Goffman, Acting Assistant Administrator, Office of Air and Radiation, EPA
Peter Tsirigotis, Director, Office of Air Quality Planning and Standards, EPA

Attachment 1

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and STEPHEN L. JOHNSON, Administrator Respondents.	)	No. 06-1250

EPA'S MOTION FOR VOLUNTARY REMAND

Respondents United States Environmental Protection Agency and Stephen L. Johnson, Administrator (jointly, "EPA" or the "Agency"), hereby move for a voluntary remand of EPA's final action titled "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors." 71 Fed. Reg. 27,324 (May 10, 2006) (the "LMWC Final Rule").

A primary focus of Petitioner's challenge to the LMWC Final Rule concerns the methodology EPA used to derive the new source performance standards and emission guidelines for Large Municipal Waste Combustors ("LMWCs") under Sections 111 and 129 of the Clean Air Act, 42 U.S.C. §§ 7411, 7429. In commenting on the proposed rule, Petitioner asserted, among other things, that the

standards and emission guidelines that EPA promulgated in 1995 pursuant to Clean Air Act Section 129(a)(2) were unlawful and contrary to subsequent D.C. Circuit case law. In addition to these comments, Petitioner included an administrative petition, asking EPA to revise the standards and emission guidelines in the 1995 rule consistent with the floor requirements of Section 129(a)(2) and D.C. Circuit precedent.[1/]

EPA has decided to grant Petitioner's administrative petition to review the 1995 standards. Because the LMWC Final Rule comprises revisions to several standards of performance and emission guidelines initially established in the 1995 rule, and because the LMWC Final Rule supercedes relevant portions of the 1995 rule, reexamination of the 1995 rule would necessitate reexamining the LMWC Final Rule. Specifically, if any of the 1995 standards change as the result of EPA's re-analysis of the 1995 floors under Section 129(a)(2), EPA would need to re-evaluate its conclusions in the LMWC Final Rule because that rule involved a review and analysis of the standards and requirements of the 1995 rule. Accordingly, EPA requests that the Court remand the LMWC Final Rule so that EPA can make any changes to the LMWC Final Rule that may flow from EPA's

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[1/] In developing standards of performance under Section 129(a)(2), EPA first establishes a "floor" and then determines whether additional reductions beyond the floor are appropriate, considering, among other things, the cost of such additional reductions. The floors represent the minimum level of stringency of the standards.

reexamination of the 1995 floors. This Court recently granted a motion for a voluntary remand under similar circumstances. Natural Resources Defense Council v. EPA, 489 F.3d 1364 (D.C. Cir. 2007), and it should do so again here.

BACKGROUND

On December 19, 1995, EPA adopted standards of performance for new LMWCs and emission guidelines for existing LMWCs, pursuant to Sections 111 and 129 of the Clean Air Act, 42 U.S.C. §§ 7411, 7429. 60 Fed. Reg. 65,387. Section 129(a)(2) of the Clean Air Act provides that the standards for existing units "shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category."[2/] 42 U.S.C. § 7429(a)(2). Section 129(a)(2) further provides that for new units, the standards "shall not be less stringent than the emissions control that is achieved in practice by the best controlled similar unit." Id. As noted above, these levels of minimum stringency are commonly referred to as "floors."

On December 19, 1995, EPA issued a final rule pursuant to Section 129, setting standards for new and existing LMWCs. 60 Fed. Reg. 65,387. In that rule, EPA based the floors for LMWCs on the emission limits established in state-issued air permits. By December 2000, the 1995 standards were fully implemented, and

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[2/] The standards for existing units are expressed in the form of emission "guidelines." See 42 U.S.C. § 7429(b).

those standards have resulted in substantial reductions in emissions of the pollutants regulated under Section 129. See 70 Fed. Reg. 75,348, 75,350 (Dec. 19, 2005) (stating that, relative to a 1990 baseline, the standards for existing sources reduced organic emissions by more than 99 percent, metal emissions by more than 93 percent, and acid gas emissions by more than 91 percent).

In 2004, in reviewing EPA's rule setting performance standards for Small Municipal Waste Combustors, this Court concluded that the floors for existing units that EPA had derived from state-issued permit limits did not fulfill the requirement in Section 129(a)(2) that floors reflect the performance of the best performing 12 percent of units. Northeast Maryland Waste Disposal Authority v. EPA, 358 F.3d 936 (D.C. Cir. 2004). Although the Court held that EPA could determine floors based on state permit data, it concluded that the record before it did not adequately explain whether the state permit levels reflected a reasonable estimate of the emission levels achieved by the best-performing 12 percent of existing units. In Northeast Maryland, the Court also focused on certain affirmative evidence in the record that called into question whether the floors in fact represented a reasonable estimate of the average level of reductions in emissions achieved by the best performing 12 percent of existing units. Id. at 953-54.

Pursuant to Section 129(a)(5), EPA must "review and, in accordance with this section [Section 129] and section 7411 [Section 111], revise" standards of performance and other requirements, every five years. 42 U.S.C. § 7429(a)(5). On December 19, 2005, pursuant to section 129(a)(5), EPA proposed the LMWC Final Rule, which set forth the Agency's proposed revisions of the new source performance standards and emission guidelines for existing LMWCs. 70 Fed. Reg. 75,348. EPA did not perform a new "floor" analysis in connection with that proposal. Rather, the Agency relied on the 1995 rule as the foundation for its revisions. EPA's proposed rule contained revised emission limits for dioxin, cadmium, lead, mercury and particulate matter for existing LMWCs. EPA also proposed to revise emission limits for cadmium, lead, mercury, and particulate matter for new LMWCs.

In February 2006, Petitioner submitted comments on the proposed rule. While Petitioner noted improvements over the 1995 rule, including more stringent emission standards, it challenged various aspects of the rule. The central focus of Petitioner's comments concerned the methodology by which EPA developed the floors in 1995. Specifically, Petitioner argued that the 1995 floors were unlawful and contrary to subsequent D.C. Circuit precedent, citing Northeast Maryland, 358 F. 3d 936, and Cement Kiln Recycling Ass'n v. EPA, 255 F.3d 855, 861-63 (D.C. Cir.), and that EPA had a legal obligation under Section 129(a)(5) to recalculate

the floors when it promulgated the LMWC Final Rule. (See Exhibit A, Comments of Earthjustice, at 3-4.)

In addition, Petitioner made an alternative argument and, on that basis, petitioned the agency to amend the 1995 regulations. Petitioner argued that, even if EPA has no obligation to re-examine the floors under Section 129(a)(5), the Agency should grant its administrative petition for rulemaking, re-open the 1995 rule under Section 129(a)(2), and revise the floors in the 1995 rule consistent with the statute and subsequent jurisprudence. Petitioner based this administrative petition on Kennecott Utah Copper Corp. v. Department of Interior, 88 F.3d 1191, 1213 (D.C. Cir. 1996) (holding that a petitioner may allege a claim, outside the statute of limitations period, that an agency action violated a statute, by filing a petition for amendment or rescission of the agency's regulations, and then challenging the denial of that petition). In its administrative petition, Petitioner asserted that EPA did not explain in the 1995 rule why the state permit limits reflect the actual performance of the best performing 12 percent of units. (Exhibit A, Comments of Earthjustice, at 3-4) (alleging that information in the record indicated that LMWCs were achieving emission levels better than their permit limits required).

On May 10, 2006, EPA issued the LMWC Final Rule under Clean Air Act Section 129(a)(5). The agency, among other things, disagreed with Petitioner's

argument that EPA was obligated by Section 129(a)(5) to recalculate the floors in connection with its periodic review. 71 Fed. Reg. at 27,327-28. On July 7, 2006, Petitioner filed the instant petition for review and, pursuant to Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), also submitted to EPA an administrative petition asking EPA to reconsider four separate aspects of the LMWC Final Rule (the "Petition for Reconsideration"), none of which involved the recalculation of floors. After reviewing the Petition for Reconsideration, EPA determined that it was appropriate to initiate an administrative reconsideration process in response to the petition.

On October 31, 2006, this Court granted EPA's unopposed motion to hold this case in abeyance pending the Agency's evaluation of the Petition for Reconsideration. At the same time, the Court ordered EPA to file status reports at 90-day intervals. EPA has been submitting status reports consistent with this Court's order. On March 20, 2007, EPA issued a proposed notice of its reconsideration of the LMWC Final Rule in the Federal Register, 72 Fed. Reg. 13,016. EPA has not yet taken final action on the pending Petition for Reconsideration.

Since mid-March 2007, this Court has issued three decisions that are relevant to rules promulgated pursuant to Clean Air Act Sections 112 and 129. Sierra Club v. EPA, 479 F.3d 875 (D.C. Cir. Mar. 13, 2007) (vacating EPA's

regulations setting national emission standards for brick and clay ceramics kilns under Section 112); Natural Resources Defense Council v. EPA, 489 F.3d 1250 (D.C. Cir. June 8, 2007) (vacating EPA regulations setting national emission standards under Section 112 for hazardous air pollutants from industrial, commercial, and institutional boilers and process heaters and EPA's regulations under Section 129 defining the term "commercial and industrial solid waste incineration unit"); and Natural Resources Defense Council v. EPA, 489 F.3d 1364 (D.C. Cir. June 19, 2007) (vacating portions of an EPA rule promulgated under Section 112 regulating hazardous air pollutants from the manufacture of plywood and composite wood products).

