UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Standards of Performance for New
Stationary Sources and Emission
Guidelines for Existing Sources:
Commercial or Industrial Solid
Waste Incineration Units

Notice of Proposed Rule;
Supplemental Solicitation
of Comments

69 Fed. Reg. 7390
(February 17, 2004)

Docket ID No.
OAR-2003-0019

COMMENTS OF EARTHJUSTICE

I. INTRODUCTION.

The practical issue in this rulemaking is the extent to which the public will be protected from the extremely dangerous toxics emitted by tens of thousands of incinerators that combust commercial or industrial waste ("commercial and industrial waste incinerators" or "CISWI"). The Clean Air Act unambiguously requires EPA to regulate all of these incinerators under § 129, a provision that mandates the Act’s most protective standards for all combustion units regardless of size. 42 U.S.C. § 7429. Evidently unwilling to comply with the Act, EPA has sought — for more than five years now — to avoid setting § 129 standards for the vast majority of CISWI. To this end, the agency has advanced various specious arguments about why it can choose to regulate the vast majority of these highly dangerous incinerators under § 112 instead.

By attempting to promulgate § 112 standards instead of § 129 standards, EPA seeks to exploit a size threshold in § 112. Under that provision, sources with the potential to emit ten tons or more of any single HAP or twenty-five tons or more of any combination of HAPs must reduce their emissions by the maximum achievable degree and, at a minimum, must match the emission levels achieved by the best performing sources. 42 U.S.C. § 7412(d)(2), (3). For sources below that threshold, however, EPA may "elect" to promulgate far less protective standards that merely "provide for the use of generally available control technologies or management practices." 42 U.S.C. § 7412(d)(4).

Most CISWI fall below the major source threshold in § 112. Thus, EPA apparently seeks to set § 112 standards so that it can elect to set generally available control technology (GACT) standards under § 112(d)(4) instead of the highly protective
MACT standards that § 129 requires. Most recently, EPA has pursued this unlawful policy objective by attempting to define "commercial or industrial waste" to exclude waste that is burned for energy recovery. 69 Fed. Reg. at 7391-7397. The agency then claims that CISWI are those units burning "commercial or industrial waste" — i.e. only those units that burn waste without energy recovery. *Id.*

Before going into the legal defects in EPA’s latest attempt to avoid its statutory obligations, it is worth emphasizing two points. First, there are tens of thousands of commercial and industrial waste incinerators, and they emit extremely toxic pollutants into peoples’ communities, homes and schools. Congress mandated the most protective standards for these polluters; EPA’s attempt to deny Americans the benefits of such standards is appalling in its arrogance and irresponsibility.

Second, EPA’s course of conduct in this rulemaking can only be described as dishonest. After EPA promulgated its § 129 regulations for CISWI in 2000, Louisiana Environmental Action Network (LEAN) and National Wildlife Federation (NWF) petitioned the agency for reconsideration, pointing out that its newly minted definitions of “commercial and industrial waste” and commercial and industrial solid waste incineration unit” were unlawful and arbitrary and capricious. Petition for Reconsideration Ex. A at 2. In addition, Sierra Club petitioned for review of EPA’s regulations. *Sierra Club v. EPA*, D.C. Cir. No. 01-1048. Among the issues raised by Sierra Club was EPA’s exemption for CISWI units that recover energy. Non-binding statement of issues in No 01-1048, Ex. B hereto.

EPA granted the petition for reconsideration filed by LEAN and NWF, promising that it would “convene further proceedings to allow an opportunity for additional public comment” on the issues presented therein. Letter from Seitz to Pew of August 17, 2001, Ex. C hereto. In addition, the agency sought and obtained a voluntary remand in No. 01-1048 by representing to the Court and Sierra Club that, *inter alia*, the agency had granted the petition for reconsideration and that it had “decided to provide all parties interested in this rulemaking (including petitioner and intervenors) with the opportunity to participate in additional notice-and-comment proceedings” with respect to the definitions of commercial and industrial wastes” and “commercial and industrial solid waste incineration unit.” Motion for Voluntary Remand, Ex. D hereto at 3. EPA further represented to the Court and Sierra Club that it “recognizes that the statutory date for establishing emission standards and related requirements for commercial and industrial solid waste incinerators passed in 1993 and that the agency "intends to act will all due speed in repromulgating emissions standards and related requirements for commercial and industrial solid waste incinerators." *Id.* at 4.

Based on EPA’s representations, the Court granted its motion for a voluntary remand, but did not issue a formal mandate. Order of September 6, 2001, Ex. E hereto.

After thirty-six months, EPA has not even begun the process of repromulgating emission standards for CISWI, despite its promise to “act with all due speed.”
Further, although EPA has at last provided an opportunity for comment on its definitions of CISWI unit and commercial and industrial waste, the opportunity is transparently a sham. On January 13, 2003, EPA proposed regulations for “Industrial/Commercial/Institutional Boilers and Process Heaters.” 68 Fed. Reg. 1660 (January 13, 2003). Those regulations, which EPA proposed under § 112 of the Clean Air Act, included standards for units that recover heat from the combustion of waste at commercial and industrial facilities — i.e., the vast majority of CISWI. As Earthjustice pointed out in comments on EPA’s proposed boiler rule, EPA is required to promulgate standards for these units under § 129. Comments of Earthjustice, Ex. F hereto. EPA cannot regulate a category of units under both § 112 and § 129. 42 U.S.C. § 7429(h)(2). Therefore, the agency’s attempt to regulate some CISWI under § 112 was flatly unlawful. Ex. F at 1-5. Earthjustice’s comments on EPA’s proposed § 112 rule are incorporated herein by reference.

Despite Earthjustice’s comments, Administrator Leavitt, on February 26, 2004, signed a final boiler rule that purports to regulate many CISWI under § 112. Thus, EPA’s present indication that it will take comment on whether such units should be regulated under § 129 is, to say the least, insincere. By failing to provide a real and meaningful opportunity to comment on this issue, EPA has blatantly violated the commitments that it made in granting the petition for reconsideration and in obtaining a voluntary remand from the Court in No. 01-1048 and has effectively rendered those commitments a fraud on the Court, Sierra Club, LEAN and NWF.

II. EPA’S PROPOSED DEFINITIONS ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS.

In the present rulemaking, EPA seeks to avoid setting § 129 standards for the vast majority of CISWI by proposing narrow definitions of “commercial or industrial waste” and “commercial and industrial solid waste incineration (CISWI) unit” (69 Fed. Reg. 7390, 7396-7397 (February 17, 2004). These definitions are functionally the same as those EPA promulgated in its remanded final rule, 65 Fed. Reg. 65 Fed. Reg. 75338, 75373 (December 1, 2000). Accordingly, they are unlawful and arbitrary for all the reasons given in the petition for reconsideration submitted by LEAN and NWF, Ex. A, which is incorporated by reference into these comments. EPA’s proposed definitions — and, more generally, the agency’s claim that it has discretion to regulate some CISWI under § 112 instead of § 129 — also are unlawful and arbitrary for the reasons given below.

A. EPA’s Contention That It Can Regulate CISWI Under § 112 Instead of § 129 Is Unlawful And Arbitrary And Capricious.

1. EPA Must Regulate All Commercial And Industrial Waste Incinerators Under § 129.

Congress clearly expressed its intent that EPA regulate all CISWI under § 129. 42 U.S.C. § 7429(a)(1), (g). Moreover, it required EPA to complete its CISWI
regulations no later than November 15, 1993. 42 U.S.C. § 7429(a)(1)(D). EPA has never promulgated the regulations that Congress required and, since 1999, has been advancing absurd arguments in attempt to avoid or further put off its statutory duty.

In its first proposed regulations for commercial and industrial incinerators, 64 Fed. Reg. 67092 (November 30, 1999), EPA proposed a definition of “solid waste” that excluded any waste that: (1) had a heat content greater than 5000 btu; and (2) was burned in a unit “that incorporates energy recovery as part of its integral design.” 64 Fed. Reg. at 67116. Under EPA's proposal, many CISWI would have been deemed to be combusting fuel rather than waste, and thus would have escaped regulation under § 129 altogether. After commenters pointed out that EPA’s proposed definition of solid waste was unlawful (Comments of Sierra Club, California Communities Against Toxics, and Desert Citizens Against Pollution, Ex. G hereto at 11-14), EPA abandoned it.¹

In the remanded final CISWI rule — and here — EPA attempts to accomplish the same result with narrow definitions of “commercial or industrial waste” and “[c]ommercial and industrial solid waste incineration (CISWI) unit.” 69 Fed. Reg. at 7396-7397. See also 65 Fed. Reg. at 75359 (definitions of “commercial and industrial solid waste incineration unit” and “commercial and industrial waste”). Specifically, EPA defines “commercial or industrial waste” as “solid waste (as defined in this subpart) combusted for reasons that do not include the recovery of heat for a useful purpose or combusted without heat recovery or with only waste heat recovery (i.e., no heat recovery in the combustion firebox)...” 69 Fed. Reg. at 7396/3. EPA then defines CISWI as “any combustion unit that combusts commercial or industrial waste (as defined in this subpart)...” Id. Thus, EPA exempts all CISWI that recover heat for a useful purpose. Although the record shows that there are scores of thousands of CISWI, EPA’s CISWI rule covers about 100 units. 64 Fed. Reg. at 67103. Thus, the agency’s definition unlawfully exempts the vast majority of CISWI from regulation under § 129.

EPA claims that it has “considerable discretion to regulate a variety of sources as solid waste incinera tors.” 69 Fed. Reg. at 7395/2. Clean Air Act § 129(a)(1), however, requires EPA to “establish performance standards and other requirements pursuant to section 7411 of this title and this section for each category of solid waste incineration units.” 42 U.S.C. § 7429(a)(1)(A) (emphasis added). Section 129(g)(1) then defines the term “solid waste incineration unit” to mean “a distinct operating unit of any facility which combuts any solid waste material from commercial or industrial establishments.” 42 U.S.C. § 7429(g)(1) (emphasis added). Moreover, the text of § 129(g)(1) shows that Congress expressly considered the issue of whether to regulate heat recovery units under § 129 and decided to provide only a limited exception for specifically enumerated units:

¹ The comments of Sierra Club, California Communities Against Toxics, and Desert Citizens Against Pollution on EPA’s 1999 proposal (Ex. G) are herein incorporated by reference.
The term "solid waste incineration unit" means a distinct operating unit of any facility that combusts any solid waste material from commercial or industrial establishments of the general public...

***

The term "solid waste incineration unit" does not include (A) materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals, (B) qualifying small power production facilities, as defined in section 796(17)(C) of Title 16, or qualifying cogeneration facilities, as defined in section 796(18)(B) of Title 16, which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes, or (C) air curtain incinerators provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with opacity limitations to be established by the Administrator by rule.

42 U.S.C. § 7429(g)(1) (emphasis added). Thus, EPA must set § 129 standards for any unit that combusts any solid waste, with the narrow exception of the categories of energy recovery units specifically enumerated in § 129(g)(1).

Indeed, EPA itself has acknowledged as much. For example, in its medical waste incinerator rule, EPA rejected arguments that cement kilns burning medical waste should not be regulated under § 129:

The EPA disagrees with commenters that contend EPA has no authority to regulate cement kilns under section 129. Section 129(a)(1)(A) requires the Administrator to establish performance standards and other requirements for each category of solid waste incineration units. Congress specifically listed in section 129 various categories of solid waste incineration units that EPA must regulate. Section 129(g)(1) broadly defines solid waste incineration unit as "a distinct operating unit of any facility which combusts any solid waste material... This definition clearly indicates Congress' intent to regulate more than just incinerators because the definition sweeps within its scope any facility that iscombusting any solid waste.


Plainly, CISWI that recover energy are combusting solid waste, and are not within excepted categories enumerated in § 129(g)(1). Therefore, EPA must regulate them as incinerators under § 129.
2. **EPA's Attempts To Fabricate Ambiguity In § 129 Are Without Merit.**

EPA next argues that the definition of solid waste incinerator in § 129 "on its own does little to identify where EPA should draw the regulatory dividing line between CISWI units and other combustion units." 69 Fed. Reg. at 7395/2. From there, EPA jumps to the conclusion that it can "decide when to treat combustion units at commercial and industrial facilities like incinerators and when to treat them like non-incineration combustion units" — i.e., regulate them under § 112 instead of § 129. *Id.* at 7395/3. According to EPA, the "critical consideration" is whether a unit "is designed and operated to recover heat for a useful purpose." *Id.*

First, regardless of whether EPA has discretion to draw the line between different types of solid waste combustion unit, the agency does not have the discretion to exempt any such units from regulation under § 129, except those expressly enumerated in § 129(g)(1). *See supra* at 3-5.²

Second, contrary to EPA's claim, the critical question is not whether a unit "is designed and operated to recover heat for a useful purpose." Congress made clear that the critical question is very simple: does the unit combust solid waste. If so — and if that unit is not in one of the categories of heat recovery units expressly exempted in § 129(g)(1) — it must be regulated under § 129.

