

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

IN RE

EAST YARD COMMUNITIES FOR ENVIRONMENTAL JUSTICE,
IRONBOUND COMMUNITY CORPORATION, and SIERRA CLUB,

Petitioners.

PETITION FOR WRIT OF MANDAMUS

Jonathan J. Smith
Earthjustice
48 Wall St., 19th Floor
New York, New York 10005
212-845-7376
jjsmith@earthjustice.org

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

Dated: December 21, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
GLOSSARY OF ABBREVIATIONS	vi
INTRODUCTION	1
STATEMENT OF RELIEF SOUGHT.....	2
STATEMENT OF JURISDICTION.....	2
ISSUE PRESENTED	2
BACKGROUND	2
A. Emissions from Municipal Solid Waste Incinerators	2
1. Particulate Matter	3
2. Sulfur Dioxide	4
3. Hydrogen Chloride.....	4
4. Oxides of Nitrogen.....	4
5. Carbon Monoxide.....	5
6. Lead.....	5
7. Cadmium	6
8. Mercury	6
9. Dioxins/furans	7
B. The Clean Air Act’s Requirements for EPA to Regulate Incinerator Emissions	6
C. EPA’s Inadequate Implementation of Section 7429 For Large MWC’s	10
SUMMARY OF ARGUMENT	17

STANDING	18
ARGUMENT	19
I. THIS COURT HAS JURISDICTION TO ENFORCE ITS MANDATE BY ISSUING A WRIT OF MANDAMUS	21
II. EPA HAS A CLEAR DUTY TO ACT	21
III. EPA HAS DEFIED THE COURT’S MANDATE AND THWARTED THE COURT’S JURISDICTION BY SHIELDING THE EXEMPTION RULE FROM REVIEW	22
IV. MANDAMUS IS WARRANTED BECAUSE EPA HAS UNREASONABLY DELAYED COMPLIANCE WITH THE COURT’S MANDATE.....	24
A. EPA’s Thirteen-Year Delay Exceeds the Rule of Reason.....	25
B. EPA’s Delay is Unreasonable in Light of Congress’s Timeframe	27
C. EPA’s Delay Harms Human Health and Welfare and is Unreasonable.....	28
D. Competing Priorities Do Not Justify Thirteen Years of Delay	30
E. EPA’s Delay Prejudices Petitioners and Communities Nationwide	31
F. A Finding of Impropriety Is Not Necessary for the Court to Grant Mandamus Relief.....	32
CONCLUSION AND RELIEF REQUESTED	33
CERTIFICATE OF COMPLIANCE.....	35
CERTIFICATE AS TO PARTIES AND AMICI.....	36
RULE 26.1 CORPORATE DISCLOSURE STATEMENT.....	37
CERTIFICATE OF SERVICE	38

TABLE OF AUTHORITIES

CASES

	Page number(s)
<i>Air Line Pilots Ass’n, Int’l v. Civil Aeronautics Bd.</i> , 750 F.2d 81 (D.C. Cir. 1984).....	26
<i>Cement Kiln Recycling Coal. v. EPA</i> , 255 F.3d 855 (D.C. Cir. 2001).....	12
<i>Cobell v. Norton</i> , 240 F.3d 1081 (D.C. Cir. 2001).....	30
<i>Cutler v. Hayes</i> , 818 F.2d 879 (D.C. Cir. 1987).....	22, 27, 30
<i>Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)</i> , 528 U.S. 167 (2000).....	18
<i>Hunt v. Washington State Apple Advertising Commission</i> , 432 U.S. 333 (1977).....	18
<i>In re Am. Rivers & Idaho Rivers United</i> , 372 F.3d 413 (D.C. Cir. 2004).....	23, 25-26, 31
<i>In re Bluewater Network</i> , 234 F.3d 1305 (D.C. Cir. 2000).....	20, 22, 25
<i>Telecommunications Research & Action Center v. F.C.C. (“TRAC”)</i> , 750 F.2d 70 (D.C. Cir. 1984).....	20-21, 24-25, 27-28, 30-32
<i>In re Core Commc’ns, Inc.</i> , 531 F.3d 849 (D.C. Cir. 2008).....	20, 22-23, 25-26, 31
<i>In re Int’l Chem. Workers Union</i> , 958 F.2d 1144 (D.C. Cir. 1992).....	25, 28, 32
<i>In re People’s Mojahedin Org. of Iran (“PMOP”)</i> , 680 F.3d 832 (D.C. Cir. 2012).....	20, 22-23, 25, 27, 31
<i>In re United Mine Workers of Am. Int’l Union</i> , 190 F.3d 545 (D.C. Cir. 1999).....	30, 32