On July 16, 2007, in EPA's Third Status Report, EPA advised the Court that it was evaluating the effect of these three recent decisions on the LMWC Final Rule and that it intended to complete such evaluation by mid-September 2007, and take appropriate next steps. In conjunction with its review of these decisions, EPA also re-examined Petitioner's 2005 administrative petition seeking revision of the 1995 rule. EPA now intends to grant that administrative petition and initiate a rulemaking to re-analyze the floors in the 1995 rule, which EPA established pursuant to Section 129(a)(2). As part of that review, EPA will consider this Court's precedent on the issue of establishing floors under Sections 112 and 129,[3/]

[3/] The floor requirements in sections 112 and 129 are essentially equivalent.

including the Court's most recent decision on the issue, Sierra Club v. EPA, 479 F. 3d 875 (D.C. Cir. 2007) (the "Brick decision"). Among other things, the Brick decision holds that EPA cannot base its floors exclusively on technology, but rather must consider non-technology factors that affect Hazardous Air Pollutant emissions.

ARGUMENT

This Court possesses ample discretion to grant a voluntary remand in these circumstances. See, e.g., Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) ("We commonly grant such motions [for remand], preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete.").

In this case, EPA seeks a voluntary remand of the LMWC Final Rule so that it can revisit the floors from the 1995 rule and revise the LMWC Final Rule as necessary to comport with any revisions to the 1995 floors. A remand is clearly appropriate in this case. As explained above, the LMWC Final Rule revised several standards and guidelines established in the 1995 rule and superceded relevant portions of the 1995 rule. As a result, in order to re-examine the floors underlying the 1995 standards and make any changes to the 1995 standards necessitated by that reexamination, the Agency needs the court to remand the

LMWC Rule to it. EPA intends to revisit the data and information used in the 1995 rule, as well as obtain additional data, to determine whether the 1995 floors need to be revised to comport with this Court's precedents. If any of the 1995 standards change as the result of EPA's re-analysis of the 1995 floors under Section 129(a)(2), EPA would need to re-evaluate its conclusions in the LMWC Final Rule because that rule involved a review of the standards and requirements in the 1995 rule. The Agency, therefore, seeks a remand of the LMWC Final Rule so that it can make any changes to the LMWC Final Rule that may flow from EPA's revisiting the 1995 floors.

Moreover, a re-evaluation of the floors in the 1995 rule may moot Petitioner's central challenge in this litigation. For example, in this case, Petitioner argues that the 1995 floors were not consistent with the floor requirements in Section 129(a)(2). By granting Petitioner's administrative petition, EPA will be conducting rulemaking to re-evaluate the 1995 floors. In addition, Petitioner challenges EPA's failure to consider pre-combustion controls, such as removing materials from the waste stream. (See Ptr.'s Nonbinding Statement of Issues 8/16/06 ¶¶ 1-9, 14; see also Exhibit A, Comments of Earthjustice, at 6.) To determine the floor for existing sources (i.e., the average emission limitation that is being achieved by the best performing 12 percent of LMWCs), the Agency must identify the best performing 12 percent of sources. Consistent with this Court's

recent precedent, EPA intends to evaluate both technology and non-technology factors that affect Hazardous Air Pollutant emissions. Among other things, EPA will re-evaluate whether units with electrostatic precipitators, as opposed to fabric filters, are part of the top 12 percent of sources, which is another one of Petitioner's principal objections. EPA also will reexamine the emission standards for all of the pollutants identified in Section 129(a)(4), in connection with its review of Petitioner's administrative petition. If EPA revises the 1995 standards in response to the administrative petition, it may determine that additional changes, such as changes to monitoring requirements, would be appropriate in light of the revised standards. EPA requests that the Court remand the LMWC Final Rule so that the Agency can make any changes to the rule that may flow from EPA's reconsideration of the 1995 floors.

It would be inefficient for this case to proceed through briefing, argument, and decision -- at which point the Court might remand the rule -- when EPA desires such a remand now so that it may fully consider the implications of this Court's decisions regarding permissible bases for calculating floors under Section 129(a)(2). The most practical and efficient process is for this Court to remand the case and allow EPA to revisit the 1995 rule in light of the principles set forth by the Court in Northeast Maryland Waste Disposal Authority and subsequent

precedent, including Sierra Club.[4/] EPA can then reevaluate the LMWC Final Rule and make any changes to that rule that may flow from EPA's reexamination of the 1995 floors.

CONCLUSION

For the reasons set forth above, this Court should remand the LMWC Rule to EPA pursuant to Circuit Rule 42(b).

Dated: November 9, 2007

Respectfully submitted,

RONALD J. TENPAS
Acting Assistant Attorney General
Environment & Natural Resources Division

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[4/] Remand without vacatur is appropriate here for three principal reasons. First, sources have been complying with the 1995 standards since December 19, 2000, see 70 Fed. Reg. 75,348, 75,350 (Dec. 19, 2005), and the controls that facilitate compliance with the 1995 standards are also expected to allow sources to comply with the revised standards established in the LMWC Final Rule. Second, existing sources are not currently required to comply with the revised standards and won't be required to do so for some time. Third, allowing the regulations to remain effective during EPA's reconsideration of the 1995 standards would be beneficial to the environment.

OF COUNSEL:

RICHARD H. VETTER
U.S. Environmental Protection Agency
Research Triangle Park, North Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing EPA's Motion for Voluntary Remand was today served, this 9th day of November, 2007, via first class mail, on the following counsel of record:

James S. Pew, Esquire
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Scott M. DuBoff, Esquire
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Paul Cirino

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Stationary Sources: Large Municipal Waste Combustors; Proposed Rule 69 Fed. Reg. 75348 (December 19, 2005)	Air and Radiation Docket No. OAR-2005-0117

COMMENTS OF EARTHJUSTICE

I. BACKGROUND.

Earthjustice appreciates the opportunity to comment on EPA's proposed revisions to its Clean Air Act regulations for large municipal waste combustors (MWC), 65 Fed. Reg. 75348 (December 19, 2005). Each year, by EPA's own estimates, large MWC continue to emit more than thirteen tons of mercury, forty-two grams of dioxins (TEQ), twenty-four tons of lead, and vast quantities of particulate matter and acid gases. *See* 60 Fed. Reg. 65387, 65403 (December 19, 1995) (citing (59 Fed. Reg. 48918, 48238 (September 30, 1994)). According to EPA, MWC also are a predominant source of polychlorinated biphenyls (PCBs) emissions in the United States and major emitters of other toxic organic pollutants. Because EPA's estimates do not account for emissions during startup, shutdown, malfunction, or other periods in which MWC exceed their emission limitations, it is likely that MWCs' actual emissions of all pollutants are significantly higher than the agency's estimates acknowledge.

EPA's proposal includes some improvements over the agency's 1995 regulations. These include:

- improving many of EPA's emissions standards;
- establishing an 8-hour block average for measuring activated carbon injection (ACI) rate, whereas EPA's existing standards apparently allow any averaging period to be used;
- considering a requirement to monitor pneumatic injection pressure at the location where the activated carbon is injected into the flue gas — a measure that would provide greater assurance that pollution control devices are working properly and that MWC are meeting their emission limits;
- requiring sources to meet mercury as well as dioxin criteria to qualify as "exceptionally well-operated" — a change that reduces a loophole in EPA's existing regulations; and
- improving the existing CEMs data collection requirement, giving permitting authorities and the public better information with which to evaluate MWCs' emissions and compliance with emission standards.

Unfortunately, EPA's proposal falls short of providing the public health and environmental protection that Congress intended. Most importantly, although many of the revised standards are somewhat more stringent than the existing standards, the agency itself states that they are not expected to yield any additional emission reductions. Indeed, EPA has expressed concern that because the revised standards still allow emission levels that are substantially worse than those actually being achieved by MWC, the new standards have the potential to allow significant "backsliding." Docket OAR-2005-0117, Item 0042 (Email of November 9 ,2005 from Walt Stevenson, EPA to Edmond Toy, OMB). Further, EPA has acknowledged that if just twenty-one large MWC improved their emission levels to those that the agency knows to be achievable through the use of control technology that is currently in place at the other 146 MWC, the nation would see substantial emission benefits. 70 Fed. Reg. at 75355. The premise for that observation is that these twenty-one units, which currently are equipped with electrostatic precipitators (ESPs), could improve their performance by switching to fabric filters (FF), yielding more than 130 tons per year of additional emission reductions each year. *Id.* Significantly, the ESP-equipped MWC already are subject to the same emission standards as the FF-equipped units, with respect to most of the pollutants regulated under § 129. Thus, if the 146 FF-equipped units also brought their emissions down to the level that EPA now acknowledges is actually being achieved through the use of FF, even greater emissions reductions would result. That EPA's proposal would — by EPA's own estimation — not yield any emission reductions makes plain that the agency's proposal is far less protective than it could be and should be. As shown below, it also is less protective than the Clean Air Act requires.

Also of great concern is EPA's failure to propose any pre-combustion requirements that would prevent or reduce the burning of batteries, switches, PVC plastics, and other wastes that increase emissions of highly toxic, persistent, and bioaccumulative pollutants. It is beyond dispute that requiring MWC to eliminate such substances from the waste they burn, or to reduce the amounts of such substances in the waste they burn, would yield significant reductions above and beyond those resulting from the use of combustion controls and end-of-stack control technology. Congress could not have indicated more clearly that it wanted EPA's incinerator standards to include pre-combustion pollution prevention measures such as materials separation, and the agency's own waste disposal hierarchy makes clear that recycling and pollution prevention are priorities. This rulemaking presents EPA with an opportunity to significantly reduce MWC's toxic emissions through pre-combustion measures. To ignore this opportunity — as EPA's proposal does — is both unlawful and misguided.

II. FAILURE TO REVISE THE FLOORS IN ACCORDANCE WITH § 129.

A. Section 129(a)(5) Requires EPA To Revise Its § 129 Standards To Ensure That They Reflect The Actual Performance Of The Best Performing Units.