Finally, the Clean Air Act is perfectly clear about which combustion units are CISWI units and which are not. Section 129(a)(1)(D) broadly requires standards for all "units combusting commercial or industrial waste." 42 U.S.C. § 7429(a)(1)(D). Section 129(g)(5), however, defines "municipal waste" as

refuse (and refuse-derived fuel) collected from the general public and from residential, commercial, institutional, and industrial sources consisting of paper, wood, yard wastes, food wastes, plastics, leather, rubber, and other combustible and non-combustible materials such as metal, glass, rock, provided that: (A) the term does not include industrial process wastes or medical wastes that are segregated from such other wastes ...

² EPA argues that it is "significant[]" that unlike § 112(d), § 129(a) did not direct EPA to establish a list of categories to be regulated but, instead, set out the different categories to be regulated along with a schedule for regulation. 69 Fed. Reg. at 7395 n.8. In § 129, however, Congress did not need to direct EPA to establish a list of categories. The Act itself plainly requires EPA to regulate "each category" of solid waste incinerator: large municipal waste combustors by 1991 (42 U.S.C. § 7429(a)(1)(B)); small municipal waste combustors and medical waste incinerators by 1992 (42 U.S.C. § 7429(a)(1)(C)); units combusting commercial or industrial waste incinerators by 1993 (42 U.S.C. § 7429(a)(1)(D)); and "other categories of solid waste incineration units" according to a schedule that EPA was required to publish by 1992 (42 U.S.C. § 7429(a)(1)(E)). 42 U.S.C. § 7429(a)(1)(A).
Id. (emphasis added). Read as a whole, therefore, § 129 makes plain EPA’s CISWI standards must apply to all combustion units that burn only waste from commercial and industrial facilities. EPA itself has recognized as much. But for the exception that EPA would carve out for energy recovery units, EPA acknowledges that universe of units affected by its rule are those “located at a commercial or industrial facility.” E.g., 69 Fed. Reg. at 7395/3, id. at 7396/1; 65 Fed. Reg. at 75359/2-3; 64 Fed. Reg. at 67095/1-2.

B. EPA’s Arguments About The Definition Of “Solid Waste” Are Irrelevant And Without Merit.

EPA also attempts to find discretion in the definition of “solid waste.” Section 129 provides that solid waste shall have the meaning established by EPA pursuant to the Solid Waste Disposal Act. 42 U.S.C. § 7429(g)(6). EPA makes much of the fact that the only definition it had established when Congress enacted § 129 — the definition in 40 C.F.R. § 261.2 defines solid waste “for purposes of identifying hazardous solid waste” and thus allegedly “could not serve as a regulatory definition for purposes of identifying nonhazardous solid waste.” 69 Fed. Reg. at 7394/1.

Those arguments are, first and foremost, irrelevant. EPA admits that the term solid waste encompasses:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, agricultural operations, and from community activities...

69 Fed. Reg. at 7396/3. There is no dispute that all CISWI are burning “solid waste” regardless of whether they also are recovering energy and regardless of whether they fit within the definition of CISWI in EPA’s remanded CISWI rule and in the present proposal. Thus, even under the solid waste definition in EPA’s remanded CISWI rule and the present proposal, the agency’s attempt to exempt CISWI that recover energy is unlawful for the reasons stated above.

In addition, EPA’s arguments are without merit. Although § 129(g)(6) provides that “solid waste” shall have the meaning established by EPA “pursuant to the Solid Waste Disposal Act” (SWDA), 42 U.S.C. § 7429(g)(6), EPA claims that it is free to come up with a different definition now in the course of promulgating Clean Air Act regulations.

As EPA concedes, the agency has established only one “comprehensive definition” of solid waste under the SWDA: the definition in 40 C.F.R. § 261.2. 69 Fed. Reg. at 7395/2. Under, § 129(g)(6), therefore, that definition must provide the meaning of “solid waste” under § 129. 42 U.S.C. § 7429(g)(6). Further, the definition of solid waste established in 40 C.F.R. § 261.2 was the only comprehensive definition that existed when Congress enacted § 129. Thus, by providing that “solid waste” shall have the
meaning established by EPA pursuant to the SWDA, Congress plainly indicated that it intended EPA to use that definition.

EPA argues that because § 261.2 “defines solid waste specifically for purposes of identifying hazardous solid waste [it] could not serve as a regulatory definition for purposes of identifying nonhazardous solid waste under CAA section 129.” 69 Fed. Reg. at 7394/1. But, because no other comprehensive definition of solid waste has been established under the SWDA, the one provided in § 261.2 is only one that EPA can use for the purpose of § 129 regulations. In any case, EPA provides absolutely no reason to believe that just because it defines solid waste for the purpose of identifying hazardous solid waste, the § 261.2 definition is unusable for identifying nonhazardous solid waste. Therefore, EPA’s refusal to use that definition is arbitrary and capricious as well as unlawful.

Even if EPA were not compelled to use the definition of solid waste provided in 40 C.F.R. § 261.2, EPA’s attempt to provide a new definition solely for the purpose of its CISWI regulations still would be unlawful. As noted above, the Clean Air Act provides that “solid waste” shall have the meaning established by EPA “pursuant to the Solid Waste Disposal Act.” 42 U.S.C. § 7429(g)(6) (emphasis added). EPA, admits, however, that the definition of solid waste in its proposal would be established for the sole purpose of EPA’s Clean Air Act regulations for CISWI. Accordingly, regardless of its merits of demerits, the proposed definition of “solid waste” is not “established pursuant to the Solid Waste Disposal Act,” 42 U.S.C. § 7429(g)(6), and therefore cannot be used under § 129 of the Clean Air Act. It bears emphasis that Congress’ directive that “solid waste” have the same meaning under § 129 as established by EPA under the SWDA shows that Congress intended that term to have the same meaning under both statutes — thus ensuring that solid waste would receive consistent regulatory treatment. By inventing a special definition of solid waste for the purpose of its CISWI rulemaking, EPA frustrates Congress’ intent.

CONCLUSION

EPA already has delayed promulgating the CISWI regulations that § 129 requires by more than a decade. Now, EPA must drop its unlawful attempts to avoid promulgating § 129 regulations for CISWI and move forward with all possible speed to promulgate the § 129 regulations for all CISWI that the Clean Air Act unambiguously requires.
EXHIBIT A
January 30, 2001

Michael McCabe
Acting Administrator,
Environmental Protection Agency
401 M. Street, SW
Washington D.C. 20460

RE: Petition To Reconsider Regulations for Commercial and Industrial Solid Waste Incineration Units

Dear Mr. McCabe:

This is a petition under Clean Air Act § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). The parties submitting this petition are the Louisiana Environmental Action Network, 162 Croydon Avenue, Baton Rouge, LA 70806 and the National Wildlife Federation, 506 East Liberty Street, 2nd Floor, Ann Arbor, MI 48104-2210 (collectively, "Petitioners"). By this petition, Petitioners request that EPA reconsider its regulations for Commercial and Industrial Solid Waste Incineration Units, 40 C.F.R. Part 60, Subparts CCCC and DDDD, 65 Fed. Reg. 75338 et seq. (December 1, 2000).

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 is 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).

After the period for public comment on EPA’s regulations for Commercial and Industrial Solid Waste Incineration Units (CIWI), EPA promulgated a definition of the term “commercial and industrial waste.” 40 C.F.R. § 60.2265, 65 Fed. Reg. at 75359. EPA’s proposed regulations for CIWI did not contain any definition of that term. 64 Fed. Reg. 67092, 67125 (November 30, 1999). Nor did EPA provide any indication in the proposed CIWI regulations (or the preamble thereto) that the agency intended to promulgate a definition of the term “commercial and industrial waste.”

Also after the comment period, EPA promulgated a definition of “commercial and industrial solid waste incineration unit” that was significantly different than the definition of that term that EPA had proposed. Specifically, the final definition of “commercial and industrial solid waste incineration unit” incorporated the newly promulgated definition of “commercial and industrial waste.” 40 C.F.R. § 60.2265; 65 Fed. Reg. at 75359. Thus, the final definition of
"commercial and industrial solid waste incineration unit" is "any combustion device that
combusts commercial and industrial waste, as defined in this subpart." Id. (emphasis added)
The proposed definition, by comparison, was "an enclosed device using controlled flame
combustion that burns solid waste or an air curtain incinerator that burns solid waste, and that is
a distinct operating unit of any commercial or industrial facility." 64 Fed. Reg. at 67125.

EPA's definition of "commercial and industrial waste" and the agency's changed
definition of "commercial and industrial solid waste incineration unit" provide "grounds for
objection" to EPA's CIWI regulations. 42 U.S.C. § 7607(d)(7)(B). Specifically, these
regulatory definitions exclude solid waste incineration units at commercial and industrial
facilities that combust solid waste with energy recovery. 40 C.F.R. § 60.2265; 65 Fed. Reg. at
75359.

Excluding such solid waste incineration units from the definition of "commercial and
industrial solid waste incineration unit" contravenes Clean Air Act § 129(a)(1)(A), 42 U.S.C.
§ 7429(a)(1)(A). Specifically, § 129(a)(1)(A) requires EPA to promulgate standards under
§§ 111 and 129 for "each category of solid waste incineration units." Solid waste incineration
units at commercial and industrial facilities that combust waste with energy recovery are
"distinct operating unit[s]" of facilities "which combust[ ] ... solid waste material from
commercial or industrial establishments or the general public." 42 U.S.C. § 7429(g)(1). Further,
such incineration units are not covered by any of the exclusions set forth in § 129(g)(1).
Accordingly, they are "solid waste incineration unit[s]" pursuant to § 129(g)(1), and must be
regulated under § 129. 42 U.S.C. § 7429(a)(1). In particular, they must be regulated under

The above-described objection to EPA's CIWI regulations is of "central relevance to the
"commercial and industrial waste" and "commercial and industrial solid waste incineration unit,"
will establish that those definitions are unlawful, and must be changed to include all solid waste
incineration units operating at commercial and industrial facilities. Thus, the above-described
objection will substantially change the number of solid waste incineration units covered by
EPA's CIWI regulations.

Grounds for the above-described objection to EPA's CIWI regulations "arose after the
period for public comment (but within the time specified for judicial review)." 42 U.S.C.
§ 7607(d)(7)(A). Specifically, they arose when EPA promulgated the final rule containing the
definition of "commercial and industrial waste" and the changed definition of "commercial and
industrial solid waste incineration unit."

Pursuant to Clean Air Act § 307(d)(7)(B), you must convene a proceeding for
reconsideration of the CIWI 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). "Such consideration shall not postpone the effectiveness of the rule." Id.
Petitioners request a prompt response to this petition.

Sincerely,

James S. Pew
Earthjustice Legal Defense Fund
Attorney for Louisiana Environmental Action Network
and National Wildlife Federation
SIERRA CLUB,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and
CHRISTINE T. WHITMAN, Administrator,
U.S. Environmental Protection Agency,¹

Respondents.

No. 01-1048

SIERRA CLUB'S NONBINDING STATEMENT OF ISSUES

Pursuant to this Court's docketing order of January 31, 2001, Sierra Club hereby submits the following nonbinding statement of issues to be raised in this proceeding:

1. Whether respondents acted unlawfully, or arbitrarily and capriciously, in promulgating regulations for "solid waste incineration units combusting commercial and industrial waste," 42 U.S.C. § 7429(a)(1)(D), that exempt units that burn waste for energy recovery;

2. Whether respondents acted unlawfully, or arbitrarily and capriciously, in promulgating regulations that exempt parts reclamer incinerators and drum reclamer incinerators;

¹ This case initially named Carol M. Browner as respondent in her capacity as Administrator of the U.S. Environmental Protection Agency. Pursuant to Fed. R. App. P. 43(c)(2), Christine T. Whitman is automatically substituted for Carol M. Browner.
3. Whether respondents acted unlawfully, or arbitrarily and capriciously, in determining the statutory minimum stringency (pursuant to 42 U.S.C. § 7429(a)(2)) for its emission standards;

4. Whether respondents acted unlawfully, or arbitrarily and capriciously, in setting emission standards that are less stringent than required by 42 U.S.C. § 7429;

5. Whether respondents acted unlawfully, or arbitrarily and capriciously, in setting emission standards that do not reflect the consideration of non-air quality health and environmental impacts, as required by 42 U.S.C. § 7429(a)(2);

6. Whether respondents acted unlawfully, or arbitrarily and capriciously, in setting emission standards that do not require maximum degree of reduction in emissions that is achievable through (1) banning or restricting the combustion of certain materials, (2) combustion technologies, (3) operating practices, or (4) pollution control technologies;

7. Whether respondents failed to promulgate standards that are “based on methods and technologies for removal or destruction of pollutants before, during or after combustion,” as required by 42 U.S.C. § 7429(a)(3);

8. Whether respondents acted unlawfully, or arbitrarily and capriciously, in setting emission standards that do not include the monitoring and reporting requirements mandated by 42 U.S.C. § 7429(c)(3);
DATED: February 28, 2001

James S. Pau
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., NW
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Attorney for Sierra Club
EXHIBIT C
Mr. James S. Pew  
Earthjustice Legal Defense Fund  
1625 Massachusetts Ave., NW, Suite 702  
Washington, D.C. 20036-2212

Dear Mr. Pew:

This letter is to inform you that the Environmental Protection Agency (EPA) is granting the petition that you filed on behalf of the Louisiana Environmental Action Network and the National Wildlife Federation requesting that the Agency reconsider certain elements of its regulations for commercial and industrial solid waste incinerators (CISWI). Specifically, the petition notes that after the period for public comment on the CISWI regulations, the EPA promulgated a definition of "commercial and industrial waste." The petition also notes that this definition was not included in the proposed rule, and that there was no indication in the proposed rule that the EPA intended to promulgate such a definition. Finally, the petition notes that EPA modified its definition of "commercial and industrial solid waste incineration unit" after publication of the proposed rule, and that this modified definition referred to and incorporated the newly adopted definition of "commercial and industrial waste." You indicated that you believe that these definitions are of central relevance to the outcome of the rule, and requested that EPA convene a proceeding for reconsideration of these elements of the CISWI regulations in order to provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

The EPA agrees that the definitions of "commercial and industrial waste" and "commercial and industrial solid waste incineration unit" are of central importance to the CISWI rule. We believe that as a matter of regulatory prudence it is appropriate in this instance for the Agency to convene further proceedings to allow an opportunity for additional public comment on these issues.
Therefore, the EPA is granting your petition for reconsideration, and shall convene a proceeding for reconsideration of those elements of the CISWI rule related to the definitions of "commercial and industrial waste" and "commercial and industrial solid waste incineration unit."