<i>Int'l Ladies' Garment Workers' Union v. Donovan</i> , 733 F.2d 920 (D.C. Cir. 1984).....	21
<i>MCI Telecommunications Corp. v. F.C.C.</i> , 627 F.2d 322 (D.C. Cir. 1980).....	26
<i>Midwest Gas Users Ass'n v. FERC</i> , 833 F.2d 341 (D.C. Cir. 1987).....	26
<i>Nader v. F.C.C.</i> , 520 F.2d 182 (D.C. Cir. 1975).....	27-28
<i>Nat. Res. Def. Council v. Thomas</i> , 805 F.2d 410 (D.C. Cir. 1986).....	13
<i>Nat. Resources Def. Council v. EPA</i> , No. 92-cv-02093 (E.D.N.Y.)	10
<i>Natural Resources Defense Council v. EPA</i> , 489 F.3d 1364 (D.C. Cir. 2007).....	17, 21
<i>Northeast Maryland Waste Disposal Authority v. EPA</i> , 358 F.3d 936 (D.C. Cir. 2004).....	12
<i>Orion Reserves Ltd. P'ship v. Kempthorne</i> , 516 F. Supp. 2d 8 (D.D.C. 2007).....	28
<i>People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.</i> , 797 F.3d 1087 (D.C. Cir. 2015).....	19
<i>Potomac Elec. Power Co. v. I.C.C.</i> , 702 F.2d 1026 (D.C. Cir.).....	19, 23, 26
<i>Pub. Citizen Health Research Grp. v. Auchter</i> , 702 F.2d 1150 (D.C. Cir. 1983).....	26, 29
<i>Pub. Citizen Health Research Grp. v. Brock</i> , 823 F.2d 626 (D.C. Cir. 1987).....	28, 32
<i>Pub. Citizen Health Rsch. Grp. v. Comm'r, Food & Drug Admin.</i> , 740 F.2d 21 (D.C. Cir. 1984).....	29

<i>Radio-Television News Directors Ass’n v. F.C.C.</i> , 229 F.3d 269 (D.C. Cir. 2000).....	23
<i>Salazar v. Buono</i> , 559 U.S. 700 (2010).....	18
<i>Sierra Club v. EPA</i> , No. 06-1250 (D.C. Cir.).....	1, 11,15–17
<i>Sierra Club v. EPA</i> , 167 F.3d 658 (D.C. Cir. 1999).....	14
<i>Sierra Club v. Thomas</i> , 828 F.2d 783 (D.C. Cir. 1987).....	27
<i>Sierra Club v. Whitman</i> , No. 01-1537 (D.D.C.).....	11

STATUTES

Clean Air Act, Amendments of 1990, PL 101–549, 104 Stat 2399, Sec. 305 (Nov. 15, 1990)	8
5 U.S.C. § 702.....	2
5 U.S.C. § 706(1)	2, 21, 24
28 U.S.C. § 1651(a)	2, 21
42 U.S.C. § 7401(b)(1).....	8
42 U.S.C. § 7411	8
42 U.S.C. § 7412.....	8
42 U.S.C. § 7429	3, 8–12, 14, 22, 27
42 U.S.C. § 7607(b)(1).....	21