The Clean Air Act provides "[n]ot later than 5 years following the initial promulgation of any performance standards and other requirements under this section and section 7411 of this title applicable to a category of solid waste incineration units, and at 5 year intervals thereafter, the Administrator shall review, and in accordance with this section and section 7411 of this title, revise such standards and requirements." 42 U.S.C. § 7429(a)(5). EPA initially promulgated emission standards for large municipal waste combustors (MWC) on December 19, 1995. 65

Fed. Reg. 65387 (December 19, 2005). Thus, the agency had a nondiscretionary duty to complete its first review and revision of these regulations no later than December 19, 2000. 42 U.S.C. § 7429(a)(5). After EPA failed to meet that obligation, the agency was ordered to do so by the United States District Court for the District of Columbia. *Sierra Club v. Whitman*, D.D.C. No. 01-1537.

As noted above, Clean Air Act § 129(a)(5) requires EPA to revise its MWC standards "in accordance with" § 129. 42 U.S.C. § 7429(a)(5). To satisfy § 129(a)(5), therefore, EPA must conduct a new floor analysis to ensure that its revised standards are "in accordance with" § 129(a)(2)'s floor requirements. Specifically, EPA's revised standards for existing MWC must, at a minimum, reflect the average emission level that is currently being achieved by the best performing twelve percent of MWC. 42 U.S.C. § 7429(a)(2). Likewise, EPA's revised standards for new MWC must reflect the actual performance of the single best performing unit. *Id.*

EPA has not even attempted to comply with this requirement. Nothing in EPA's proposal indicates that EPA identified the relevant best performing sources or determined the average emission level that these sources are achieving. Although EPA revised some of its standards, the revised standards do not purport to reflect the actual performance of the relevant best performing sources. Rather, where EPA revised its standards at all, the new standards appear to reflect emission levels that the agency regarded as achievable for all units through the use of certain control technology. EPA does not claim that its new standards reflect the actual performance of the relevant best units. Further, even if EPA had made such a claim, it is well established that the agency cannot satisfy the Clean Air Act's floor requirements by setting standards at levels that it regards as achievable for all units through the use of chosen control technologies. *Cement Kiln Recycling Association v. EPA*, 255 F.3d 855, 861-863 (D.C. Cir. 2001) ("*CKRC*"). Therefore, EPA has not revised its standards in accordance with § 129(a)(2), as § 129(a)(5) requires.

B. Because EPA's 1995 Standards Were Unlawful, § 129(a)(5) Requires The Agency To Revise Them In Accordance With § 129(a)(2).

Even if § 129(a)(5) did not always require EPA to recalculate the floors for its § 129 standards, it would require the agency to do so here. Section 129 requires that the floors for existing units reflect the actual performance of the best performing twelve percent of units. 42 U.S.C. § 7429(a)(2). Likewise, floors for new units must reflect the actual performance of the single best-performing unit. *Id.* Where EPA seeks to estimate the relevant best units' performance, it must explain why its estimates are reasonable and must corroborate its assumptions "with substantial evidence — not mere assertions." *CKRC*, 255 F.3d 855 at 866. *See also Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 954 (D.C. Cir. 2004) (remanding EPA's § 129 standards for small MWC where agency failed to provide "evidence that the permit levels reflect the emission levels of the best-performing 12 percent of existing MWCs").

Nonetheless, the floors the EPA established in its 1995 rulemaking did not even purport to reflect the emission levels achieved by the best performing MWC. EPA's floors for existing units reflected requirements in existing State air permits. 59 Fed. Reg. 48198, 48245 (September

20, 1994); Docket A-90-45, Item IV-B-8 at 1-2. Indeed, EPA did not even claim that these permit limits reflected the actual performance of the relevant best units. Instead, the agency argued that it had discretion to interpret the Clean Air Act as requiring floors to be based on limits in State air permits regardless of whether such limits were representative of the best units' actual performance. Docket A-90-45, Item V-B-1 at 7-70 – 7-71.

The statutory interpretation on which EPA's 1995 regulations rested was flatly unlawful, and has been soundly and repeatedly rejected by the D.C. Circuit:

> In *Sierra Club v. EPA*, 167 F.3d 658, (D.C. Cir. 1999), the court rejected EPA's similar use of state permit limits to set the MACT floor for medical waste incinerators (MWIs). The court recognized that CAA § 129 may permissibly be construed "to permit the use of regulatory data" but only "if they allow EPA to make a reasonable estimate of the performance of the top 12 percent of units." 167 F.3d at 662. The court rejected the use of such data in that case because "[a]lthough EPA said that it believed the combination of regulatory and uncontrolled data gave an accurate picture of the relevant MWI's performance, it never adequately said why it believed this." EPA fares no better here.

Northeast Maryland Waste Disposal Authority, 358 F.3d at 953-954 (emphasis in original). Further, even if EPA had claimed that its floors reflected the best sources' performance — which it did not — the record contains no explanation or substantial evidence supporting any such assertion. Moreover, overwhelming record evidence shows that even before the 1995 regulations were issued, MWC were achieving emission levels considerably better than their permit limits required. For example, EPA admitted that the actual performance achieved by the Kent County, Michigan MWCs was .007 milligrams per dry standard cubic meter (mg/dscm) — i.e., more than 100 times better than .870 mg/dscm, the level that their State permits allowed. For these reasons, the floor approach that EPA adopted in promulgating the 1995 MWC regulations was unlawful and arbitrary and capricious.

Like its floors for existing units, EPA's floors for new units did not purport to reflect the actual performance of the relevant best units. Rather, they reflected EPA's views about what is achievable through the use of certain control technologies. 59 Fed. Reg. at 48215-48216. As the subsequent caselaw has confirmed, the Clean Air Act does not allow EPA to set floors based on what it regards as achievable through the use chosen technology rather than on the actual performance of the relevant best units. *Northeast Maryland Waste Disposal Authority*, 358 F.3d at 954-955; *CKRC*, 255 F.3d at 861. Thus, EPA's floors for new units also were unlawful and arbitrary and capricious.

To bring its standards into accordance with § 129, EPA must recalculate the floor for each of its standards and ensure that its final standards do — at a minimum — reflect the actual performance of the relevant best performing units. 42 U.S.C. § 7429(a)(5), (a)(2).

C. Petition To Amend Regulations In Accordance With § 129.

Assuming *arguendo* that § 129(a)(5) does not require EPA to revise its MWC regulations in accordance with the floor requirements in § 129(a)(2), Earthjustice hereby petitions the agency

to do so under the authorities described in *Kennecott Utah Copper Corp. v. Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996).

Quoting earlier precedent, *Kennecott Utah Copper* holds "although a statutory review period permanently limits the time within which a petitioner may claim that an agency action was procedurally defective, a claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition." 88 F.3d at 1213 (emphasis added, citation and internal quotation marks omitted). It further holds that because this "circuitous process would be a waste of time and resources" "where an agency reiterates a rule or policy subject to renewed challenge on any substantive grounds, a coordinate challenge that such a rule or policy is contrary to law will not be held untimely because of a limited statutory review period." *Id.*, 88 F.3d at 1214. As explained above, EPA's 1995 MWC regulations violated the § 129's floor provisions. Under *Kennecott Utah Copper*, a petition is unnecessary because EPA's current proposal is "subject to renewed challenge" on substantive grounds. Nonetheless, as a precaution, Earthjustice petitions EPA to amend its 1995 MWC regulations to bring them into compliance with § 129's floor requirements.

III. FAILURE TO REVISE THE FINAL STANDARDS IN ACCORDANCE WITH § 129.

A. Section 129(a)(5) Requires EPA To Ensure That Its MWC Standards Require The Maximum Achievable Degree Of Reduction In Emissions.

Just as EPA has failed to ensure that its standards comply with the floor requirements in § 129(a)(2), it also has failed to ensure that its standards comply with that provision's "beyond-the-floor" requirements for final standards. Section 129(a)(2) provides "[s]tandards applicable to solid waste incineration units promulgated under section 7411 of this title and this section shall reflect the maximum degree of reduction in emissions of air pollutants listed under section (a)(4) that the Administrator taking into account the cost of achieving such reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing units in each category." 42 U.S.C. § 7429(a)(2) (emphasis added). Section 129(a)(3) then provides "[s]tandards under section 7411 of this title and this section applicable to solid waste incineration units shall be based on methods and technologies for removal or destruction of pollutants before, during, or after combustion, and shall incorporate for new units siting requirements that minimize, on a site-specific basis, to the maximum extent practicable, potential risks to public health or the environment." 42 U.S.C. § 7429(a)(3). Read together, as they must be, §§ 129(a)(2) and (3) require the maximum degree of reduction in emissions that can achieved through the application of, *inter alia*, the pre-combustion removal methods and technologies to which § 129(a)(3) refers.

EPA, however, has not even attempted to ensure that its proposal requires the maximum achievable degree of reduction in emissions through pre-combustion measures or any other measures. Indeed, the agency has not even determined the maximum achievable degree of reduction for any of the pollutants listed in § 129(a)(4). Rather, EPA has revised only some of its emission standards and the revised standards do not even purport to reflect the maximum

achievable degree of reduction. By failing to revise its MWC standards to ensure that each such standard reflects the maximum achievable degree of reduction, as required by § 129(a)(2)-(3), EPA contravenes § 129(a)(5).

In particular, EPA's failure to set final MWC standards that require the maximum degree of reduction that can be achieved through methods and technologies for the removal of pollutants "before combustion" is unlawful. 42 U.S.C. 7429(a)(3), (5). Because § 129(a)(2) and (3) require the "maximum" achievable degree of reduction that is achievable through measures including pre-combustion measures, EPA must set final standards reflecting the use of pre-combustion measures, unless: (1) pre-combustion measures would not yield any additional reductions; or (2), standards including pre-combustion measures would not be achievable considering the factors set out in § 129(a)(2). 42 U.S.C. § 7429(a)(2)-(3). Otherwise, its standards will necessarily reflect a degree of reduction that is less than the "maximum" that is "achievable."