Sincerely,

[Signature]

John J. Seitz
Director
Office of Air Quality Planning and Standards

cc: Louisiana Environmental Action Network
162 Croydon Avenue
Baton Rouge, LA 70806

National Wildlife Federation
506 East Liberty Street, 2nd Floor
Ann Arbor MI 48104-2210
EXHIBIT D
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Case No. 01-1048

EPA'S UNOPPOSED MOTION FOR
VOLUNTARY REMAND WITHOUT VACATUR

Respondent United States Environmental Protection Agency ("EPA" or "Agency")
moves the Court to remand without vacatur the final rule at issue here to EPA. By so doing, the
Court will allow the Agency to (1) conduct further proceedings to allow an opportunity for
additional public comment on certain aspects of the final rule, and (2) reconsider the Agency's
approach to setting certain emissions limits in light of a recent decision by this Court that
controls key issues in this case. The requested remand without vacatur will serve the interests of
judicial efficiency and economy, without any prejudice to Petitioner Sierra Club, Intervenors or
any other person.

Counsel for EPA has spoken to counsel for Petitioner Sierra Club, and Petitioner supports
this motion for remand without vacatur. Counsel for EPA has spoken to counsel for each
group of Intervenors, and Intervenors do not oppose this motion.
In further support of this motion for voluntary remand, EPA states as follows:

1. Petitioner seeks review of a final rule by EPA setting standards for new and existing commercial and industrial solid waste incineration ("CISWI") units pursuant to sections 111 and 129 of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7511, 7429. The rule was published in 65 Fed. Reg. 75,338 (December 1, 2000).

2. The bases for Petitioner's challenge to EPA's rule can be divided into two sets of issues: (1) issues relating to EPA's definition of "commercial and industrial waste" and "commercial and industrial solid waste incinerator" under which the rule does not apply to units that burn waste as fuel for energy recovery, and (2) issues relating the establishment of emission standards and related requirements under 42 U.S.C. § 7429.

3. This Court has noted that agency motions for remand to permit an agency to reconsider its prior proceedings are commonly granted to avoid wasting the resources of the courts and the parties in litigation. Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) ("We commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources ... ").

4. Remand of this rule is appropriate because both sets of issues before this Court may become moot or, at a minimum, will be significantly narrowed if this motion for remand is granted.

   a. With respect to the issues relating to EPA's definition of "commercial and industrial waste" and "commercial and industrial solid waste incineration unit," EPA has granted a petition for agency reconsideration of those definitions filed by National Wildlife Federation ("NWF") and the Louisiana Environmental Action Network ("LEAN") under 42 U.S.C.
§ 7607(d)(7)(B) seeking further proceedings on these issues. In particular, EPA has decided to provide all parties interested in this rulemaking (including Petitioner and Intervenors) with the opportunity to participate in additional notice-and-comment proceedings with respect to these definitions. Remand of the challenged rule to EPA to conduct further proceedings will serve the interests of judicial economy. Moreover, remand to the agency for further proceedings will not prejudice Petitioner, Intervenors or any other person. Indeed, opportunity for further agency proceedings is the relief that Petitioner would obtain if it prevailed before this Court.

b. With respect to issues relating to EPA’s approach in establishing emissions standards and related requirements for commercial and industrial solid waste incinerators, a remand of this rule is appropriate to allow EPA to reconsider this rule in light of this Court’s recent decision in Cement Kiln Recycling Coalition v. EPA, No. 99-1457, 2001 WL 826523 (D.C. Cir. July 24, 2001), which was decided after EPA promulgated the final rule at issue here. In Cement Kiln, this Court remanded an EPA rule establishing emissions standards and related requirements for another group of incinerators (hazardous waste incinerators). The Court remanded that rule on the grounds that EPA’s approach in establishing the minimum stringency of its emissions standards (or “emissions floors”) did not meet the requirements of 42 U.S.C. § 7412(d)(3). The language of 42 U.S.C. § 7429(a)(2), which governs the establishment of emissions floors for the standards at issue here, is nearly identical to the statutory provision governing emission floors for hazardous waste incinerators, and EPA’s approach to setting emissions floors in the rule at issue here is substantially the same as the approach rejected by this Court in Cement Kiln. Therefore, remand of the rule here is appropriate to allow EPA to reconsider its regulatory approach in light of this recent decision.
5. A remand of the rule without vacatur will not prejudice Petitioner, Intervenors or any other person. All interested parties will have an opportunity to participate in EPA’s administrative process that will follow the remand. To the extent that any interested party is not satisfied with EPA’s final action following the remand, that party may obtain review in this Court in accordance with the relevant statutory provisions governing judicial review.

6. EPA recognizes that the statutory date for establishing emissions standards and related requirements for commercial and industrial solid waste incinerators passed in 1993. Accordingly, following the requested remand without vacatur, EPA intends to act with all due speed in repromulgating emissions standards and related requirements for commercial and industrial solid waste incinerators consistent with this Court’s decision in Cement Kiln.

CONCLUSION

For these reasons, EPA’s motion for remand without vacatur should be granted.

Further, this case is unlike Cement Kiln, in which this Court ordered a vacatur and remand because there were industry petitioners that had brought substantive challenges to the rule that were not reached when the Court ordered a remand based on other claims. 2001 WL 826523, *17 ("we have chosen not to reach the bulk of industry petitioners’ claims, and leaving the regulations in place during remand would ignore petitioners’ potentially meritorious challenges."). In contrast to Cement Kiln, there are no industry petitioners in this case, and the sole petitioner (Sierra Club) supports a remand without vacatur. Thus, this case is analogous to Sierra Club v. EPA, 167 F.3d 658, 664 (D.C. Cir. 1999), in which there was no industry petitioner and the agency action was remanded without vacatur on Petitioner Sierra Club’s request. See also National Lime Ass’n v. EPA, 233 F.3d 625, 635 (D.C. Cir. 2000) (remand without vacatur granted where industry petitioners’ claims were considered and rejected); Cement Kiln, 2001 WL 826523, *17 (discussing these cases).
Respectfully submitted,

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August 23, 2001
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by telexcopier and by United States mail, postage prepaid, on August 23, 2000, upon:

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ORDER

Upon consideration of respondent's unopposed motion for voluntary remand without vacatur, it is

ORDERED that the motion be granted, and this case is hereby remanded to the Environmental Protection Agency.

The Clerk is directed to transmit forthwith to the Environmental Protection Agency a certified copy of this order in lieu of formal mandate.

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Mark Butler
Deputy Clerk
I. EPA MUST PROMULGATE § 129 STANDARDS FOR ALL UNITS THAT COMBUST SOLID WASTE.

A. Failure to Promulgate § 129 Standards for all Units That Combust Solid Waste Would Contravene the Clean Air Act.

EPA’s proposed regulations for “industrial/commercial/institutional boilers and process heaters” apply to industrial boilers, institutional boilers, and process heaters. 68 Fed. Reg. 1660, 1663 (January 13, 2003). An industrial, commercial or institutional boiler, according to EPA, “is an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water.” 68 Fed. Reg. at 1703. Such boilers do not include “waste heat boilers, which the agency defines as “a device that recovers normally unused energy and converts it to usable heat.” Id. at 1714. A “process heater,” according to EPA, “is an enclosed device using controlled flame with the unit’s primary purpose being to transfer heat indirectly to process streams (liquids, gases, or solids) instead of generating steam.” Id. at 1703.

EPA’s proposed regulations do not apply to units that are subject to EPA’s current standards for commercial and industrial solid waste incinerators (CISWI) or to fossil fuel-fired utility boilers — i.e., fossil fuel fired combustion units that have a heat input greater than twenty-five megawatts and that serve a generator producing electricity for sale. 68 Fed. Reg. at 1663. Nor do they apply to boilers that combust hazardous waste. Id.

Within the category of boilers and process heaters to which the proposed regulations do apply are a wide range of units combusting a wide range of different materials. The materials combusted in these boilers and process heaters include fossil fuels and a wide variety of waste including, inter alia: coke oven gas, blast furnace gas and other waste gases, wood waste, shredded tires, paper mill sludge and various other sludges, various waste oils, used creosote,
railroad ties (assumed to be treated), glue, paper, waste from recycling newspapers and magazines, and agricultural waste.

Although EPA proposes to regulate all units in the “industrial/commercial/institutional boilers and process heaters” category under § 112 of the Clean Air Act, any such unit that "combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels and motels)" is a "solid waste incineration unit" under § 129 of the Clean Air Act. 42 U.S.C. § 7429(g)(1). The Clean Air Act clearly mandates that all such units must be regulated under § 129. 42 U.S.C. § 7429(a)(1)(A). Because EPA must regulate such units under § 129, it may not regulate them under § 112. 42 U.S.C. § 7429(h)(2).

As EPA’s description of the “industrial/commercial/institutional boilers and process heaters” category indicates, many of the units therein combust commercial and industrial waste. All such units must be regulated under § 129(a)(1)(D). EPA’s failure to promulgate standards for such units in its regulations that purported to satisfy § 129(a)(1)(D) contravened the Clean Air Act and was arbitrary and capricious. EPA’s continued failure to promulgate standards for such units under § 129(a)(1)(D) also represents a blatant and egregious violation of the deadline set forth in § 129(a)(1)(D) which required the agency to have promulgated regulations for all such units no later than November 15, 1994.

B. Failure to Conduct the Promised Notice and Comment Rulemaking Would Contravene the Clean Air Act and Violate EPA Commitments.

In its CISWI regulations, EPA sought to avoid promulgating § 129 regulations for a wide variety of solid waste incineration units — including many units in the “industrial/commercial/institutional boilers and process heaters” category for which the agency has just proposed regulations — by promulgating unlawful and arbitrary definitions of “commercial and industrial waste” and “commercial and industrial solid waste incineration unit.” 40 C.F.R. § 60.2265, 65 Fed. Reg. 75338, 75359 (December 1, 2000).

Sierra Club petitioned for review of EPA’s regulations under § 307(d) of the Clean Air Act. Sierra Club v. EPA, D.C. Cir. No. 01-1048. Among the issues raised by Sierra Club was EPA’s exemption of units that combust waste for energy recovery. Non-binding statement of issues in No. 01-1048, Ex. A hereto. In addition, Louisiana Environmental Action Network (LEAN) and National Wildlife Federation (NWF) filed a petition for reconsideration with the agency. Letter from Pew to McCabe of January 30, 2001, Ex. B hereto. Their petition challenged EPA’s definitions of “commercial and industrial waste” and “commercial and industrial solid waste incineration unit” — neither of which had been proposed and both of which were elements in EPA’s unlawful and arbitrary exemption of units combusting waste for energy recovery.¹

¹ EPA had proposed a similar exemption on different grounds, and commenters pointed out that such exemption was unlawful. Comments of Sierra Club, et al., Ex. C hereto. The agency then promulgated final rules advancing new argument for exempting units that combust waste for energy recovery. That argument is addressed in the petitions for agency reconsideration. Ex. A.
EPA granted the petition for reconsideration filed by LEAN and NWF, promising that it would “convene further proceedings to allow an opportunity for additional public comment” on the issues presented therein. Letter from Seitz to Pew of August 17, 2001, Ex. D hereto. In addition, the agency sought and obtained a voluntary remand in No. 01-1048 by representing to the Court and Sierra Club that, *inter alia*, the agency had granted the petition for reconsideration and that it had “decided to provide all parties interested in this rulemaking (including Petitioner and Intervenors) with the opportunity to participate in additional notice-and-comment proceedings” with respect to the definitions of “commercial and industrial waste” and “commercial and industrial solid waste incineration unit.” Motion for Voluntary Remand, Ex. E hereto at 3. EPA further represented to the Court and Sierra Club that it “recognizes that the statutory date for establishing emission standards and related requirements for commercial and industrial solid waste incinerators passed in 1993” and that the agency “intends to act with all due speed in repromulgating emissions standards and related requirements for commercial and industrial solid waste incinerators.” *Id.* at 4.

Based on EPA’s representations, the Court granted its motion for a voluntary remand, but did not issue a formal mandate. Order of September 6, 2001, Ex. F hereto.