REGULATIONS

40 C.F.R. Pt. 60, Subpt. Cb, Tbl. 3	5
40 C.F.R. § 60.53b(a).....	5

OTHER AUTHORITIES

Emission Guidelines: Municipal Waste Combustors, 59 Fed. Reg. 48,228 (proposed Sept. 20, 1994)	11
EPA, Dioxins and Furans, U.S. Environmental Protection Agency Fact Sheet.....	7
EPA, Docket No. A-89-08, Item IV-B-46, EPA Responses to Administration Comments on EPA's Draft Final Materials Separation Rules for Municipal Waste Combustors (Dec. 13, 1990)	14
EPA, Docket No. A-89-08, Item-11-A-8, Municipal Waste Combustion Study: Sampling and Analysis (July 1987)	14
EPA, EPA-HQ-OAR-2005-0117-0020, Industry Profile for Large Municipal Waste Combustors (MWCs): Final Report (Feb. 2005)	2
EPA, Hazard Summary: Cadmium Compounds (A) (Jan. 2000)	6
EPA, Integrated Risk Information System Chemical Assessment Summary: Mercury, elemental; CASRN 7439-97-6 (June 1, 1995)	7
EPA, <i>Integrated Science Assessment (ISA) for Nitrogen Dioxide - Health Criteria</i> (Jan. 2016).....	4
EPA, <i>Integrated Science Assessment (ISA) for Particulate Matter</i> (Dec. 2019)	3
EPA, <i>Integrated Science Assessment (ISA) for Sulfur Oxides - Health Criteria</i> (Dec. 2017).....	4
EPA, <i>Integrated Science Assessment for Carbon Monoxide</i> (Jan. 2010).....	5
EPA, <i>Integrated Science Assessment for Lead</i> (2013)	5, 6

EPA, <i>Integrated Science Assessment for Ozone and Related Photochemical Oxidants</i> (Apr. 2020)	5
Memorandum from Walt Stevenson, EPA, on Emissions from Large and Small MWC Units at MACT Compliance, to Large MWC Docket No. EPA-HQ-OAR-2005-0117-0164 (Aug. 10, 2007).	3–7
Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 70 Fed. Reg. 75,348 (proposed Dec. 19, 2005)	3, 8, 11
Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors; Final Rule, 71 Fed. Reg. 27,324 (May 10, 2006)	3, 15
Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources, 60 Fed. Reg. 65,387 (Dec. 19, 1995).....	10
Standards of Performance for New Stationary Sources: Municipal Waste Combustors, 59 Fed. Reg. 48,198 (proposed Sept. 20, 1994)	11

GLOSSARY OF ABBREVIATIONS

1995 Large MWC Standards	Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources, 60 Fed. Reg. 65,387 (Dec. 19, 1995)
1995 MACT Floors	MACT floors calculated in the 1995 Large MWC Standards
2006 Large MWC Standards	Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 71 Fed. Reg. 27,324 (May 10, 2006)
Earthjustice Comments	Earthjustice, Comment Letter on Proposed Rules for Standards of Performance for New Stationary Sources and Emissions Guidelines for Existing Stationary Sources: Large Municipal Waste Combustor (Feb. 2006)
EPA	United States Environment Protection Agency
Final Rule	Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 71 Fed. Reg. 27,324 (May 10, 2006)
MACT	Maximum Achievable Control Technology
MWCs	Municipal Waste Combustors
NO _x	Oxides of Nitrogen
Petitioners	East Yard Communities for Environmental Justice, Ironbound Community Corporation and Sierra Club
Proposed Rule	Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 70 Fed. Reg. 75,348

(proposed Dec. 19, 2005)

Remand Motion

EPA Mot. for Voluntary Remand, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir., Nov. 9, 2007)

Remand Order

Order, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir., Feb. 15, 2008)