EPA's 1995 standards for existing MWC are either set at the permit-based floor, or are based solely on the alleged performance of combustion controls and end-of-stack control technology. Item V-B-1 at 7-18 – 7-20. EPA's 1995 standards for new MWC were based solely on the performance of combustion controls and end-of-stack control technology. 60 Fed. Reg. at 65395-65396 (1995 new unit standards). Completely left out of the standards were pre-combustion measures. To the extent EPA's proposal revises the MWC standards, the revisions reflect emission levels that EPA regards as achievable through the use of end-of-stack control technology. 69 Fed. Reg. at 75351-75352. Thus, none of the standards that EPA has set for MWC ever have reflected, either directly or indirectly, the effects of pre-combustion measures. For this reason alone, requiring pre-combustion measures will necessarily yield some additional reductions above and beyond those attributable to existing standards. For example, removing mercury from the waste stream will reduce mercury emissions, removing lead from the waste stream will reduce lead emissions, etc. Other reductions also will result from pre-combustion measures: removing chlorinated plastics from the waste stream will reduce emissions of chlorinated organic pollutants such as dioxins and PCBs and also will reduce emissions of hydrochloric acid. The D.C. Circuit recognized this self-evident truth in the medical waste incinerators case. *Sierra Club v. EPA*, 167 F.3d 558, 666 (D.C. Cir. 1999) ('The less mercury in, the less mercury out.") EPA itself has acknowledged it repeatedly in the record for this rulemaking. *E.g.* Docket A-89-08, Item II-A-8, Municipal Waste Combustion Study (1987) at 17 ("it is EPA's judgment, based on a review of available studies and other information, that removing specific components of the waste stream prior to incineration has beneficial effects on MWC stack emissions, above and beyond the benefits of stack controls."); Docket A-89-08, Item IV-J-348 (materials separation air benefits). In addition, EPA has received communications from States that have successfully implemented pre-combustion requirements, and these communications further confirm that such requirements yield additional reductions. *E.g.*, Letter of July 7, 1997 from Sullivan to Porter (Ex. A) hereto).

The record also amply demonstrates that pre-combustion measures are achievable. For example, in its memorandum entitled "Cost and Benefit Estimates for Materials Separation Requirements in MWC NSPS, EPA provided a model "offering complete coverage of the major factors determining the economic consequences of requiring materials separation." Docket A-

89-08, Items II-B-47, at 1. The agency concluded that "the overall costs of the materials separation requirements will be negligible." Docket A-89-08, Item IV-B-38. Further, although § 129(a)(2) does not impose a cost-benefit test, EPA expressly found that a materials separation requirement would pass "any imaginable" cost benefit test:

> the long-term national costs are negligible or negative, while benefits are positive. These benefits include extended disposal capacity due to reduced waste and ash landfilling; reduced combustor emissions of toxic metals, toxic organics, and acid gases; reduced volume and toxicity of ash; energy savings due to recycling energy benefits and diversion of combustibles from landfills; and reduced energy use and pollution associated with virgin materials extraction and use.

Docket A-89-08, Item IV-B-46, at 4. *See generally* Docket A-89-08, Item IV-B-38 ("the Agency believes that the overall national costs of the materials separation requirements will be negligible"); IV-B-44 (discussing benefits of materials separation requirement); IV-B-45 (discussing pollution reductions and energy savings that materials separation requirement would yield); IV-J-348 ("MWC: Materials Separation Air Benefits"). More recently, as noted above, pre-combustion measures have been implemented successfully in some jurisdictions.

Because pre-combustion measures would yield additional reductions and are achievable, § 129(a)(2) and (3) mandate that EPA's final MWC standards require them. Therefore, to revise its MWC standards "in accordance with" those provisions, as § 129(a)(5) requires, the agency must set standards that reflect the maximum degree of reduction that is achievable through the use of control measures including pre-combustion measures. The agency's failure to do so is unlawful.

B. Because EPA's 1995 Standards Were Unlawful, § 129(a)(5) Requires The Agency To Revise Them In Accordance With § 129(a)(2) and (3).

Even if § 129(a)(5) did not always require EPA to recalculate the maximum achievable degree of reduction for its § 129 standards, it would require the agency to do so here. Section 129(a)(2) and (3) require that EPA's standards reflect the maximum degree of reduction that is achievable through measures and technologies that include pre-combustion measures. 42 U.S.C. § 7429(a)(2)-(3). EPA's 1995 standards do not meet this requirement. Specifically, they do not reflect the maximum degree of reduction that can be achieved, but only a degree of reduction that can be achieved through post-combustion end-of-stack technologies. Most glaringly, they fail to reflect the additional degree of reduction that undisputedly could be achieved through pre-combustion measures.

To bring its standards into accordance with § 129, as mandated by § 129(a)(5), EPA must revise its MWC standards to ensure that these standards require the maximum degree of reduction that is achievable through measures including pre-combustion measures, as expressly required by § 129(a)(2)-(3).

C. Petition To Amend Regulations In Accordance With § 129.

Assuming *arguendo* that § 129(a)(5) does not require EPA to revise its MWC regulations in accordance with the beyond-the-floor requirements in § 129(a)(2), Earthjustice hereby petitions the agency to do so under the authorities described in *Kennecott Utah Copper Corp. v. Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996). As explained above, EPA's 1995 MWC regulations violated § 129's mandate that final standards require the maximum degree of reduction that is achievable through methods and technologies including pre-combustion measures. Under *Kennecott Utah Copper*, a petition is unnecessary because EPA's current proposal is "subject to renewed challenge" on substantive grounds. Nonetheless, as a precaution, Earthjustice petitions EPA to amend its 1995 MWC regulations to bring them into compliance with § 129.

IV. EPA'S MUST SET REVISED DIOXIN STANDARDS THAT APPLY TO ALL EXISTING MWC.

A. Section 129(a)(5) Requires EPA To Revise Its § 129 Standards To Eliminate The Distinction Between Existing MWC That Are Equipped With Electrostatic Precipitators And Those Using Different Air Pollution Control Devices.

Section 129(a)(2) provides "the Administrator may distinguish among classes, types ... and sizes of units within a category" in establishing standards. 42 U.S.C. § 7429(a)(2) (emphasis added). It does not allow EPA to distinguish based on the type of air pollution control device that a unit uses. Indeed, EPA itself has recognized that it lacks authority to subcategorize on this basis. 69 Fed. Reg. 21198, 21214 (April 20, 1994). *See also* 69 Fed. Reg. 394, 403 (January 5, 2004). Therefore, EPA's decision to set different standards for existing MWC equipped with electrostatic precipitators (ESPs) and those not equipped with ESPs was unlawful. To bring its MWC standards into "accordance with" § 129 as § 129(a)(5) requires, EPA must eliminate the distinction between MWC equipped with ESPs and those not so equipped. EPA appears to be moving in this direction by proposing that after April 28, 2009 the emission limit for all existing large MWC is 21 ng/dscm. The agency should not wait another three years, however, to eliminate an unlawful distinction; it should require all existing MWC to meet the standard for non-ESP-equipped units now, and then meet — as expeditiously as practicable — more protective standards established in the present rulemaking under § 129(a)(5).

B. Petition To Amend Regulations In Accordance With § 129.

Assuming *arguendo* that § 129(a)(5) does not require EPA to eliminate its distinction between existing MWC equipped with ESPs and those not so equipped, Earthjustice hereby petitions the agency to do so under the authorities described in *Kennecott Utah Copper Corp. v. Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996). As explained above, the distinction exceeded EPA's authority under § 129(a)(2). Under *Kennecott Utah Copper*, a petition is unnecessary because EPA's current proposal is "subject to renewed challenge" on substantive grounds. Nonetheless, as a precaution, Earthjustice petitions EPA to amend its 1995 MWC regulations to bring them into compliance with § 129.

V. TO COMPLY WITH § 112(c)(6), EPA MUST SET EMISSION STANDARDS FOR PCBS AND POM.

Clean Air Act § 112(c)(6) requires EPA to assure that source categories accounting for not less than ninety percent of the aggregate emissions of certain highly persistent and bioaccumulative hazardous air pollutants are subject to the Act's highly protective standards under § 112(d)(2) or (d)(4) with respect to such pollutants. 42 U.S.C. § 7412(c)(6). EPA has found that much of these emissions are attributable to categories of incinerators that must be regulated under § 129 rather than § 112. 63 Fed. Reg. 17838, 17849 (April 10, 1998). Therefore, the agency has interpreted the Clean Air Act as allowing it to meet the requirements of § 112(c)(6) by setting emission standards for incinerators' emissions of the § 112(c)(6) pollutants under § 129 instead of § 112(d). The agency asserts that § 129 standards are "substantively equivalent to those promulgated under section 112(d)." 70 Fed. Reg. at 75356.