Although more than eighteen months have passed, EPA has not conducted the notice and comment rulemaking that it promised. Nor has the agency communicated with LEAN, NWF or Sierra Club in any way regarding that rulemaking, or otherwise indicated that it had begun the rulemaking process in any way.

Instead, EPA apparently has made the decision to move forward with regulating waste-burning boilers and process heaters under § 112. To do so would violate the commitments that EPA made in granting the petition for agency reconsideration and in obtaining a voluntary remand from the court. Indeed, it would render those commitments a fraud on the Court and on Sierra Club, LEAN and NWF. Clearly, despite its representations, EPA was not willing to engage in any meaningful rulemaking that even considers the proper regulation of waste burning boilers and process heaters under § 129 of the Act if the agency already has determined to regulate them under § 112.

Failure to conduct a meaningful rulemaking in a timely manner would also contravene the Clean Air Act. 42 U.S.C. § 7607(d)(7)(B).

Further, if the promised notice and comment rulemaking takes place after EPA has made a decision to regulate waste burning boilers and process heaters under § 112, it necessarily would either be meaningless or would result in a huge waste of time and resources. Specifically, for the promised rulemaking to have any meaning whatsoever, EPA must actually be open to the conclusion that all waste burning units must be regulated under § 129. If EPA concluded that such units must be regulated under § 129 after having already decided to regulate them under § 112, however, the agency would have to redo the rulemaking completely to comply with § 129.
Accordingly, EPA must reverse its course now. Any further progress toward regulating waste burning units under § 112 instead of § 129 will simply waste time, resources, and delay promulgation of the regulations that the Clean Air Act requires.

C. Any Distinction Based on Whether a Unit Recovers Energy From the Combustion of Solid Waste Would Be Unlawful and Arbitrary and Capricious.

EPA does not offer any reason in the proposal for setting § 112 standards rather than § 129 standards for waste-burning units in its proposal for the “industrial/commercial/institutional boilers and process heaters” category. Instead, the agency appears to simply take for granted that it can do so — even though that very issue already has been raised in court and even though the agency has agreed that notice and comment rulemaking is necessary to address it. Because the Act requires all units combusting solid waste to be regulated under § 129, EPA’s failure to promulgate § 129 standards is unlawful, and the agency’s failure to explain its decision is arbitrary and capricious.

To the extent EPA is relying on arguments that it advanced in its CISWI rulemaking, the agency is relying on an unlawful interpretation of the statute. In its CISWI rulemaking, EPA stated that the “overall intent of the CAA provisions is that section 129 rules are to apply to devices conventionally regarded as incinerators, that is, devices burning wastes in order to destroy the wastes.” 65 Fed. Reg. at 75342/2 (emphasis added). Elaborating, the agency argued:

commercial and industrial units burning materials without energy recovery are disposing of the materials, that is, they are treating such materials as commercial or industrial waste, and should be regulated … under section 129. In contrast, commercial and industrial units burning materials with energy recovery, that is treating such materials as fuel, should be regulated under section 112.

Id. at 75343/1.

Boilers and process heaters that combust solid waste are solid waste incineration units subject to § 129 of the Clean Air Act regardless of whether they recover heat or energy from such combustion.

First, § 129(a)(1) of the Clean Air Act requires the EPA to “establish performance standards and other requirements pursuant to section 7411 of this title and this section for each category of solid waste incineration units.” 42 U.S.C. § 7429(a)(1)(A) (emphasis added). Section 129(g)(1) defines the term “solid waste incineration unit” to mean “a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments.” 42 U.S.C. § 7429(g)(1). Thus, the Clean Air Act plainly required EPA to promulgate § 129 standards for each unit that combusts any solid waste. The agency was required to promulgate standards for units combusting commercial and industrial waste by November 15, 1994. 42 U.S.C. § 7429(a)(1)(D).

Second, § 129(g)(1) shows that Congress expressly considered and rejected the notion of a broad exemption from § 129 for units that combust solid waste for energy recovery. Section
129(g)(1) broadly defines "solid waste incineration unit" and then enumerates the only exceptions for energy recovery units:

The term "solid waste incineration unit" means a distinct operating unit of any facility that combuts any solid waste material from commercial or industrial establishments or the general public...

***

The term "solid waste incineration unit" does not include (A) materials recovery facilities (including primary or secondary lead smelters) which combust waste for the primary purpose of recovering metals, (B) qualifying small power production facilities, as defined in section 796(17)(C) of Title 16, or qualifying cogeneration facilities, as defined in section 796(18)(B) of Title 16, which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes, or (C) air curtain incinerators provided that such incinerators only burn wood wastes, yard wastes, and clean lumber and that such air curtain incinerators comply with opacity limitations to be established by the Administrator by rule.

42 U.S.C. § 7429(g)(1) (emphasis added). By enumerating the categories of solid waste incineration units that are not covered by § 129, Congress made plain that all other categories are covered.

Third, the definition of solid waste is also broad, and encompasses waste that is burned for energy recovery. The Clean Air Act provides that the term "solid waste" shall have the meaning established by EPA pursuant to the Solid Waste Disposal Act (SWDA). 42 U.S.C. § 7429(g)(6). The SWDA, in turn, defines "solid waste" broadly to mean

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations and from community activities...

42 U.S.C. § 6903((27). The only regulatory definition of the terms "solid waste" and "discarded material" that EPA had provided under the SWDA when § 129 was enacted — and, indeed the only definition that EPA has ever provided under the SWDA — is at 40 C.F.R. § 261.2. That provision makes clear that material is "discarded material," and therefore solid waste, if it is burned or incinerated regardless of whether is burned or incinerated for energy recovery.

Finally, because § 129(g)(6) refers to the EPA definition of solid waste under the SWDA that existed at the time Congress enacted § 129 (i.e., in 1990), any subsequent attempts by EPA to narrow that definition would be irrelevant under § 129.
II. EPA'S FLOOR APPROACH IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS.

A. After Separating Out All Units Combusting Solid Waste for Separate Regulation Under § 129, EPA Must Completely Redo The Floors for Units Combusting Fossil Fuel.

As explained in detail below, EPA must regulate all units that combust any solid waste under § 129. Thus, EPA must completely redo its standards for all such units, to bring such standards fully into compliance with all the requirements of § 129. Among other things, EPA must promulgate standards for all units that combust any solid waste, regardless of size. Further, EPA must promulgate numerical emission standards for each of the pollutants enumerated in § 129(a)(4).

In addition, because EPA must regulate units that do combust any solid waste separately from units that do not combust any solid waste, the agency must completely redo its § 112 standards for the latter. Specifically, EPA must recalculate the floors for the boilers and process heaters that do not combust any waste (and that are therefore subject to § 112 rather than § 129) by identifying the best performing twelve percent for which it has emissions information and then setting floors reflecting the average emission levels achieved by those sources. Accordingly, comment on the specific flaws in EPA's floor approach are beside the point. However, even assuming *arguendo* that EPA could choose to ignore the law by moving forward to regulate both sources that combust solid waste and sources that do not combust solid waste under § 112, the agency still would have to correct the additional flaws described in detail below.

B. EPA's Floor Approach Contravenes § 112 and Is Arbitrary and Capricious.

It is now well established that the "floor" for EPA's emission standards under Clean Air Act § 112(d) — i.e., the statutory minimum stringency — must reflect the "emission level achieved" by the relevant best performing sources. *Cement Kiln Recycling Coalition v EPA*, 255 F.3d 855, 865 (D.C. Cir. 2001) (*CKRC*). Thus, because all of the subcategories within the Industrial/Commercial/Institutional Boilers and Process Heaters category have more than 30 sources, existing source floors for each subcategory must reflect the average emission level achieved by the best performing twelve percent of sources for which EPA has emissions information. 42 U.S.C. § 7412(d)(3). See *CKRC*, 255 F.3d at 861, 865. Floors for new sources must reflect the emission level achieved by the single best performing source in each category. 42 U.S.C. § 7412(d)(3).

Although EPA may estimate the emission levels achieved by the relevant best performing sources, it must do so reasonably and its estimates must provide an "accurate picture" of the relevant best sources' performance. *Sierra Club v. EPA*, 167 F.3d 658, 663 (D.C. Cir. 1999). As the D.C. Circuit has made very plain, EPA may not use the performance of a chosen control technology as an estimate of the emission levels achieved by the relevant best sources, where other factors also influence such performance.
we explained in [National Lime Ass'n v. EPA, 233 F.3d 625 (D.C. Cir. 2000)] that such an approach would satisfy the statute "if pollution control technology were the only factor determining emission levels of that HAP, 233 F.3d at 633.

CKRC, 255 F.3d at 863 (emphasis in original).

Here, the record makes abundantly clear that pollution control technology is not "the only factor determining emission levels" of any of the HAP that boilers and process heaters emit. For example, EPA states “[b]oilers and process heaters can emit a wide variety of compounds depending on the fuel burned.” 68 Fed. Reg. at 1671. Similarly, the agency argues

a unit without any add-on controls, but burning a fuel containing lower amounts of HAP, can have emission levels that are lower than the emissions from a unit with the best add-on controls.

68 Fed. Reg. at 1672. In addition, even within the various subcategories of boilers and process heaters that EPA has created, sources vary widely with respect to size, design and age. Likewise, even control devices of the same type (e.g., fabric filters) can and do vary widely in performance, and some sources may use more than one end-of-stack control technologies or a combination of different control technologies. Finally, boilers and process heaters are operated differently; different companies require different levels of equipment maintenance, operator training and operator care. All of these factors — in addition to the variations in fuel used and the different types of control device installed — affect HAP emission levels. Thus, by attempting to base floors on the performance of chosen control technology, EPA contravenes the Clean Air Act. CKRC, 255 F.3d at 863-865; National Lime Ass'n, 233 F.3d at 633. Indeed, given that the D.C. Circuit has now ruled on this very issue twice, it appears that EPA and its lawyers are either unaware of such basic concepts as the rule of law and the separation of powers or have simply decided that the agency is above the law.

EPA argues that it could not set floors at the emission levels achieved by the best performing sources because these sources did not necessarily have the best add-on control equipment. 68 Fed. Reg. at 1672. The agency goes on to claim that the best performing units are not necessarily the "best-controlled" because they may have lower efficiency end-of-stack control equipment. Id. EPA completely misreads the mandate of § 112’s floor requirement — a remarkable achievement given that the D.C. Circuit has now explained that requirement three times. Floors under § 112 must reflect the emission levels actually achieved by the “best performing” sources — i.e., those with the lowest emission levels — not the ones that EPA deems to be the “best-controlled”. CKRC, 255 F.3d at 861, 865. It does not matter how these sources achieve their superior emission levels; they may do so by burning a cleaner fuel, by being better designed or newer, by being better maintained or operated, by using better end-of-stack control technologies, or by using more than one control technology. EPA’s simple but mandatory task is to identify the relevant best performing sources — regardless of how they are achieving their superior emission levels — and set standards reflecting the average emission level these sources are achieving. Thus, EPA’s contention that floors reflecting the emission levels achieved by the best performers may not reflect what is achievable for all sources through using a chosen control technology is irrelevant. Further, EPA’s contention that floors must
reflect what is achievable through using a chosen control technology is flatly unlawful; indeed, that contention has already been rejected twice by the D.C. Circuit. *CKRC*, 255 F.3d at 861, 865; *National Lime Ass'n*, 233 F.3d at 633.

EPA goes on to argue that, because the HAP content of fuels used in different boilers and process heaters varies, floors based on the emission levels actually achieved by the best performers may not necessarily be achievable for all sources in the same subcategory. 68 Fed. Reg. at 1672. For example, EPA claims that “coal burning boilers may never be able to achieve the mercury HAP level of [a] wood-fired unit, no matter what add-on controls are used.” *Id.* (emphasis added) EPA does not assert, however, all sources would not be able to match the performance of the best performers, far less demonstrate any such assertion with record evidence. Moreover, EPA completely neglects to consider the extraordinarily high emission reduction levels that can be achieved through advanced emission control technologies (e.g., carbon injection and carbon absorption); and thus necessarily neglects to consider that it very well may be possible, for example, for coal burning units to match the mercury emissions performance of wood fired units.

In any case, floors need not be achievable for all units in a subcategory through the application of an end-of-stack control technology; the Clean Air Act requires only that floors reflect the emission levels actually achieved by the relevant best sources. *CKRC*, 255 F.3d at 861, 865. Thus, even assuming arguendo that some sources cannot meet floor standards through the application of any single end-of-stack control technology or any combination of end-of-stack control technologies, the Clean Air Act still would not allow EPA to set floors do not reflect the relevant best performers’ emission levels. Rather, the sources that could not meet floor levels would have to shut down or switch fuels.

EPA argues that “fuel switching was not an appropriate control technology for purposes of determining the MACT floor level of control for any subcategory.” 68 Fed. Reg. at 1672. Floors, however, must reflect the emission levels actually achieved by the relevant best performers. That mandate applies regardless of whether some sources may have to switch fuels and regardless of whether EPA believes that fuel switching is an appropriate “control technology.” As noted above, floors must not be based on any single control measure unless that measure is the only factor affecting emissions. Here, it is undisputed that ICI sources’ HAP emissions are not affected by just one factor.