INTRODUCTION

East Yard Communities for Environmental Justice, Ironbound Community Corporation, and Sierra Club (“Petitioners”) petition this Court for a writ of mandamus requiring the United States Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator of the Environmental Protection Agency, (collectively, “EPA”) to promulgate a rule updating its emission standards for large municipal solid waste incinerators. In 2007, EPA sought a voluntary remand of these standards from this Court in light of several court opinions that called into question the legality of the standards, committing to review them administratively and make any necessary revisions. EPA’s Motion for Voluntary Remand at 7–12, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir., Nov. 9, 2007). In 2008, this Court granted EPA’s motion and remanded the standards to EPA, noting that “the appropriate remedy for an agency’s delay in issuing a final decision is mandamus.” Order, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir., Feb. 15, 2008). Over 13 years have passed since the Court’s remand with no action from EPA to review or update its standards. Accordingly, Petitioners seek a writ of mandamus requiring EPA to comply with the Court’s 2008 Order and complete a rulemaking process to review and revise its outdated large municipal solid waste incinerator standards.

STATEMENT OF RELIEF SOUGHT

Petitioners seek a writ of mandamus directing EPA to comply with this Court's mandate by proposing revisions to its large municipal waste combustor ("large MWC") standards within eighteen months of the Court's writ and finalizing those standards nine months after such proposal.

STATEMENT OF JURISDICTION

This Court has jurisdiction to compel EPA to act under the Administrative Procedure Act, 5 U.S.C. §§ 702, 706(1), and authority to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). *See infra* Argument I.

ISSUE PRESENTED

Whether EPA's failure to comply with the Court's Feb. 15, 2008, mandate that remanded EPA's large MWC emission standards insulates those standards from judicial review and constitutes agency action unreasonably delayed, 5 U.S.C. § 706(1), thereby warranting mandamus relief from this Court.

BACKGROUND

A. Emissions from Municipal Solid Waste Incinerators

In 2005, EPA estimated that 66 incinerators nationwide combusted 250 tons or more of municipal waste per day, emitting toxic air emissions into the surrounding communities.¹ EPA identifies this category of incinerators as large

¹ EPA, EPA-HQ-OAR-2005-0117-0020, Industry Profile for Large Municipal Waste Combustors (MWCs): Final Report at 8 (Feb. 2005).

municipal waste combustors (“large MWCs”).² Large MWCs emit a variety of harmful air pollutants, including particulate matter, sulfur dioxide, hydrogen chloride, oxides of nitrogen, carbon monoxide, lead, cadmium, mercury, and dioxins/furans.³

1. Particulate Matter

In 2005, large and small MWCs emitted 780 tons of particulate matter nationwide.⁴ Particulate matter is a mixture of solid particles and liquid droplets that, due to their small size, can enter the lungs and even the blood stream, negatively impacting the respiratory, cardiovascular, and nervous systems.⁵ Particulate matter exposure is linked to cancer and premature death.⁶

² See Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors; Final Rule, 71 Fed. Reg. 27324 (May 10, 2006).

³ See 42 U.S.C. § 7429(a)(4); Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 70 Fed. Reg. 75,348, 75,350 (proposed Dec. 19, 2005).

⁴ Memorandum from Walt Stevenson, EPA, on Emissions from Large and Small MWC Units at MACT Compliance, to Large MWC Docket No. EPA-HQ-OAR-2005-0117-0164 (Aug. 10, 2007).

⁵ EPA, *Integrated Science Assessment (ISA) for Particulate Matter* (Dec. 2019), <https://www.epa.gov/isa/integrated-science-assessment-isa-particulate-matter> (click PDF cover on right).

⁶ *Id.*

2. Sulfur Dioxide

In 2005, large and small MWCs emitted 4,600 tons of sulfur dioxide nationwide.⁷ Short-term exposure to sulfur dioxide is linked to an array of adverse respiratory effects, such as increased asthma symptoms and increased emergency department visits for respiratory illnesses, with greater effects on children.⁸

3. Hydrogen Chloride

In 2005, large and small MWCs emitted 3,200 tons of hydrogen chloride nationwide.⁹ Hydrogen chloride is a corrosive gas that can cause pulmonary edema and irritation of the nose, throat, and respiratory tract.¹⁰

4. Oxides of Nitrogen

In 2005, large and small MWCs emitted 49,500 tons of oxides of nitrogen (“NO_x”) nationwide.¹¹ NO_x are a group of highly reactive gases that can trigger asthma attacks and are linked to chronic obstructive pulmonary disease, respiratory infection, respiratory effects in healthy populations, and respiratory mortality.¹²

⁷ Stevenson, *supra* note 4.