Section 112(c)(6) requires EPA to set § 112(d) standards for each of the § 112(c)(6) pollutants. As EPA acknowledges, MWC account for a large portion of the aggregate emissions of both polychlorinated biphenyls (PCBs) and polycyclic organic matter (POM). Thus, to satisfy § 112(c)(6), EPA must exercise its discretionary authority under § 129(a)(4) to set emission standards for both of these pollutants.[1]

EPA now argues that because its existing standards for <u>other</u> pollutants coincidentally reduce MWCs' emissions of PCBs and POM, the agency does not have to set standards for PCBs and POM to satisfy its obligations under § 112(c)(6). 70 Fed. Reg. at 75356. According to EPA, the control measures needed to comply with its existing standards for other pollutants also reduce PCBs and POM "substantially" and "effectively." The Clean Air Act, however, does not give EPA discretion to decide standards set to control <u>other</u> pollutants are good enough to satisfy § 112(c)(6) if, in the agency's view, such standards reduce the § 112(c)(6) pollutants "substantially" or "effectively." Rather, both § 112 and § 129 require a highly specific degree of reduction of each pollutant. Each hazardous air pollutant enumerated in § 112(b) — and, *a fortiori*, the hazardous air pollutants singled out for special treatment under § 112(c)(6) — must be reduced by the degree set out specifically in §§ 112(d)(2)-(3) or the "substantially equivalent" provisions in § 129(a)(2). Specifically, EPA must ensure that each such pollutant is, at a minimum, reduced to the emission levels achieved by the relevant best performing sources. 42 U.S.C. § 7412(d)(3), § 7429(a)(2). Beyond, that EPA must ensure that each such pollutant is reduced to the "maximum" degree that is achievable considering cost and the other statutory factors. 42 U.S.C. § 7412(d)(2), § 7429(a)(2)-(3). Thus, EPA's declaration that its existing MWC standards reduce PCBs and POM "effectively" and "substantially" is not enough. To satisfy § 112(c)(6), EPA must set emission standards for these pollutants ensuring that that they are reduced by the amount that the Clean Air Act expressly requires in § 112(d) and § 129(a).

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[1] Because large MWC account for less than ninety percent of the aggregate emissions of PCBs and POM, setting PCBs and POM emission standards for the large MWC category alone will not fully satisfy EPA's obligations under § 112(c)(6). Because MWC account for more than ten percent of the aggregate emissions of PCBs and POM, however, EPA cannot possibly satisfy § 112(c)(6) unless it sets PCBs and POM emission standards for this category.

EPA may in some circumstances use surrogates to set emission standards for hazardous air pollutants, but those circumstances are not applicable here. First, EPA does not even claim that any of its standards for other pollutants serve as surrogates for PCBs or POM, but only that these standards reduce PCBs and POM to some degree. Second, Congress expressly directed EPA to assure that ninety percent of aggregate PCBs and POM emissions are subject to standards with respect to these pollutants. 42 U.S.C. § 7412(c)(6). Accordingly, § 112(c)(6) requires direct numerical emission standards for PCBs and POM, and does not give EPA discretion to regulate them through surrogates. Third, assuming *arguendo* that EPA were claiming that its existing standards for other pollutants were surrogates for other pollutants and even if the agency ever could satisfy its obligations under § 112(c)(6) by using surrogate standards, the agency's discretion to use surrogates has been carefully defined by binding judicial precedent, which provides a three part test:

> In *National Lime*, this court established a three-part analysis for determining whether the use of PM as a surrogate for HAPs is reasonable: PM is a reasonable surrogate for HAPs if (1) "HAP metals are invariably present in ... PM;" (2) "PM control technology indiscriminately captures HAP metals along with other particulates;" and (3) "PM control is the only means by which facilities 'achieve' reductions in HAP metal emissions." If these criteria are satisfied and the PM emission standards reflect what the best sources achieve — complying with Section 7412(d)(3) — "EPA is under no obligation to achieve a particular numerical reduction in HAP metal emissions."

Sierra Club v. EPA, 353 F.3d 976, 984 (D.C. Cir. 2004) (quoting *National Lime Ass'n v. EPA*, 233 F.3d 625, 639 (D.C. Cir. 2000) (emphasis added). The standards that EPA has set for other pollutants fail the test set forth in *National Lime Ass'n* and *Sierra Club*, and therefore do not satisfy the agency's obligations under § 112(c)(6) to set standards for PCBs and POM.

Under the *Sierra Club* test, it is necessary but not sufficient that PCBs and POM are reduced by the same measures that MWC take to meet EPA's existing standards for other pollutants. The measures that MWC take to meet EPA's existing standards for other pollutants also must be the "only" means by which MWC achieve reductions in PCBs and POM. That is not the case. MWCs' emissions of PCBs and POM also are affected by the composition of the waste that they burn. Indeed, EPA has admitted that for hazardous waste combustors, "the major source of HWC PCB emissions is thought to be from PCBs in the waste (that are not destroyed in the combustion zone)." EPA, Technical Support Document for HWC MACT Standards (September 2005), v.3 at 3-9 (excerpts attached as Ex. B hereto). The same applies equally to MWC.

The governing caselaw uses the term "achieved" very deliberately. Section 129(a)(2), like § 112(d)(3), requires floors to reflect the average emission levels "achieved" by the best performing sources. 42 U.S.C. § 7429(a)(2), (c)(3). *See CKRC*, 255 F.3d at 865 ("Section 7412(d)(3) requires only that EPA set floors at the emission level achieved by the best-performing sources."). As the Court has made entirely clear, "[t]he Clean Air Act requires EPA to set MACT floors based upon the 'average emission level achieved,' 42 U.S.C. § 7412(d)(3); it nowhere suggests that this achievement must be the product of a specific intent." *National Lime Ass'n*, 233 F.3d at 640 (emphasis added). It is precisely the point of the § 129's floor

requirements to assess units' performance as an end result — i.e., emission levels achieved — rather than the means by which those levels are achieved. Thus, reductions can be "achieved" through means that are not deliberate. In particular, MWC can achieve reductions in PCBs and POM emissions within the meaning of *Sierra Club* and *National Lime*, by burning waste that has less PCBs or POM present, whether or not the MWC operator is making any deliberate efforts to control the amount of PCBs or POM in the waste burned. Because MWCs' emissions of PCBs and POM are affected by the quantities of PCBs and POM in the waste they burn — and not just by the combustion controls and end-of-stack controls that MWC implement to meet the agency's existing standards — such controls are not the "only" means by which facilities "achieve" reductions in PCBs and POM. *Sierra Club*, 353 F.3d at 984. Therefore, EPA's existing standards for other pollutants cannot possibly provide a reasonable surrogate for these pollutants. *Sierra Club*, 353 at 984; *National Lime Ass'n*, 233 F.3d at 639-640.

Although the undeniable effect of PCBs and POM feedrate on PCBs and POM emissions is enough to doom any argument that EPA's existing standards for other pollutants provide a surrogate for PCBs and POM, it also is now well established that emissions of both PCBs and POM are affected by the amount of certain chlorinated compounds and other plastics in the waste feed. This fact further refutes any claim that EPA's existing standards for other pollutants provide a surrogate for PCBs and POM. *See. e.g.*, EPA, "Evaluation of Emissions From The Open Burning Of Household Waste In Barrels" (1998) (Ex. C hereto) Greenpeace, "PVC: A Primary Contributor To The U.S. Dioxin Burden (Ex. D hereto); Citizens Clearinghouse For Hazardous Waste, "How To Start To Stop Dioxin Exposure In Your Community" (Ex. E hereto); Center For Health, Environment And Justice, "PVC: The Poison Plastic, Health Hazards And The Looming Waste Crisis" (Ex. F hereto). Additional documents relevant to this point have been submitted to the docket by Jane Williams and are incorporated with there comments by reference.

Assuming *arguendo* that EPA could ever satisfy § 112(c)(6) by setting surrogate standards instead of direct standards for PCBs and POM, the agency could only doing so by passing the test set forth in *Sierra Club*: showing that the controls required by its existing MWC standards are the only means by which MWC "achieve" reductions in these pollutants. Because EPA cannot possibly make such a showing — given that some MWC also "achieve" reductions of these pollutants within the statutory meaning of that term by burning waste with lower levels of PCBs and POM — the agency must set floors and final standards for these pollutants. By doing so, the agency will: (1) necessarily determine which MWC are achieving the best emission levels for PCBs and POM; (2) ensure that all MWC match the levels achieved by the relevant best performing units; and (3) ultimately set standards that reflect the maximum degree of reduction in each of these pollutants. To do anything less would contravene the Clean Air Act and frustrate Congress's intent in enacting § 112(c)(6), § 112(d), and § 129(a).

VI. EPA'S NEW CO STANDARDS ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS.

EPA's proposal adds two new subcategories of MWC, and sets CO standards for them. 70 Fed. Reg. at 75352-75353. The agency states that it determined the stringency of these standards by "calculat[ing] a statistically achievable emission limit based on a 24-hour block average for each of the two MWC types." *Id.* at 75353.

EPA's method for the setting the new CO standards does not satisfy § 129(a)(2) and, indeed, bears no relationship to the standard-setting process that provision sets out. Specifically, EPA did not determine which were the relevant best performing units in the two new subcategories, did not assess such units' performance, and did not set floors at the emission level such units achieved. Nor did EPA determine the maximum degree of reduction that was achievable for units in the two new subcategories.

In addition, EPA completely failed to set new standards for pollutants other than CO for the new subcategories. The agency apparently assumed that it only had to set standards for CO but, if the agency believes it is necessary to create new subcategories, it also is necessary to set standards for these new subcategories for each of the pollutants that § 129(a)(4) enumerates. Such standards must satisfy the stringency requirements in § 129(a)(2). EPA's proposal, which assumes that the agency can simply use the standards that it previously set for other subcategories, ignores the agency's obligations under § 129(a)(2) to ensure that each of the standards for its new subcategories reduces the relevant pollutants to degree required by that provision, and is arbitrary and capricious.

VII. USE OF CONTINUOUS EMISSION MONITORS.

A. Section 129(a)(5) Requires EPA To Revise Its Monitoring Requirements In Accordance With § 129(c).

Clean Air Act § 129(c) provides

> The Administrator shall, as part of each performance standard promulgated pursuant to subsection (a) of this section and section 7411 of this title, promulgate regulations requiring the owner of operator of each solid waste incineration unit —
>
> (1) to monitor emissions from the unit at the point at which such emissions are emitted into the ambient air (or within the stack, combustion chamber or pollution control equipment as necessary to protect public health and the environment;
>
> (2) to monitor such other parameters relating to the operation of the unit and its pollution control technology as the Administrator determines are appropriate; and
>
> (3) to report the results of such monitoring.