III. EPA’S FAILURE TO SET EMISSION STANDARDS FOR EACH HAP THAT BOILERS AND PROCESS HEATERS EMIT IS UNLAWFUL AND ARBITRARY AND CAPRICIOUS.

Regulations under § 112 of the Clean Air Act must include emission standards for each hazardous air pollutant (HAP) that a category emits. 42 U.S.C. § 7412(d). *National Lime Ass'n v. EPA*, 233 F.3d 625, 633-634 (D.C. Cir. 2000). EPA’s proposed regulations fail to comply with that mandate. Although the agency indicates that boilers and process heaters emit many different HAPs, including dioxin and a wide variety of metals (68 Fed. Reg. at 1690), the agency has proposed standards for only a few of these pollutants. Specifically, existing sources need only comply with a mercury standard, a hydrogen chloride (HCl) standard and a standard for either particulate matter (PM) standard or total metals. For new units the requirements are
similar, but also include a carbon monoxide (CO) standard. Because EPA did not set emission standards for each HAP that boilers and process heaters emit, its regulations are unlawful. 42 U.S.C. § 7412(d). National Lime Ass'n, 233 F.3d at 633-634.

EPA claims that PM is a surrogate for all non-mercury metals. 68 Fed. Reg. at 1671. The agency argues that: (1) the same control techniques that would be used to control fly-ash PM would also control non-mercury metallic HAPs; (2) the use of PM as a surrogate will eliminate the need for performance testing to show compliance with individual metal standards.

For a number of reasons, PM is not a valid surrogate for non-mercury metal emissions from boilers and process heaters. First, as explained above, factors other than the end-of-stack PM control technologies affect emissions of these HAPs. Accordingly, a PM standard would not reflect the metal emission levels actually achieved by the relevant best performing sources. It is now well established that EPA must set emission standards for each HAP that a category emits (National Lime Ass'n) and that such standards must at least match the emission levels achieved by the relevant best sources (CKRC). Accordingly, EPA may not use a surrogate where — as here — it results in regulations that do not include standards for each HAP or do not reflect the emission levels achieved by the best performers. For this reason, the National Lime Ass'n Court expressly recognized that the use of PM as a surrogate for HAP metals would be unreasonable (and therefore unlawful) if “switching fuels would decrease HAP metal emissions without causing a corresponding reduction in total PM emissions.” 233 F.3d at 639. Here, it bears emphasis that EPA admits that factors other that PM control affect HAP metal emissions.

Second, EPA has admitted in the past that PM is not a valid surrogate for semivolatile metals such as lead and cadmium. 64 Fed. Reg. 53014, 52845-52846 (September 30, 1999). Nowhere does EPA explain how that admission can be reconciled with its apparent position here that PM is a valid surrogate for such metals.

Third, EPA’s argument that that the use of PM as a surrogate pollutant for HAP metals would reduce costs do not relieve the agency of its clear statutory obligation to set standards for each HAP that a category emits. Likewise, cost concerns do not allow the agency to use an inadequate surrogate, as the agency proposes to do here.

Fourth, EPA does not explain why its only choice is either to set individual standards for each metal HAP or to use PM as a surrogate for all of them. In the past, EPA has grouped metals with similar characteristics together. See, e.g., 64 Fed. Reg. at 52845-52847. Nowhere does EPA explain why that same approach could not be used here.

EPA also used CO as a surrogate for all organic compounds, arguing that CO levels are indicative of good or bad combustion. 68 Fed. Reg. at 1671. As EPA is well aware, one of the organic compounds emitted by boilers and process heaters is dioxin. Id. Although good combustion is one factor affecting dioxin emissions, it is by no means the only factor. As EPA is well aware, dioxin emissions also are affected by the temperature of the emissions, how quickly that temperature is lowered. In addition they are affected by the levels of chlorine in the materials that are being combusted. Further, they are affected by control devices, such as
activated carbon injection, and others. Because factors other than good combustion affect dioxin emission levels, CO is not an adequate surrogate for dioxins. See supra at 9.

IV. EPA'S FINAL STANDARDS AND BEYOND-THE-FLOOR ANALYSIS ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS.

The Clean Air directs EPA to consider "non-air quality health and environmental impacts" in determining the maximum degree of reduction in emissions that is achievable. 42 U.S.C. § 7412(d)(2). EPA claims that it considered "non-air quality, health impacts" (68 Fed. Reg. at 1684), but nowhere did the agency consider the non-air quality health and environmental impacts caused by the deposition, persistence and bioaccumulation of HAP metals, such as mercury, cadmium and lead and persistent organic pollutants such as dioxins. EPA already has recognized that such impacts exist. See, e.g., 64 Fed. Reg. 52828, 53014 (September 30, 1999) 64 Fed. Reg. 31898, 31908-31909 (June 14, 1999); 63 Fed. Reg. 14182, 14193 (March 28, 1998); 61 Fed. Reg. 17358, 17478 (April 19, 1996) (due to bioaccumulation, mercury levels may be 10,000,000 higher in fish than in the water those fish inhabit). Further, EPA has recognized that such impacts are "non-air quality health and environmental impacts" within the meaning of § 112(d). 61 Fed. Reg. at 17382. EPA's failure to consider these effects in setting final standards was unlawful and arbitrary and capricious. See National Lime Ass'n, 233 F.3d at 634-635.

V. EPA'S RISK-BASED EXEMPTION SCHEMES ARE UNLAWFUL AND ARBITRARY AND CAPRICIOUS.

A. Section 129 Does Not Allow Risk Based Exemptions Under any Circumstances.

As explained in detail above, EPA must regulate all units that combust any solid waste under § 129 rather than § 112. Because § 129 does not permit EPA to establish any risk-based exemptions, it would be unlawful for EPA to do so for any boilers and process heaters that combust any solid waste.


In its proposal EPA solicits comment on what the agency describes as "applicability cutoffs" for threshold pollutants under § 112(d)(4) of the Clean Air Act. 68 Fed. Reg. at 1688. Specifically, the agency requests comment on an industry interpretation of § 112(d)(4) of the Act under which the agency could exempt individual facilities that can demonstrate that their emissions will not result in air concentrations above the threshold levels with an ample margin of safety even if the category is otherwise subject to MACT. Id.

The Clean Air Act allows no such cutoffs. Rather, it provides only that "[w]ith respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection." 42 U.S.C. § 7412(d)(4) (emphasis added). Had Congress intended to give EPA discretion to consider threshold levels in such a way as to exempt facilities from
compliance with emission standards the Clean Air Act would say so. The notion that Congress created such a gaping loophole in the Act sub silentio is nothing short of absurd.

Indeed, Congress considered and expressly rejected the applicability cutoffs on which EPA now solicits comment. The House version of the 1990 Amendments allowed States to issue permits that exempted a source from compliance with MACT rules if the source presented sufficient evidence to demonstrate negligible risk:

(g) Alternative Emissions Limitations.—(1) Notwithstanding the requirements of subsection (d), a State ... may issue a permit that authorizes—

(A) a major source to comply with alternative emission limitations in lieu of standards under this section, if the owner or operator presents sufficient evidence to demonstrate that emissions from the source in compliance with such limitations present a negligible risk to public health under criteria issued by the Administrator...


The Senate version of the 1990 Amendments, however, contained no such provision. Instead, it contained language similar to current § 112(d)(4): "[w]ith respect to pollutants for which a health threshold can be established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection." S. 1630, 101st Cong., 2nd Sess. (1990) 307, 3 Legislative History at 4425.

In conference, Congress considered both the House and Senate versions. It rejected the House bill's exemption for specific facilities in favor of the Senate bill's language. Explaining the decision (in the context of a draft alternatives paper prepared by EPA), Senator Durenberger stated:

The fourth set of alternatives reviewed in the paper concern source-by-source exemptions from MACT based on risk assessments, a provision contained in the House bill. The authority for such exemptions was not present in the Senate bill, and the House receded to the Senate on this point. The provision was deleted in conference. As a result, the paper's discussion of this provision is irrelevant to the final legislation.

1 Legislative History at 866. In short, any discussion of source-by-source exemptions has no basis in the Clean Air Act.

EPA's alternatives paper also asserted that "a facility may be subject to a MACT regulation but ... cutoffs specified in the standard may result in no additional controls being applied." 1 Leg. Hist. at 869. Senator Durenberger commented

No such authority has been retained in the final statute. While various categories and subcategories of sources may be established, emissions from all facilities
within a category or subcategory must be controlled by the MACT standard. The
managers specifically disapprove of EPA's practice — evident in recent new
source performance standards under section 111 of current law — for example,
the air oxidation and distillation standards — of establishing cutoffs that result in
excluding some sources within the category or subcategory from the emission
limitations or control measures otherwise required.

1 Leg. Hist. at 869.

In sum, the text and legislative history of the Clean Air Act make clear that the
applicability cutoffs on which EPA solicits comment are unlawful. By attempting to resuscitate
an exemption that Congress expressly considered and rejected, the agency would blatantly
contravene the Clean Air Act.

Even if applicability cutoffs for individual sources were not inherently unlawful, they
would be unlawful here. First, EPA has indicated that sources in the automobile and light-duty
truck surface coating category emit carcinogens including at least four carcinogens: benzene,
formaldehyde, EGBE and nickel compounds. 67 Fed. Reg. at 78626. As the legislative history
makes clear, Congress did not intend EPA to establish any carcinogens as “threshold” pollutants
under § 112(d)(4):

where health thresholds are well-established, for instance in the case of ammonia,
and the pollutant presents no risk of other adverse health effects, including cancer,
for which no health threshold can be established, the Administrator may use the
threshold with an ample margin of safety (and not considering cost) to set
emissions limitations for sources in the category or subcategory. Employing a
health threshold or safety level rather than the MACT criteria to set standards
shall not result in adverse environmental effects which would otherwise be
reduced or eliminated.

Senator Durenberger stated:

With respect to pollutants for which a safe threshold can be set, the authority to
set a standard less stringent than the maximum achievable control technology is
contained in subsection (d)(4). With respect to carcinogens and other non-
threshold pollutants, no such authority exists in subsection (d) or any other
provision of the Act.

1 Leg. Hist. at 876-877 (emphasis added). Thus, providing § 112(d)(4) cutoffs for sources that
emit carcinogens or other non-threshold pollutants is plainly unlawful.

Second, EPA appears simply to assume that it need consider only inhalation based risks.
Nowhere, however, does the agency demonstrate (or even claim) that people are exposed only
through inhalation to the hazardous air pollutants emitted by the automobile and light-duty truck
surface coating category. Absent any such demonstration, it is reasonable to conclude that there
is a possibility of exposure through other pathways (e.g. ingestion). Section 112(d)(4) refers to
pollutants "for which a health threshold has been established." As this language and the legislative history make clear, it refers to pollutants that have no adverse health or environmental effects. See 5 Legislative History at 8511. Thus, § 112(d)(4) necessarily requires EPA to consider all possible ways that a pollutant could affect human health or the environment.

With respect to carcinogens, EPA requests comment on "how we should consider the state of the science as it relates to the treatment of threshold pollutants when making determinations under section 112(d)(4)." 68 Fed. Reg. at 1692. As shown above, Congress made clear that it did not regard carcinogens as threshold pollutants. Thus, it is irrelevant whether EPA may ultimately conclude that some carcinogens are threshold pollutants; applying § 112(d)(4) to carcinogens is unlawful.

EPA also requests comment on "whether there is a level of emissions of a nonthreshold carcinogenic HAP ... at which it would be appropriate" to allow a facility to use the ... the section 112(d)(4) approach. Id. As explained above, the answer is no; regardless of what EPA thinks the risks from any particular carcinogen might be, Congress has plainly indicated its intent that carcinogens are not threshold pollutants. Therefore, no level of emissions of carcinogens is insignificant for the purpose of § 112(d)(4).

Even assuming arguendo that EPA’s applicability cutoff proposal were not otherwise unlawful, the agency’s proposed methods for determining a hazard index would contravene § 112(d)(4)’s mandate to "provide an ample margin of safety." Specifically, none of these methods accounts for the fact that the potency of a mixture of HAP can be more potent than the sum of the individual HAP potencies. Without accounting for the synergistic effects of two or more pollutants, EPA cannot possibly provide an ample margin of safety.


EPA also states that it is considering whether it would be possible to establish a subcategory of facilities within the larger automobile and light-duty truck surface coating category that would meet the risk-based criteria for delisting under § 112(c)(9). 68 Fed. Reg. at 1692. Any such action would be flatly unlawful. Section 112(c)(9)(B) provides that EPA "may delete any source category from the § 112(c) list upon making certain determinations. 42 U.S.C. § 7412(c)(9)(B). Congress was well aware of the difference between a "category" and a "subcategory" when it enacted § 112(c) and, when Congress wished to refer to subcategories as well as categories, it did so expressly. See, e.g., 42 U.S.C. § 7412(c)(1). By referring only to "category," Congress made plain that § 112(c)(9)(B) does not allow EPA to delist a "subcategory" for any reason.