42 U.S.C. § 7429(c) (emphasis added). Thus, EPA's standards must require emissions monitoring, not just parameter monitoring, for "each" of its standards. To revise its MWC standards "in accordance with" § 129(c), as § 129(a)(5) requires, EPA must now establish emission monitoring requirements for each such standard.

Recognizing that continuous emission monitors (CEMs) are now widely available for many of the pollutant that MWC emit, EPA has requested comment on the reasonableness of amending its regulations to allow for their use. 70 Fed. Reg. at 75354. Among the types of CEM that are available but not currently in widespread use on MWC in the United States are CEMs for HCl, mercury, metals, and dioxins. Because EPA's current standards do not include emission monitoring requirements for the majority of its standards, EPA must establish such requirements now. Accordingly, it is not enough for EPA merely to "allow" MWC to use the available CEMs to monitor their emissions, the agency must establish regulations requiring them to do so.

Section 129(c) also provides that EPA's regulations must be sufficient "to protect public health and the environment." 42 U.S.C. § 7429(c)(1). Accordingly, to satisfy § 129(a)(5), EPA must now determine what emissions monitoring requirements are necessary to protect public health and the environment and establish such requirements. CEMs monitoring requirements are not only the only available means to monitor emissions of the standards subject to EPA's standards, but the only requirements that can possibly provide data adequate to ensure compliance with emission standards and protection of public health and the environment.

B. Because EPA's 1995 Standards Were Unlawful, § 129(a)(5) Requires The Agency To Revise Them In Accordance With § 129(c).

Even if § 129(a)(5) did not automatically require EPA to establish emissions monitoring requirements in accordance with § 129(c), it would require that result here. In direct contravention of § 129(c)(1), EPA's 1995 regulations failed to establish emissions monitoring requirements for the majority of the performance standards they included. Instead, those regulations established only "parameter" monitoring requirements. The Clean Air Act unambiguously requires EPA to establish "emission" monitoring requirements for "each" standards and such "parameter" monitor requirements as the agency determines are appropriate. 42 U.S.C. § 7429(c). Accordingly, the agency lacked discretion to establish only parameter monitoring requirements for some standards. Now, to bring its MWC standards into accordance with § 129(c) as required by § 129(a)(5), the agency must establish emissions monitoring requirements for each standard that are sufficient to protect public health and the environment. CEMs are the only means to monitor "emissions" of the pollutants subject to EPA's standards. Further, even if there were other means of monitoring such emissions, CEMs provide the only means that provide sufficient information of sufficient accuracy to protect public health and the environment.

C. Petition To Amend Regulations In Accordance With § 129.

Assuming *arguendo* that § 129(a)(5) does not require EPA to revise its MWC regulations in accordance with the monitoring in § 129(c), Earthjustice hereby petitions the agency to do so under the authorities described in *Kennecott Utah Copper Corp. v. Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996). As explained above, EPA's 1995 MWC regulations violated § 129's mandate that, for "each" standard, EPA establish regulations to monitor "emissions" as necessary to protect public health and the environment. Under *Kennecott Utah Copper*, a petition is unnecessary because EPA's current proposal is "subject to renewed challenge" on

substantive grounds. Nonetheless, as a precaution, Earthjustice petitions EPA to amend its 1995 MWC regulations to bring them into compliance with § 129.

VIII. EPA'S DECISION NOT TO REQUIRE ESP-EQUIPPED UNITS TO USE FFS WAS ARBITRARY AND CAPRICIOUS.

For the reasons given above, EPA must recalculate the floors and final standards for all MWC units. Even if that were not the case, however, the agency's decision not to require ESP-equipped units to replace their ESPs with FFs, was unlawful and arbitrary and capricious.

EPA acknowledges that the change would yield substantial reductions in emissions. 70 Fed. Reg. at 75355. In particular, the twenty-one units that would switch from ESP to FF would emit a total ninety grams less of dioxins each year (1.0E-4 tons), 1000 pounds less of mercury, 340 pounds less of cadmium, 4800 pounds less of lead, 130 tons less of particulate matter (PM) and sixteen tons less of fine particulate matter. *Id.* EPA's stated reason for declining to require the ESP-equipped units to switch to FF was that "the cost-reduction ratio for ESP replacement was excessive." *Id.* The Clean Air Act, however, does not condition EPA's obligation to require the "maximum" degree of reduction in emissions on the agency's views about whether the "cost-reduction ratio" is or is not "excessive." Rather, it requires the maximum degree of reduction that is "achievable" considering "the cost of achieving such emission reduction" and the other statutory factors. 42 U.S.C. § 7429(a)(2). Thus, the question for EPA is not whether it views cost-reduction ratio as excessive or appropriate but: (1) whether a measure would yield additional reductions; and (2) whether the measure is "achievable" considering cost. Standards are achievable if they can be achieved by "a predominant segment of the industry." *NRDC v. Thomas*, 805 F.2d 410, 423 (D.C. Cir. 1986). Here, EPA itself has concluded that "the economic impacts of a regulation that required ESP replacement is expected to be insignificant." Docket OAR-2005-0117, Item 0119, at 7 (emphasis added). Given this finding and the undisputed fact that ESP replacement would yield further reductions in emissions, EPA must require such replacement to ensure that its standards reflect the "maximum" achievable degree of reduction. Further, the agency's claim that it can refuse to require such a switch based on its views about whether the cost-reduction ratio is excessive — as opposed to a showing that the costs would render such a requirement unachievable — reflect a flatly unlawful interpretation of the Clean Air Act.

In addition, EPA's decision is arbitrary and capricious. EPA's stated reason for rejecting ESP replacement — that the "cost-reduction ration" was "excessive" — is directly at odds with uncontroverted record evidence that the economic impacts of requiring such replacement is "insignificant." Nowhere has EPA explained why it has adopted a decision at odds with its own findings in the record. Nor has EPA reconciled its conclusion that the "cost-reduction ratio" for ESP replacement would be "excessive" with its finding that the economic impact of requiring ESP replacement would be "insignificant."

Further, without any explanation, EPA chose to consider only the benefit of reducing PM. Specifically, EPA states that the cost effectiveness of switching from ESPs to FFs would be $100,000/ton of total particulate or $900,000/ton of fine particulate. 70 Fed. Reg. at 75355. The same investment in switching to FF, however, would yield reductions in both total and fine PM. Thus, for EPA to allocate the total cost of ESP replacement to just one artificially inflates the

cost. Further, as EPA itself has acknowledged, ESP replacement also would yield substantial reductions in dioxins, cadmium, lead, and mercury. *Id.* The agency completely fails even acknowledge these benefits in its cost benefit analysis. For all of these reasons, EPA's decision to reject ESP replacement on cost-benefit grounds would be arbitrary and capricious even if it were not otherwise unlawful to engage in a cost-benefit analysis rather than determining whether ESP replacement is achievable considering cost.

Attachment 2

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and STEPHEN L. JOHNSON, Administrator Respondents.	)	No. 06-1250

EPA'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR VOLUNTARY REMAND

EPA respectfully submits this reply in further support of its motion for a voluntary remand of this case pursuant to Circuit Rule 41(b).

Petitioner opposes the motion on the ground that EPA has not conceded that any portion of the LMWC Final Rule is defective. Petitioner states that, if EPA admits that the floor approach in the 1995 rule is unlawful, and the Court imposes a reasonable deadline for EPA to respond to the remand and requires "regular status reports," then Petitioner would not oppose this motion. (Pet'r Br. at 4.)

As an initial matter, EPA does not agree with Petitioner that an agency must admit that it acted unlawfully or arbitrarily in order for a court to remand a case to the agency for further consideration. This Court has held that a remand is

appropriate "to allow agencies to cure their mistakes." Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993). Ethyl Corporation does not require an agency to confess legal error before granting the remand. In fact, that case involved the agency's discovery of test results that were completed after the agency's decision. Id. at 523. This Court granted EPA's motion for a remand of the record based on the "tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision into question." Id. at 524. This Court and others have relied on the principles set forth in Ethyl Corporation to order remands of the case when a legal decision may affect the validity of the agency action. See, e.g., SKF USA Inc. v. United States, 254 F.3d 1022 (Fed. Cir. 2001) (citing Ethyl Corporation); National Fuel Gas Supply v. FERC, 899 F.2d 1244, 1245 (D.C. Cir. 1990) (per curiam) (remanding review of an FCC order so that the agency could reconsider its ruling in light of a D.C. Circuit decision). Petitioner does not cite any legal authority for its position that an agency must admit some mistake before a Court can remand the case.

As explained more fully in EPA's motion, Petitioner filed an administrative petition asking EPA to revise the standards and emission guidelines in the 1995 LMWC rule consistent with the floor requirements of Clean Air Act Section 129(a)(2) and this Court's rulings in Northeast Maryland Waste Disposal Authority v. EPA, 358 F.3d 936 (D.C. Cir. 2004), and Cement Kiln Recycling

Ass'n v. EPA, 255 F.3d 855, 861-63 (D.C. Cir. 2001). EPA has decided to grant that administrative petition and initiate a rulemaking to re-analyze the floors in the 1995 rule, which EPA established pursuant to Section 129(a)(2).

The primary reason for granting that administrative petition is that the floors in the 1995 rule were calculated in a manner that is not consistent with the principles later set forth in Northeast Maryland. More specifically, like the floors for the Small Municipal Waste Combustors that were at issue in Northeast Maryland, the floors in the 1995 rule for LMWCs were derived from state-issued permit limits. This Court has held that EPA may base floors on state-issued permit data if it can demonstrate that the permit data represents a reasonable estimate of the performance of the top 12 percent of units. Northeast Maryland, 358 F.3d at 953-54. In Northeast Maryland, the Court identified certain affirmative evidence in the record that called into question whether the floors represented a reasonable estimate of the performance of the best performing 12 percent of existing units. Id. In reviewing the 1995 LMWC rule and the administrative petition to re-open that rulemaking, EPA recognized that the deficiency identified by the Court in Northeast Maryland is present in the 1995 LMWC rule. EPA therefore has decided to grant the administrative petition and initiate a rulemaking to re-evaluate the floors in the 1995 rule in light of Northeast Maryland and subsequent case law. Thus, while EPA disagrees with Petitioner's assertion that it must admit a legal

error before it can request a remand, EPA acknowledges that the 1995 LMWC rule has a deficiency similar to that identified in Northeast Maryland, and that deficiency formed the basis of EPA's decision to grant the administrative petition.[1/]

As explained in EPA's initial motion, if any of the 1995 standards change as the result of the agency's re-analysis of the 1995 floors under Clean Air Act Section 129(a)(2), EPA would need to re-evaluate its conclusions in the LMWC Final Rule because that rule involved a review of the standards and requirements in the 1995 rule. EPA respectfully requests that the Court remand the LMWC Final rule so that EPA can make any changes to that rule that may flow from EPA's re-evaluation of the floors in the 1995 rule.

Contrary to Petitioner's suggestion, this Court should not require EPA to complete its proceedings on remand by a specific deadline. This Court should follow its recent example of granting EPA's motions for voluntary remand to the agency in cases challenging EPA action under Section 112 without imposing a deadline for a final action. See Natural Resources Defense Council v. EPA, 489 F.3d 1364 (D.C. Cir. 2007) (vacating portions of an EPA rule promulgated under Section 112 regulating hazardous air pollutants from the manufacture of plywood

---

[1/] EPA disagrees with Petitioner's separate contention in this litigation that the floors must be recalculated under Clean Air Act Section 129(a)(5), 42 U.S.C. § 7429(a)(5).

and composite wood products). In Natural Resources Defense Council, EPA requested a partial vacatur and remand so that it could re-evaluate and revise the Maximum Achievable Control Technology floor determination to conform to this Court's interpretation of the Clean Air Act in Sierra Club v. EPA, 479 F.3d 875 (D.C. Cir. 2007). The Court granted EPA's motion for partial vacatur and remand but imposed no deadlines with respect to EPA's determination on remand. Natural Resources Defense Council, 489 F.3d at 1375. The Court explained that the appropriate remedy in these circumstances is a mandamus action if the Agency, in the future, unduly delays in responding to the Court's remand. Id. ("We decline to set a two year limit on EPA's proceedings on remand as the NRDC requests; mandamus affords a remedy for undue delay.").

As in Natural Resources Defense Council, Petitioner here has the remedy of mandamus in the event the Agency unduly delays its final action upon remand. Moreover, Petitioner has not suggested any specific timetable other than a "reasonable" deadline. There is no point is this Court establishing a "reasonable" deadline, as Petitioner, if circumstances warrant, can assert a claim for undue delay.

Accordingly, it is neither necessary nor appropriate for this Court, in granting EPA's motion for a voluntary remand, to establish any deadlines or require periodic court filings concerning the Agency's progress.

CONCLUSION

For the reasons set forth above and in EPA's motion, this Court should remand the case pursuant to Circuit Rule 41(b) and deny Petitioner's request to require the Agency to complete its proceedings upon remand by a deadline and/or to submit periodic status reports.

Dated: December 6, 2007

Respectfully submitted,

RONALD J. TENPAS
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing EPA's Reply in Further Support of Its Motion for Voluntary Remand was today served, this 6th day of December, 2007, via first class mail, on the following counsel of record:

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Pamela S. [illegible]

Attachment 3

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1250 **September Term, 2007**

Filed On: February 15, 2008

[1099358]
Sierra Club,
Petitioner

v.

Environmental Protection Agency and Stephen L. Johnson, Administrator,
Respondents

York County Solid Waste and Refuse Authority and Integrated Waste Services Association,
Intervenors

BEFORE: Randolph, Tatel, and Garland, Circuit Judges

O R D E R

Upon consideration of the motion for voluntary remand, the opposition thereto, and the reply, it is

ORDERED that the motion for voluntary remand be granted to allow the Environmental Protection Agency to review its "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors." 71 Fed. Reg. 27,324. The agency is not required to admit legal error as a precondition for remand. See Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993). Further, the appropriate remedy for an agency's delay in issuing a final decision is mandamus. See Natural Resources Defense Council v. EPA, 489 F.3d 1364, 1375 (D.C. Cir. 2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Deputy Clerk

Attachment 4

EARTHJUSTICE
Because the earth needs a good lawyer

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

July 7, 2006

Stephen L. Johnson
Administrator,
Environmental Protection Agency
1101A EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

BY FIRST CLASS MAIL, FAX, AND EMAIL

Dear Mr. Johnson:

This is a petition under Clean Air Act § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). The party submitting this petition is Sierra Club, 85 Second Street, 2d Floor, San Francisco, California 94105 ((415) 977-5500). By this petition, Sierra Club requests that you reconsider certain aspects of the final action taken at 71 Fed. Reg. 27324, *et seq.* (May 10, 2006) and entitled "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors; Final Rule."

I. EPA MUST RECONSIDER ITS DECISION TO ALLOW UNTRAINED EMPLOYEES TO PERFORM THE DUTIES OF A CERTIFIED CHIEF FACILITY OPERATOR OR CERTIFIED SHIFT OPERATOR.

A. Background.

The Clean Air Act required EPA to develop a program for "training and certification" of municipal waste combustor (MWC) operators. 42 U.S.C. § 7429(d). The Act further provides "it shall be unlawful to operate any unit in the category unless each person with control over processes affecting emissions from such unit has satisfactorily completed a training program meeting the requirements established by the Administrator under this subsection." 42 U.S.C. § 7429(d). Thus it is unlawful for any MWC to be operated unless a person who has not fully complied with the training and certification requirements established by EPA.

EPA's own training and certification requirements provide:

> (b) not later than the date six months after the date of startup of an affected facility or on December 19, 1996, whichever is later, each chief facility operator and shift supervisor shall have completed full certification or

> shall have scheduled a full certification exam with either the American Society of Mechanical Engineers … or a State certification program.
>
> (c) no owner of an affected facility shall allow the facility to be operated at any time unless one of the following persons is on duty and at the affected facility: a fully certified chief facility operator, a provisionally certified chief facility operator who is scheduled to take the full certification exam according to the schedule specified in paragraph (b) of this section, a fully certified shift supervisor, or a provisionally certified shift supervisor who is scheduled to take the full certification exam according to the schedule specified in paragraph (b) of this section.

40 C.F.R. § 60.54b(b), (c).

EPA's proposed MWC rule would have amended the existing regulations regarding when a "provisionally certified control room operator" can stand in for a certified operator. EPA described the change as follows: "A provisionally certified control room operator could stand in for up to 12 hours without notifying EPA; for up to two weeks if EPA is notified; and longer than 2 weeks if EPA is notified and the MWC owner demonstrates to EPA that a good faith effort is being made to ensure that a certified chief facility operator or certified shift supervisor is on site as soon as practicable." 70 Fed. Reg. 75348, 75350 (December 19, 2005).

Without any notice to the public, however, EPA issued a much broader exemption from the Clean Air Act's operator training requirements. The agency's final rule adds entirely new language allowing "a provisionally certified operator who is newly promoted or recently transferred to a shift supervisor position or a chief facility operator position at the municipal waste combustion unit [to] perform the duties of the certified chief facility operator or certified shift operator without notice to, or approval by, the Administrator for up to six months before taking the … certification exam." 40 C.F.R. § 60.54b(c)(3).

Section 307(d)(7)(B) of the Clean Air Act provides that if grounds for an objection to a rulemaking arise "after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B). EPA's new provision allowing MWCs to be operated for up to six months at a time by people who have not completed the statutorily required training program meets the requirements of § 307(d)(7)(B). Accordingly, EPA must reconsider this aspect of its rule.

B. Grounds For Objection.

The Clean Air Act provides that "it shall be unlawful to operate any unit in the category unless each person with control over processes affecting emissions from such unit has satisfactorily <u>completed</u> a training program meeting the requirements established

by the Administrator under this subsection." 42 U.S.C. § 7429(d) (emphasis added). The "operator training" program mandated by § 129(d) and established by EPA pursuant to § 129(d) contains both "training" and "certification" requirements. 42 U.S.C. § 7429(d). *See* 40 C.F.R. § 60.54b(b), (c)(1)-(2). A person has not "completed" such training program until he is fully certified. Therefore, it is unlawful to operate a MWC unit unless each person with control over processes affecting emissions — and, at a minimum, each person performing the duty of a chief facility operator or shift supervisor — is fully certified.

A person who is only "provisionally" certified is not fully certified and thus has not "completed" the operator training requirements. By allowing MWC to operate for six months at a time with operators that are only "provisionally" certified, EPA contravenes § 129(d).

EPA also frustrates § 129(d)'s purpose. Congress enacted this provision to protect the public from the excess pollution and increased threat to health and the environment that occur when incinerators malfunction or are operated under suboptimal conditions as a result of operator error. Congress made clear that, to this end, it wanted the processes affecting incinerator emissions to be run only by people who had "completed" training and certification requirements, not — as EPA appears to believe — people who had made some limited progress toward completing such requirements and were therefore "provisionally" certified.

Finally, EPA does not and cannot explain how allowing MWC to be run for up to six months by people who by definition have not "completed" the training requirements implements § 129(d) and comports with its purpose. Does EPA believe that there is no significant difference between operation by personnel that are fully certified and those that are only "provisionally" certified? The agency does not make, far less explain, any such claim. Further, if that were the rationale EPA's new provision, why require full certification at all? Does EPA believe that it is somehow harmless to have MWC run by less qualified people for only six months out of the year? If so, where did the agency come up with this time period, and why does the agency believe that significant harm cannot be done in six months? EPA's failure to explain the rational basis for its new provision renders the MWC rule arbitrary and capricious.