Even if EPA could delist a subcategory, it could not do so based on risk. Section 112(c) states that “[t]o the extent practicable, categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 111 and part C.” 42 U.S.C. § 7412(c)(1). Subcategories based on risk would not be “consistent with” either the § 111 list or part C.
Also, § 112(d) makes plain that EPA can only subcategorize based on "classes, types and sizes." 42 U.S.C. § 7412(d)(1). In addition, EPA itself has interpreted the term "subcategory" to mean equipment that shares physical characteristics relevant to the degree of pollution control that can be achieved. Because risk is not such a characteristic, EPA may not subcategorize based on risk. Further, risk-based subcategories would be at odds with Congress's purpose in enacting § 112 — i.e., requiring technology-based standards with a performance-based floor — which was precisely to overcome EPA's all but complete failure to promulgate any health-based standards.

Moreover, EPA has offered no reason for departing from its current interpretation of subcategory other than its apparent desire to avoid setting emission standards. Therefore, if EPA subcategorizes based on risk, it will be reversing its own stated policy in an arbitrary and capricious manner. Thus, by attempting to subcategorize based on risk — a necessary step in delisting a subcategory based on risk — EPA would contravene § 112(d)(1).

Nor could EPA render risk-based subcategories any less unlawful by creating them under the pretense of subcategorizing by technology — a possibility the agency admits to considering. 68 Fed. Reg. at 1693.

Even assuming arguendo that EPA could subcategorize by risk, it would be unlawful for the agency to refuse to consider the low-risk sources in its floor calculations. Section 112's floor language does not provide for any exception to its mandate to base floors on the emission levels achieved by the relevant best performing sources.
COMMENTS OF SIERRA CLUB, CALIFORNIA COMMUNITIES AGAINST TOXICS
AND DESERT CITIZENS AGAINST POLLUTION

Sierra Club, California Communities Against Toxics and Desert Citizens Against Pollution ("Commenters") submit the following comments on EPA's proposed regulations for commercial and industrial solid waste incineration (CISWI) units, 64 Fed. Reg. 67092 (November 30, 1999).

I. FLOOR ISSUES.

A. Existing Units.

1. EPA's Technology-Based Floor Approach Is Unlawful.

The Clean Air Act mandates floors based on "the average emissions limitation achieved by the best performing 12 percent of units." 42 U.S.C. § 7429. This mandate requires EPA to show—and not merely assert—that its floors reasonably reflect the actual performance of the best performing twelve percent of units. Sierra Club v. EPA, 167 F.3d 658, 663-664 (D.C. Cir. 1999). EPA's floors, however, do not even purport to reflect the actual performance of the best units; they reflect emission levels that the agency believes to be achievable with a particular type of control technology.\textsuperscript{1}

\textsuperscript{1} It is not clear from the agency's discussion what EPA regards as the "floors" for its standard. At one point, the agency refers to its technology choice as "the technology basis" for each floor, implying that the floor is the emission level that EPA believes to be achievable with that technology. 64 Fed. Reg. at 67099. In the very next paragraph, however, the agency refers to the "resulting emission limits associated with the MACT floors for each pollutant," implying that the floors are the chosen technologies themselves. Id. (emphasis added). EPA's failure to indicate whether it believes that the floors are the technologies themselves or the emission levels footnote continued on next page...
EPA's floor approach contravenes the Clean Air Act in several respects. First, setting floors based on the performance of a particular technology is flatly inconsistent with the Act's floor language. Quite simply, the alleged performance of a technology is not "the average emissions limitation achieved by the best performing twelve percent of units." 42 U.S.C. § 7429(a)(2) (emphasis added). EPA must set floors based on what the best performing CISWI units have achieved, not on what the agency believes a particular technology can achieve. 2

Second, EPA has not claimed—far less shown—that its floors reasonably reflect the actual performance of the best units. EPA claims only that its floors reflect limits that are achievable through deployment of the technology used by the best performing units. Even if true, this claim would not show that EPA's floors reasonably reflect the actual performance of the best units, and thus would not bring EPA's floor approach within the requirements of § 129. See Sierra Club, 167 F.3d at 663 (if EPA bases floors on data other than actual emissions data, the agency must show that those data reasonably reflect the actual performance of the best units).

Third, even if EPA had claimed that its floors reasonably reflect the actual performance of the best units, the agency has not shown this to be correct. Sierra Club 167 F.3d at 663 (EPA must show and not merely assert that its floors reflect the actual performance of the best units). To begin with, EPA has never identified the best performing twelve percent of units or the emissions limitation those units achieved. 3 As a result, the agency cannot possibly compare its technology-based floors to such units' actual performance, and cannot possibly show that its floors reflect such performance. Moreover, as EPA is well aware, a unit's actual performance depends not just on the type of control technology it uses, but also on many other factors.

... footnote continued from previous page

"associated with" those technologies renders the agency's attempted explanation of its floor approach difficult to understand.

2 The first step in EPA's floor-setting approach was to rank control technologies according to effectiveness, based on the agency's review of "information about emission reduction in the literature and engineering judgment." Id. Second, EPA ranked the units in its database based on which control technology they used. Third, EPA "determined the technology basis of the MACT floor for each pollutant by identifying the best-performing 12 percent of units on a pollutant-by-pollutant basis." 64 Fed. Reg. at 67099. Finally, EPA established an emission level that the agency believed to be "achievable" with the chosen technology. That level was the "maximum concentration of emissions reported for the given pollutant/control combination"—i.e., apparently, the very worst emissions test reported.

3 Although EPA claims that it "determined the technology basis of the MACT floor for each pollutant by identifying the best-performing 12 percent of units on a pollutant-by-pollutant basis" (64 Fed. Reg. at 67099 (emphasis added)), EPA did not identify the best performing units. Instead, the agency simply chose a particular technology, and declared that the best performing units were the units that used that technology. The agency then declared that that technology—i.e., the very technology EPA had chosen in the first place—is the technology used by the best performing units. In short, the agency's claims to have identified the best performing units and the technology that those units deploy both rest on circular reasoning.
including the materials being burned, pollution prevention measures, and combustion conditions
(which in turn vary with the type of combustor and the manner in which it is run). Thus, the
alleged performance of a control technology alone cannot possibly give a reasonable indication
of the performance of the best units.

Fourth, EPA’s floor approach virtually guarantees that its floors do not reasonably reflect
the actual performance of the best units. The emission limits that EPA “associated” with the
chosen technologies was the “maximum concentration” reported for that technology—i.e.,
apparently, the worst emission test result for each pollutant/control technology combination.
Quite simply, the worst emissions test result for any unit using a particular technology does not
reasonably reflect the actual performance of the “best performing” units. See Sierra Club, 167
F.3d at 663-664 (rejecting as “hopelessly irrational” EPA’s attempt to characterize the worst
emissions test results as reflective of the actual performance of the best performing units). If
EPA were to make such an Orwellian claim, the agency would find no support in the record.
Indeed, EPA’s own emissions data show that the best performing twelve percent of units are
achieving emission limits that are substantially better than the agency’s floors. See Table 1, infra
at 5.

Fifth, EPA’s decision to inject its own notion of what is “achievable” into the floor
analysis blatantly contravenes the Clean Air Act. EPA’s discussion of its floor approach
indicates that the agency did not even attempt to set floors that reasonably reflect the actual
performance of the best units. Instead, EPA admits that, after choosing a technology, it
at 67099 (emphasis added). The Clean Air Act, however, does not direct EPA to set floors
reflecting the emissions limitations that it believes to be “achievable,” but rather the emissions
limitations that are “achieved” by specific units—the “best performing 12 percent.” The
difference between what EPA believes to be “achievable” and what the best units actually
“achieved” is enormous. The first reflects a subjective judgment by the agency; the second is an
objective measurement. By substituting the agency’s subjective judgment for the objective
measurement that § 129 requires, EPA’s approach writes the floor language out of § 129
altogether.

Indeed, even assuming arguendo that EPA could lawfully identify the best performing 12
percent of units solely by reference to the technology they deploy, the agency would still be
obliged to set floors that reasonably reflect the performance of those units. Because EPA’s
floors are based on the worst emissions test result for any unit using a particular technology,
however, those floors do not reasonably reflect the performance of units using that technology.
A fortiori, EPA’s floors do not reflect the performance of the best units using the chosen
technology.

Although the Act requires EPA to determine what additional reductions are “achievable”
beyond-the-floor, the Act’s floor language simply mandates that all units match the performance
of the best units. Obviously, “the average emissions limitation achieved by the best performing
12 percent of units” has been “achieved.” Therefore, that performance level is achievable. How
units that are not in the top twelve percent match the performance level of the best performing
twelve percent is not EPA’s concern.
Moreover, EPA's approach renders the agency's MACT standards indistinguishable from best available control technology (BACT) standards under § 111 of the Clean Air Act, which merely requires standards that:

reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. § 7411(a)(1). Had Congress intended this result, it need not have included the floor language in § 129 and, indeed, need not have enacted § 129 at all.

2. EPA's Emission Standards Are Less Stringent than Required by the Clean Air Act.

The actual floors for existing units, based on EPA's own emissions data, are set forth in Table 1, infra. As Table 1 demonstrates, EPA's proposed standards for existing units are not as stringent as the Clean Air Act requires. If EPA does not believe that it has enough emissions data to represent the actual performance of individual units, or if EPA does not believe that it has data for enough units to represent the ICWI population, the agency must use its authority under § 114 of the Clean Air Act to obtain such data. See 42 U.S.C. § 7414(a). If EPA does not use its authority to collect more emissions data, it must be assumed that the data in the agency's database accurately reflect the performance of existing ICWI units, and the agency must promulgate final standards that are at least as stringent as the floors set forth in Table 1.

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6 For each pollutant, the actual floors were calculated using the emissions test data in EPA's ICCR Emission Test Database. First, the three test runs for each unit were averaged to obtain each unit's average performance. Second, the best performing 12 percent of units in the database was identified based on average performance. Third, floors were calculated by averaging the average performance of the best performing 12 percent of units in the database.
TABLE 1 (EXISTING UNITS)

<table>
<thead>
<tr>
<th>HAP</th>
<th>Units</th>
<th>Actual Floors</th>
<th>EPA's Final Emissions Standards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cadmium</td>
<td>mg/dscm</td>
<td>0.0006443</td>
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</tr>
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<td>CO</td>
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<tr>
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<tr>
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<td>Mercury</td>
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<tr>
<td>Sulfur Dioxide</td>
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<td>20</td>
</tr>
</tbody>
</table>

3. EPA's Floors for Oxides of Nitrogen and Carbon Monoxide Are Unlawful.

EPA's floors for oxides of nitrogen (NOx) and carbon monoxide (CO), which are both unlawful for all the reasons discussed above (see supra at 1-4), are also unlawful for an additional reason. EPA concedes that CISWI have deployed technologies to reduce emissions of NOx and CO (combustion modification techniques for NOx and afterburners for CO), but asserts that the emissions data do not demonstrate that these technologies significantly reduce emissions. 64 Fed. Reg. at 67100. Thus, although, EPA used "information about emission reduction in the literature and engineering judgment," to evaluate the effectiveness of pollution control technology for other pollutants, the agency evaluated the effectiveness of NOx and CO control technologies—that are admittedly in use—solely on the basis of emissions test data and without regard to "information about emission reduction in the literature and engineering judgment."

Further, EPA provided no reason for failing to use information in literature and engineering judgment to evaluate the control technologies for NOx and CO. Using different criteria to evaluate these control technologies is arbitrary and capricious, especially given EPA's failure to explain why it did so. Moreover, the agency's different approaches suggests that EPA deliberately used different approaches to reach different results—i.e., used actual emissions data

\(^7\) In EPA's database, the dioxin emissions data were recorded in parts per million (ppm). To provide a comparison with the agency's final dioxin standards, these results were converted to nanograms per dry standard cubic meter (ng/dscm) according to the following formula: 1 ppm = 22.4 ng/dscm. See http://palimpsest.stanford.edu/byorg/abbey/an/an11/an11-7/an11-714.html (citing Thompson, The Museum Environment, 125 (1978)).
to avoid setting floors for NOx and CO, but refused to use actual emissions data where such data would have led to more stringent floors for other pollutants.

Based on its arbitrary and capricious finding that NOx and CO controls have not been demonstrated on CISWI units, EPA determined that "the MACT floor reflects no control of these pollutants." 64 Fed. Reg. at 67100. Accordingly EPA set floors that "represent the highest uncontrolled emission rates of [NOx and CO] in the emissions database" (id. (emphasis added))—effectively no floor at all. This result, and the inconsistent and manipulative means by which it was reached, contravene the Clean Air Act. Further, the fact that EPA's floor approach led the agency to conclude that there is no floor for NOx and CO—even where the agency conceded that emissions control methods are in use—underscores the irrationality of that approach.

4. The Proposed Mercury Limits Are Not Too Stringent.

EPA requests comment on whether the proposed mercury limits are too stringent. EPA set the final mercury standard at the floor level—i.e. the level that it believes to be achievable with a wet scrubber. Nonetheless, the agency expresses concern that, because wet scrubbers may not be effective in removing non-water-soluble mercury species, CISWI units that burn relatively more of these species of mercury may not be able to meet the standard solely by using a wet scrubber. 64 Fed. Reg. at 67100.

Far from suggesting that EPA’s mercury standard is too stringent, the possibility that that some units may not be able to meet the standard solely by using a wet scrubber merely reconfirms that EPA’s floor approach is not what Congress intended. As explained above, the Act requires floors based on the “average emissions limitation achieved by the best performing 12 percent of units.” This language emphasizes the best units’ actual performance—a concept that encompasses not just the control technologies used but also every other factor that affects performance, including pollution prevention measures, the waste being burned, the quality of the combustion unit, and the parameters of the combustion process. Thus, EPA’s concern—which results from the agency’s erroneous belief that all units should be able to achieve the floor levels just by employing a particular technology—is unfounded.

B. New Units.

1. EPA’s Technology-Based Floor Approach Is Unlawful.

EPA’s floor approach for new units was identical to its approach for existing units, and is unlawful for all the same reasons. See supra at 1-5.
2. **EPA's Emission Standards Are Less Stringent than Required by the Clean Air Act.**

The actual floors for new units, based on EPA's own emissions data, are set forth in Table 2, infra.\(^8\) As Table 2 demonstrates, the proposed standards for new units are not as stringent as the Clean Air Act requires. If EPA does not believe that it has enough emissions data to represent the actual performance of individual units, or if EPA does not believe that it has data for enough units to represent the ICWI population, the agency must use its authority under § 114 of the Clean Air Act to obtain such data. See 42 U.S.C. § 7414(a). If EPA does not use its authority to collect more emissions data, it must be assumed that the data in the agency’s database accurately reflect the performance of existing ICWI units, and the agency must promulgate final standards that are at least as stringent as the floors set forth in Table 2.

**TABLE 2 (NEW UNITS)**

<table>
<thead>
<tr>
<th>HAP</th>
<th>Units</th>
<th>Actual Floors</th>
<th>EPA's Final Emissions Standards</th>
</tr>
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<tr>
<td>Cadmium</td>
<td>mg/dscm</td>
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<td>HCl</td>
<td>ppm/dscm</td>
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<td>Lead</td>
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<td>Mercury</td>
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<tr>
<td>Sulfur Dioxide</td>
<td>ppm</td>
<td>0.8126667</td>
<td>20</td>
</tr>
</tbody>
</table>

\(^8\) For each pollutant, the actual floor levels were calculated using the emissions test data in EPA’s ICCR Emission Test Database. First, the three test runs for each unit were averaged to obtain each unit’s average performance. Second, the best performing unit in the database was identified based on average performance. The floors equal the average performance of the best performing unit in the database.
3. EPA’s Floors for Oxides of Nitrogen and Carbon Monoxide Are Unlawful.

EPA’s new unit floors for NOx and CO are unlawful for the same reasons as its existing unit floors. See supra at 5-6.

4. The Proposed Mercury Limits Are Not Too Stringent.

EPA’s new unit mercury limits are too weak, not too stringent, for the same reasons as its existing unit mercury limits. See supra at 6.

II. BEYOND THE FLOOR ISSUES

The Clean Air Act mandates that EPA “shall” establish emissions standards that reflect “the maximum degree of reductions” that the agency determines to be achievable 42 U.S.C. § 7429(a)(2). Thus, the Act imposes an obligation on EPA to set standards that are more stringent than the floor where additional reductions are achievable. The Clean Air Act further requires that final emission standards be based on “methods and technologies for removal or destruction of pollutants before, during or after combustion.” 42 U.S.C. § 7429(a)(3). Thus the Act requires EPA to look beyond the reductions that are achievable through the deployment of control technologies, and determine whether additional reductions are achievable through methods to remove or destroy pollutants before or during combustion—i.e., pollution prevention methods and methods based on combustion technologies and techniques. If such reductions are achievable and would further reduce emissions, EPA must require them to obtain the “maximum degree of reductions.” Finally, in determining what reductions are achievable, EPA must consider “non-air quality health and environmental impacts.” For CISWI units, EPA must consider the effects of dioxin and mercury emissions that are deposited on land or water, bioaccumulate in food chain, and threaten the health of wildlife and humans. In particular, EPA must consider the health effects on populations that are highly exposed to these pollutants, such as subsistence fishing communities.

For both new and existing units and for all of its emission standards, EPA states that it considered only one beyond-the-floor option, a fabric filter with carbon injection and a wet scrubber. 64 Fed. Reg. at 67099, 67100. Although EPA found that this option would provide further reductions of dioxin and possibly mercury, the agency rejected it, asserting that “the incremental cost effectiveness of applying this dry/wet system is considered excessive.” Id. Significantly, EPA did not state why it felt that the incremental cost effectiveness was excessive. Nor did the agency what criteria it uses to determine whether a given cost effectiveness is excessive or acceptable. Absent any such explanation, EPA’s decision not to set beyond the floor standards based on the “wet/dry system” is arbitrary and capricious.

EPA also failed to consider any other beyond the floor options (although the agency requests comment on this subject). Under the Act, EPA must consider options based on banning or restricting the combustion of certain materials and on good combustion technology and good combustion techniques. See supra at 8 (discussing 42 U.S.C. § 7429(a)(3)). In particular, EPA must consider banning or restricting the combustion of any mercury-bearing waste and chlorinated plastics. It is beyond dispute that eliminating or reducing mercury in the waste stream will eliminate or reduce mercury emissions. See Letter from O’Sullivan to Porter of July
7, 1997 (Ex. A hereto); Response to Comment Document for Medical Waste Incineration Rule
(Excerpt attached as Ex. B hereto). Likewise, it is beyond dispute that eliminating or restricting
chlorinated plastics in the waste stream will reduce hydrogen chloride emissions. Ex. B at 7-17–
7-18. Further, there is ample evidence that these pollution reduction methods are achievable.
Therefore, the agency must set beyond-the-floor standards that reflect the additional reductions
that can be achieved through these measures. 9

Finally, although EPA considered cost in determining whether to set beyond the floor
standards, the agency failed to consider "non-air quality health and environmental impacts," such
as the effects (discussed above) of bioaccumulated mercury and dioxins. EPA’s failure to
consider these impacts contravenes the Clean Air Act. 10

III. MONITORING AND TESTING

The Clean Air Act mandates that EPA’s regulations must require the owner or operator of
each CISWI unit "to monitor emissions ... as necessary to protect public health." 42 U.S.C.
§ 7429(c)(1). Under EPA’s monitoring hierarchy, continuous emissions monitors (CEMS) are
the first and foremost means of monitoring emissions, and the agency considers other options
only when CEMs are not available or when the costs are "unreasonable." 64 Fed. Reg. 67100–
67101. The Clean Air Act also requires: (1) such monitoring of parameters relating to the
operation of a unit and its control equipment as EPA determines to be appropriate (42 U.S.C.
§ 7429(c)(2)); (2) all monitoring results to be reported and made available to the public (42
U.S.C. § 7429(c)(3)); and, (3) all CISWI units to have Title V permits (42 U.S.C. § 7429(c)), a
requirement of which is that owners and operators promptly report each and every deviation
from emissions standards (42 U.S.C. § 7661b(b)(2)). In short, owners and operators of CISWI
units must know their emission levels and compliance status at all times.

Notwithstanding the need for effective monitoring and EPA’s reiteration of its oft-stated
monitoring hierarchy, the agency proposes not to require CEMs. EPA claims that HCl CEMs are
too costly. This claim is based entirely on the argument that the annual operating costs are

9 Even if EPA believes that it cannot determine what emission levels are achievable through
eliminating or reducing mercury-bearing waste and chlorinated plastics, the agency still should
ban or restrict the combustion of mercury-bearing waste and chlorinated plastics as a separate
requirement in addition to its emission standards. These measures themselves are achievable,
and would reduce emissions. Therefore, it is unnecessary—and, indeed, creates an unnecessary
regulatory obstacle—to condition the adoption of these measures on the agency’s ability to
incorporate them into numerical emission standards. Commenters recommend the following
regulatory language: "CISWI units shall not combust any materials containing mercury or
chlorinated plastics."

10 EPA did consider water and solid waste impacts (the amount of extra water that would be
required for wet scrubber use and the amount of additional solid waste that would be generated),
but this consideration did not satisfy the agency’s obligations to consider non-air quality health
and environmental impacts. The latter impacts encompass far more than extra water usage or
solid waste generation including—at a minimum—the effects of bioaccumulated mercury and
dioxin. See supra at 8.
approximately $36,000, about seventy percent of the annual operating costs of a wet scrubber. The agency does not indicate, however, why $36,000 is too costly or why seventy percent is too much. Absent some explanation, EPA’s decision on this issue is arbitrary and capricious.

EPA also claims that CEMs for particulate matter (PM) and mercury “have not been demonstrated in the United States for the purpose of determining compliance.” Id. at 67100. This claim is puzzling at best. Is the agency attempting to distinguish between CEMs that have been demonstrated for the purpose of compliance and those that have been demonstrated for some other purpose? If so, what is the basis for this distinction? If a CEM has been demonstrated to be effective, it should be used to determine compliance. Absent some explanation, EPA’s rejection of CEMs on the grounds that they have not been demonstrated “for the purpose of determining compliance” is arbitrary and capricious.

Yearly stack testing, the only emissions monitoring that EPA has proposed, will not protect public health, as required by § 129(c)(1). EPA claims that these tests will “ensure on an ongoing basis, the air pollution control device is operating properly and that its performance has not deteriorated.” 64 Fed. Reg. at 67101. Accepting this claim **arguendo**, the mere fact that a pollution control device is operating properly on one day out of the year does not guarantee that it is functioning properly (or at all) on other days. Proper functioning requires the device to be turned on and properly operated, requirements that are elementary but often flouted. Moreover, even if a facility’s air pollution control device is turned on and functioning, other factors—unrelated to the performance of the control device—may still cause the facility to exceed emission standards. In short, yearly stack testing can only ensure that a pollution control device is capable of functioning; it cannot ensure that facilities will meet emission standards continually or even consistently. Therefore, yearly stack testing does not satisfy § 129’s requirement for emissions monitoring that is protective of public health. If CEMs are, in fact, too costly or otherwise unavailable, EPA should require other types of periodic emissions testing. In particular, EPA should require the use of portable emissions analyzers to test emissions at periodic intervals. These analyzers are affordable and have been demonstrated to be effective. Periodic emissions testing, although not as good as continual emissions monitoring, would significantly improve the quality of emissions data available to EPA and the public.

Because parameter monitoring is not emissions monitoring, EPA’s proposed parameter monitoring requirements cannot—as a statutory matter—remedy the agency’s failure to provide emissions monitoring that is adequate to protect public health. **Compare** 42 U.S.C. § 7429(c)(2) with 42 U.S.C. 7429(c)(3). Nonetheless, effective parameter monitoring could help to fill the gap as a practical matter. Unfortunately, EPA’s parameter monitoring requirements appear to be of little value in determining compliance, and may be unlawful. EPA states that it selected parameters to monitor “that indicate the proper operation of a wet scrubber and that can be monitored continuously at a reasonable expense,” yet the agency does not indicate what these parameters are. EPA also states that the maximum and minimum operating parameters are established by determining “what range of operating parameter values represents good operation of the unit and control device and is necessary to achieve compliance with the proposed emission limits.” Yet the agency does not even claim that a unit that stays within this range is also in compliance with its emission standards. Nor does the agency claim that failure to stay within these ranges constitutes an enforceable violation. Only if the right parameters are monitored and
only if the ranges for those parameters are correlated directly (i.e. through emissions test data) with emission limits can parameter monitoring be effective.\textsuperscript{11} If operating within EPA's chosen parameters does not equal compliance, (and if deviating from those parameters does not equal non-compliance), parameter monitoring is of little use as a compliance tool.

More problematically, the proposal implies that operation within EPA's chosen ranges will be treated as compliance—even though a correlation between the two has not been demonstrated. If this were the case, EPA's range of operating parameters would constitute a different set of de facto emissions standards that does not even purport to comply with the Act's stringency requirements.

In short neither EPA's emissions monitoring requirements nor its operating parameter monitoring requirements will protect public health or allow owners and operators to promptly report deviations, as required by § 503.

Finally, EPA's stated purpose for its monitoring requirements raises serious concerns that these requirements will not support—and were never intended to support—citizen enforcement actions. The agency states that the purpose of its monitoring requirements is to "allow the EPA to determine whether a source is operating in compliance with the regulations." 64 Fed. Reg. at 67100 (emphasis added). Yet the Clean Air Act plainly provides for enforcement by citizens as well as EPA. 42 U.S.C. § 7604. Given the many and serious flaws in EPA's proposed monitoring scheme, it is unlikely that even EPA will be able to enforce the agency's ICWI standards effectively. See supra at 9-10. For citizens, who lack EPA's authority to make inspections and require testing, enforcement will be virtually impossible. Specifically, the absence of any reliable day-to-day emissions information (or information that can be reliably correlated to emissions) will make it impossible for citizens to determine CISWI units' compliance status. By promulgating regulations that openly fail to provide for citizen enforcement—indeed, as a practical matter, preclude it—EPA will contravene the Clean Air Act and frustrate the purpose of Congress.

IV. DEFINITION OF "SOLID WASTE"

EPA has defined "solid waste" unlawfully and far too narrowly. As a result, many CISWI units will not be subject to § 129 regulations, and may not be regulated at all. Because the exempted units emit hazardous air pollutants, EPA's failure to regulate these facilities would threaten public health.