II. EPA MUST RECONSIDER ITS CEMS DATA AVAILABILITY REQUIREMENTS.

A. Background.

EPA's proposed rule increased the continuous emissions monitoring systems (CEMS) data availability requirements from ninety percent of the operating days per calendar quarter to ninety-five percent of the operating days per calendar quarter. 70 Fed. Reg. at 75353. The agency explained that new data indicate that "well designed and operated CEMS reliably collect data at rates higher than require in current regulations." *Id.*

In its final rule, however, EPA required ninety-five percent CEMS data collection only for a calendar year and allowed sources to collect only ninety percent CEMS data per calendar quarter. 71 Fed. Reg. at 27329. Further, EPA eliminated the requirement that operators obtain CEMS data for seventy-five percent of the operating hours per day before the data is counted toward the CEMS data availability requirement.

Section 307(d)(7)(B) of the Clean Air Act provides that if grounds for an objection to a rulemaking arise "after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B). EPA's new provision allowing MWC operators to collect CEMs data for only ninety percent of the operating hours per calendar quarter and to eliminate the requirement to collect data for seventy-five percent of the operating hours per day before counting such data toward the CEMS data availability requirement meets the requirements of § 307(d)(7)(B). Accordingly, EPA must reconsider this aspect of its rule.

B. Grounds For Objection.

The Clean Air Act mandates that EPA's emission standards must require compliance on a "continuous basis." 42 U.S.C. § 7602(k). EPA's rule, however, allows MWC to avoid compliance with emission standards significant portions of time. Specifically, it requires CEMS data availability for only ninety percent of the hours in a calendar quarter. There are approximately 2160 hours in a calendar quarter. Thus, EPA's rule allows MWC to not collect data for 216 hours — nine days — in a quarter. Further, EPA's regulations provide that compliance shall be measured on a twenty-four hour daily block average of CEMS data. Although EPA previously required sources to have data for seventy-five percent of the hours in a day before counting that day's hours toward the overall data availability requirement, the agency eliminated that requirement in its final rule. Thus, MWC operators could now claim to be in full compliance with emission standards for every day in a calendar quarter even if it had data for only fifty percent of the hours in eighteen days in that quarter.

Because EPA's rule allows MWC to operate out of compliance with emission standards for a substantial portion of the hours in each calendar quarter, it contravenes the Clean Air Act's mandate that emission standards require "continuous" compliance. 42 U.S.C. § 7602(k).

Further, EPA has not provided a rational explanation for its decision. The agency admits that its data indicate that CEMS can provide "more than 99 percent data availability for all calendar quarters for all parameters monitored." 70 Fed. Reg. at 75353. The agency does not provide any evidence refuting its prior assertion. All it offers are industry comments that some operators might install a backup CEMS to assure compliance — a result that EPA states it did not intend. 71 Fed. Reg. at 27329. EPA does not say why it concluded that backup CEMS would be necessary despite its own

evidence showing otherwise. Nor does EPA explain why it concluded that the possibility of MWC operators having to install backup CEMS was worse, in its mind, than the possibility that MWC would exceed their emission limitations for a significant portion of their operating hours. Nowhere did EPA explain how it concluded that operating out of compliance with emission standards for a significant portion of a calendar quarter is acceptable, or how that result comports with the statutory mandate for continuous compliance. For these reasons, EPA's MWC rule is arbitrary and capricious.

III. EPA MUST RECONSIDER ITS OPERATING PARAMETER REQUIREMENTS.

A. Background.

EPA's proposed rule provided that "[d]uring the annual mercury performance test and the 2 weeks preceding the annual mercury performance test, no limit is applicable for average mass carbon feed rate." 40 C.F.R. 60.58b((m)(2)(i) (proposed) (emphasis added), 70 Fed. Reg. at 75367. Without providing any notice to the public or opportunity for comment, EPA issued a final rule that provides "[d]uring the annual dioxin/furan or mercury performance test and the 2 week period preceding the annual dioxin/furan or mercury performance test, no limit is applicable for average mass carbon feed rate." 40 C.F.R. § 60.58b(m)(2)(i). Thus, EPA's final rule now allows MWC to avoid meeting mass carbon feed rate limits for dioxin/furan testing as well as mercury testing, and increases to more than four weeks per year the total amount of time that MWC can avoid meeting mass carbon feed rate limits.

Section 307(d)(7)(B) of the Clean Air Act provides that if grounds for an objection to a rulemaking arise "after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B). EPA's decision to exempt MWC operators from meeting mass carbon feed rate limits during dioxin/furan testing as well as mercury testing and to increase the potential time covered by its exemption to more than four weeks per year meets the requirements of § 307(d)(7)(B). Accordingly, EPA must reconsider this aspect of its rule.

B. Grounds For Objection.

The Clean Air Act requires "continuous" compliance with emission standards, not compliance for forty-eight weeks out of the year. 42 U.S.C. § 7602(k). By allowing MWC to avoid compliance with a key operating parameter requirement — the limits on mass carbon feed rates, which determine the effectiveness of activated carbon injection pollution controls — EPA's rule allows MWC to avoid compliance with emission standards for as much as four weeks every year. Therefore, it contravenes the Clean Air Act.

Further, EPA has not provided a rational explanation — or indeed, any explanation at all — for the change. EPA states inaccurately in both the final and proposed rule that MWC already are allowed to avoid meeting carbon feed rate limits during the two weeks preceding dioxin/furan performance testing. 71 Fed. Reg. at 27326; 70 Fed. Reg. at 75350-75351. To the contrary, the regulations did not provide such an exemption until EPA inserted one for the first time in its final rule. The agency does not and cannot dispute that the exemption for dioxin/furan performance testing appears in the version of 40 C.F.R. § 60.58b(m)(2)(i) published in its final rule, but does not appear in the version of that same regulatory provision that appears in its proposed rule. EPA's complete failure to explain the change — and, more importantly, to explain how allowing sources to avoid compliance with a key operating parameter for more than four weeks each year implements the Clean Air Act's mandate for continuous compliance or serves the public interest — renders the agency's MWC rule arbitrary and capricious.

IV. EPA MUST RECONSIDER ITS LEAD STANDARD.

A. Background.

EPA's proposed lead standard for existing MWC was 250 micrograms per dry standard cubic meter (µg/dscm). 40 C.F.R. § 60.33b(a)(4) (proposed), 70 Fed. Reg. at 75360. EPA's final standard is 400 µg/dscm, and thus allows MWC to emit sixty percent more lead. 71 Fed. Reg. at 27333. Further, although EPA claimed to have based its 250 µg/dscm proposed standard on statistical analysis, the agency states that in the final rule, it "discounted both the EPA and industry statistical estimates, and based the final limit on a review of the year 2000-2005 test data and public comment, selecting a higher emission limit." 71 Fed. Reg. at 27328/3. Thus, EPA admits that in the final rule, it simply picked a number that it thought was appropriate.

Section 307(d)(7)(B) of the Clean Air Act provides that if grounds for an objection to a rulemaking arise "after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B). EPA's final lead standard, and the approach on which that standard is based meet the requirements of § 307(d)(7)(B). Accordingly, EPA must reconsider this aspect of its rule.

B. Grounds For Objection.

The Clean Air Act provides that EPA must review and revise its MWC standards, including the lead standard for existing units, "in accordance with" the requirements of § 129. 42 U.S.C. § 7429(d). Thus, the agency must ensure that its standard is no less stringent than the lead emission level achieved by the best performing MWC. 42 U.S.C. § 7429(a)(2). Further, EPA must ensure that its lead standard reflects the "maximum" degree of reduction in lead emissions that is achievable, considering cost and other statutory factors, through the use of "methods and technologies for removal or

destruction of pollutants before, during, or after combustion." 42 U.S.C. § 7429(a)(2)-(3).

As explained in detail in the comments that Earthjustice submitted regarding EPA's proposed rule for large MWC, EPA's proposed revisions to the large MWC standards contravened § 129's minimum stringency requirements as well as the requirement that final standards reflect the "maximum" degree of reduction that is achievable through the use of "methods and technologies for removal or destruction of pollutants before, during, or after combustion." Accordingly, they were not "in accordance with" § 129, as required by § 129(a)(5).

In its proposed rule, EPA claimed that it used "statistical analysis" to calculate an "actually achievable emission limit." 70 Fed. Reg. at 75352. That limit did not purport to reflect the emission level achieved by the relevant best units. Nor did it purport to reflect the "maximum" achievable degree of reduction. Whatever method there may have been in EPA's proposed rule, however, disappeared in the final rule. EPA now states that it "discounted" its own statistical estimates as well as those provided to it by industry after proposal, and "based the final limit on a review of the year 2000-2005 test data and public comment." 71 Fed. Reg. at 27328. EPA provides no indication of how its final standards are "based on" the test data or public comment or, indeed, what standard setting approach it used. Thus, it now appears that the agency simply picked 400 μg/dscm as the final lead standard without any discernible rationale at all.

As noted above, the Clean Air Act required EPA to review and revise the MWC standards in accordance with § 129. EPA's new approach to setting the lead standard is not "in accordance with" § 129. Further, EPA has completely failed to explain how it based the new standard on the test data and comments and how that approach implements the Clean Air Act. Accordingly, the agency's rule is arbitrary and capricious.

CONCLUSION

Pursuant to Clean Air Act, § 307(d)(7)(B), you must convene a proceeding for reconsideration of the issues raised above and "provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B).

If you have any questions, please do not hesitate to call me (202) 667-4500.

Sincerely,

James S. Pew
Attorney for Sierra Club