The Clean Air Act provides that solid waste shall have the meaning established by EPA pursuant to the Solid Waste Disposal Act (SWDA), which in turn defines "solid waste" as:

any garbage, refuse, sludge from a waste treatment plant, or air pollution control facility and other discarded material.

\textsuperscript{11} To improve the correlation between parameter monitoring and actual emissions, EPA should require periodic emissions testing with portable emissions analyzers.
definition of the crucial term “discarded material” that existed when § 129 was enacted—and,
indeed, the only regulatory definition that exists today—is codified in EPA’s regulations for
identification and listing of hazardous waste. 40 C.F.R. § 261.2. By providing that “solid waste”
shall have the meaning “established by the Administrator pursuant to the SWDA,” Clean Air Act
§ 129(g)(6) incorporates that Part 261 definition by reference.

EPA appears to argue that because the Part 261 only applies to “hazardous” solid waste,
Congress did not intend Part 261’s definition of “solid waste” to be used for regulations under
Clean Air Act § 129. 64 Fed. Reg. at 67104 (citing 40 C.F.R. § 261.1(b)(1)). This argument is
flatly wrong. Because the definition in 40 C.F.R. § 261.2 was the only definition of “discarded
material” that existed when Congress enacted § 129, it is plainly the definition to which
Congress referred in § 129(g)(6). Congress cannot be assumed to have defined “solid waste,” by
reference to a regulatory definition that EPA might promulgate sometime in the future—i.e., a
definition that did not even exist. EPA’s apparent belief that § 129(g)(6) was meaningless until
the agency decided to breathe life into it nine years later must be rejected as contrary to basic
principles of statutory construction. Section 129(g)(6) must be construed to have had meaning
when it was enacted, and the only possible meaning is provided by the definition in 40 C.F.R.
§ 261.2.

EPA’s argument for rejecting the Part 261 definition of “solid waste” finds no support in
the fact that the agency chose to limit the application of that definition to hazardous solid waste.
See 40 C.F.R. § 261.1(b)(1). Congress was free to use the Part 261 definition regardless of how
EPA chose to limit the application of that definition in its regulations: EPA’s decisions about
how to use a definition in its regulations do not govern Congress’s decisions about how to use
the same definition in its legislation. Moreover the broad definition of solid waste in 40 C.F.R.
§ 261.2 is entirely consistent with Congress’s plain intent—established by the language and
legislative history of § 129—to define “solid waste” broadly as a means to ensure that all solid
waste incinerators are covered by § 129. This consistency confirms that § 129(g)(6) incorporates
by reference the Part 261 definition of solid waste.

In short, the definition of “solid waste” in 40 C.F.R. § 261.2 does apply to nonhazardous
solid waste for the purpose of Clean Air Act § 129. Therefore, EPA must use that definition in
its § 129 regulations, and is not free to redefine “solid waste” now.

Even assuming arguendo that EPA is at liberty to redefine solid waste, the agency’s
proposed definition still must be rejected as inconsistent with the SWDA and the Clean Air Act.
First, the SWDA defines “solid waste” to include “discarded material,” and this term has been
held to have its ordinary meaning. AMC v. EPA, 824 F.2d 1177, 1185-1186 (D.C. Cir. 1987).
Accordingly, a material that has been disposed of or abandoned is still “discarded
material”—and thus “solid waste,” pursuant to the SWDA—even if it is later used for some other
purpose. API v. EPA, 906 F.2d 729, 740-741 (D.C. Cir. 1990) (slag from steel making process
was “discarded” even when it entered reclamation furnace). EPA’s proposed definition of “solid waste” excludes any material that has a heat value of 5000 btu/lb and is burned to recover energy—regardless of whether it was previously “discarded.” 64 Fed. Reg. at 67105. Therefore, EPA’s proposed definition fails to give the term “discarded material” its proper meaning under SWDA, and must be rejected.

Second, the Clean Air Act provides that “solid waste” shall have the meaning established by EPA “pursuant to the Solid Waste Disposal Act.” EPA indicates repeatedly, however, that the proposed definition is solely for the purpose of Clean Air Act § 129. 64 Fed. Reg. at 67104-67105. When Congress referred to a definition established “pursuant to” the SWDA, it did not merely mean that the regulatory definition should be governed by the SWDA definition, but also that it should be a promulgated under the SWDA and for the purpose of implementing the SWDA. Thus, the proposed definition, which would be established solely for the purpose of Clean Air Act regulations, would not be not established “pursuant to” the SWDA. 42 U.S.C. § 7429(g)(6). Moreover, Congress’s reference to the SWDA indicates its intent that “solid waste” have a consistent definition under the Clean Air Act and the SWDA. Inventing a special definition for the purpose of § 129 would frustrate this intent.

EPA’s excessively narrow definition of “solid waste” may also cause the agency to violate §§ 129(a)(1) and 129(g)(1) of the Clean Air Act, which require the agency to establish § 129 regulations for:

any facility which combusts any solid waste material from commercial or industrial establishments.

42 U.S.C. § 7429(g)(1) (emphasis added). Apparently following on its argument that “discarded material” is “fuel” if it has a heat value of 5000 btu/lb or more and is burned for energy recovery, the agency has stated:

EPA ... is developing regulations to limit emissions from hazardous waste combustion in boilers and industrial furnaces. In addition, EPA is also developing regulations under section 112 to limit emissions from burning fuels in stationary sources, such as boilers.

64 Fed. Reg. at 67104 (emphasis added). Because many boilers and process heaters combust waste with a heat value of at least 5000 btu/lb for energy recovery, the waste combustion in these units would qualify as fuel combustion under EPA’s proposed definition of solid waste. 60 Fed. Reg. at 67116 (definition of “solid waste”). Thus, as a result of this regulatory legerdemain, such units would escape § 129 regulation.

Contrary to EPA’s arguments, however, facilities burning “discarded material” are solid waste incineration units whether or not they are burning such material for energy recovery and whether or not such material has a heat value of 5000 btu/lb. See supra at 11-13. Therefore,

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12 Only if the material is part of an ongoing manufacturing or industrial process within the generating industry is it not “solid waste.” Id. (citing AMC, 824 F.2d at 1186).
EPA's failure to regulate these facilities under § 129 would contravene the Clean Air Act, which defines boilers and process heaters that combust solid waste as "solid waste incineration units" (42 U.S.C. § 7429(g)(1)) and mandates that all such units be regulated under § 129. 42 U.S.C. §§ 7429(a)(1).

EPA attempts to deflect concerns about failure to regulate certain facilities under § 129 by claiming such facilities will be regulated under § 112:

the main purpose of this definition of nonhazardous solid waste is merely to identify which materials (when burned) are subject to regulations developed under section 129 and which materials (when burned) are subject to regulations developed under section 112.

64 Fed. Reg. at 67104. As EPA is well aware, however, many solid waste incineration units (including boilers and process heaters) would not meet major source threshold for regulation under § 112. See 42 U.S.C. § 7412(a)(1) (defining “major source” as any source emitting ten tons per year of any single hazardous air pollutant or twenty-five tons per year of any combination of hazardous air pollutants). Because these incinerators would not be regulated under § 112, the effect of the proposed definition of “solid waste” (whatever EPA's “main purpose” may have been) would be to ensure that they will not be regulated at all.\(^\text{13}\)

In sum, EPA’s proposed definition of “solid waste” is unlawful and dangerous. Because the emissions from incinerators are toxic whether or not the materials being combusted have a heat value of 5000 btu/lb and whether or not the incinerator is being used for heat recovery, a failure to regulate these facilities threatens public health and the environment. EPA must abandon the proposed definition. The agency must use the definition established in Part 261. In the alternative, EPA must—at a minimum—promulgate a definition that gives proper weight and effect to the term “discarded material.” See supra at 12-13.

\(^{13}\) It is possible that area source incinerators could be regulated under §§ 112(c)(3) or 112(c)(6) of the Act, but EPA has provided no indication that these facilities would meet the requirements of those sections. Nor has EPA provided any assurance that it plans to use its authority under those sections to regulate area source incinerators. Indeed, in a recent meeting with environmental groups, EPA indicated that it deliberately planned to exploit § 112's major source threshold as a means to avoid promulgating regulations for another category of incinerators comprised entirely of area sources, sewage sludge incinerators. Specifically, the agency announced it would: (1) determine that sewage sludge incinerators—a category previously slated for § 129 regulations—are subject to § 112, not § 129; (2) find that no sewage sludge incinerators are major sources; and, (3) then decline to promulgate any regulations. In short, even if area source incinerators could be regulated under § 112, the agency's apparent willingness to engage in such cynical tactics to avoid regulation indicates that promulgation of § 112 regulations for area source incinerators is highly unlikely.
V. FAILURE TO REGULATE DRUM RECLAIMER INCINERATORS AND PARTS RECLAIMER INCINERATORS.

Based on the Incinerator Working Group’s Regulatory Alternatives Paper (September 8, 1998) ("September RAP"), it appears that more than 1500 CISWI units are operating in the United States. September RAP (Ex. C hereto) at 18-24. Nonetheless, EPA expects that the proposed rule to affect a maximum of only 116 units. 64 Fed. Reg. at 67107. The difference of approximately 1400 units appears largely to reflect a decision by the agency not to regulate approximately 1350 parts reclamer incinerators and fifty-five drum reclamer incinerators. See Ex. C at 22.

Parts reclamer incinerators and drum reclamer incinerators, by EPA’s own description, combust solid waste—the residue in steel containers and the coatings on various types of metal parts. Ex. C at 41. See supra at 11-14 (regarding definition of “solid waste”). Further, the steel containers and metal parts that are placed in these incinerators may also be solid waste, although EPA’s description of this category leaves that issue unclear.

Because the residue and coatings burned in parts reclamer incinerators and drum reclamer incinerators is solid waste (and because the drums and parts that are placed in these incinerators may also be solid waste), these facilities are CISWI units and must be subject to EPA’s CISWI regulations. Accordingly, EPA’s failure to regulate these units under its CISWI regulations would be unlawful. In addition, EPA’s failure to explain its decision not to regulate parts reclamer incinerators and drum reclamer incinerators would be arbitrary and capricious.

EPA’s apparent decision not to regulate drum reclamer incinerators under § 129 is particularly disturbing. 14 Among the waste that is placed in these units are containers that held hazardous waste, and that still hold significant amounts of residue from that waste. 15 Burning this type of residue has the obvious potential to cause extremely toxic emissions. Given this potential, the agency’s decision not to regulate these facilities under § 129 is reprehensible. As

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14 Although EPA’s proposal provides no explanation for this decision, it appears that drum reclamer incinerators can combust the waste in any container that is “empty,” as that term is defined under the SWDA. Regulatory Options Paper (Docket A-94-63, Item II-B-1) (“ROP”). Under EPA’s regulatory definition, a drum is “empty” even if it still has up to one inch of residue on the bottom or (for a drum of less than 110 gallons) if it still contains residue equaling three percent of its total capacity. 40 C.F.R. § 261.7. Therefore, drum reclamer incinerators can combust large quantities of waste that, but for EPA’s definition of “empty,” would qualify as hazardous waste under the SWDA.
15 Even in the absence of emissions data, EPA experts have recognized that drum reclamer incinerators emit dioxin. See EPA, The Inventory of Sources of Dioxin in the United States, (extracts attached as Ex. D hereto) at 7-18 – 7-20. Moreover, given that the drums contain concentrated residue that (but for EPA’s definition of “empty”) would qualify as hazardous waste, it is likely that they emit significant quantities of many other toxins as well. Regrettably, it appears that EPA has made no effort to determine what substances are being combusted in drum reclamer incinerators, or what substances are being emitted from the combustion process. See Ex. C at 39-40 (indicating EPA has no emissions test data for drum reclamer incinerators).
EPA is well aware, few (if any) drum reclaimer incinerators meet the "major source" threshold under Clean Air Act § 112. Therefore, it is likely that if EPA does not regulate these facilities under § 129, the category will escape regulation altogether. See supra at 14 n.13. In short, it appears that EPA is deliberately refusing to regulate drum reclaimer incinerators, even though the agency knows that its refusal is likely to have serious effects on the environment and on people's health.

VI. FAILURE TO ESTABLISH STANDARDS FOR POLYCHLORINATED BIPHENYLS, POLYCYCLIC ORGANIC MATTER AND POLYAROMATIC HYDROCARBONS.

The Clean Air Act authorizes EPA to establish numerical emission limits for substances other than those enumerated in § 129(a)(4). In this rulemaking, EPA should use that authority to establish emission limits for polychlorinated hydrocarbons (PCBs), polycyclic organic matter (POM) and polyaromatic hydrocarbons (PAHs). These are all highly toxic, persistent bioaccumulative pollutants that probably are emitted by CISWI units (including drum reclaimer incinerators and parts reclaimer incinerators). Failure to establish emission standards for these pollutants in this rulemaking would mark yet another missed opportunity to obtain the reductions in these pollutants that Congress intended. See 42 U.S.C. § 7412(c)(6). Therefore, if EPA has emissions data for these pollutants, it should use that data to establish emission standards. If EPA does not have the emissions data necessary to establish emissions standards for PCBs, POM and PAHs, the agency should use its authority under § 114 of the Clean Air Act to obtain such data.