⁸ EPA, *Integrated Science Assessment (ISA) for Sulfur Oxides - Health Criteria* at xlix (Dec. 2017), <https://www.epa.gov/isa/integrated-science-assessment-isa-sulfur-oxides-health-criteria> (click PDF cover on right).

⁹ Stevenson, *supra* note 4.

¹⁰ EPA, Hazard Summary: Hydrochloric Acid (Hydrogen Chloride) (Jan. 2000), <https://www.epa.gov/sites/default/files/2016-09/documents/hydrochloric-acid.pdf>.

¹¹ Stevenson, *supra* note 4.

¹² EPA, *Integrated Science Assessment (ISA) for Nitrogen Dioxide - Health Criteria* at lxxxiii (Jan. 2016), <https://www.epa.gov/isa/integrated-science-assessment-isa-nitrogen-dioxide-health-criteria> (click PDF cover on right).

Nitrogen oxides are also a precursor to ground-level ozone (smog), which itself can adversely affect the respiratory, cardiovascular, nervous, and reproductive systems, and can lead to mortality.¹³

5. Carbon Monoxide

Large MWCs emit carbon monoxide.¹⁴ Carbon monoxide exposure is associated with cardiovascular mortality, central nervous systems effects, birth outcomes and developmental effects, respiratory morbidity, and mortality.¹⁵

6. Lead

In 2005, large and small MWCs emitted 5.5 tons of lead nationwide.¹⁶ Lead exposure, even at low levels, is associated with adverse health effects across multiple bodily systems, including harm to the nervous, cardiovascular, immune, and reproductive systems, as well as to the kidneys.¹⁷ Lead exposure can cause anemia, increased blood pressure, an increased risk of cancer, and – at high levels

¹³ EPA, *Integrated Science Assessment for Ozone and Related Photochemical Oxidants* at lxiv, ES-15 (Apr. 2020), <https://www.epa.gov/isa/integrated-science-assessment-isa-ozone-and-related-photochemical-oxidants> (click PDF cover on right).

¹⁴ 40 C.F.R. Pt. 60, Subpt. Cb, Tbl. 3; 40 C.F.R. § 60.53b(a).

¹⁵ EPA, *Integrated Science Assessment for Carbon Monoxide* at 2-5 (Jan. 2010), <https://www.epa.gov/isa/integrated-science-assessment-isa-carbon-monoxide> (click PDF cover on right).

¹⁶ Stevenson, *supra* note 4.

¹⁷ EPA, *Integrated Science Assessment for Lead*, at lxxxii-vii, 1-14 to -37 (2013), <https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=255721> (click PDF cover on right).

– death.¹⁸ Children are particularly susceptible to harm from low-level lead exposure which can decrease physical growth and cause neurodevelopmental harm, leading to behavioral problems and learning deficits.¹⁹ Many of these deleterious effects are irreversible.²⁰

7. Cadmium

In 2005, large and small MWCs emitted 0.4 tons of cadmium nationwide.²¹ Long-term exposure to lower levels of cadmium can negatively impact the kidney, liver, lung, bones, immune system, blood, and nervous system, while acute inhalation exposure at high levels can result in long-lasting impairment of lung function.²²

8. Mercury

In 2005, large and small MWCs emitted 2.3 tons of mercury, a potent neurotoxin.²³ The inhalation of mercury can cause insomnia, neuromuscular

¹⁸ *Id.*

¹⁹ *Id.* at 1-15 tbl. 1-2 (explaining that there is “[c]lear evidence of cognitive function decrements . . . in young children . . . with mean or group blood [lead] levels measured at various lifestages and time periods between 2 and 8 µg/dL”).

²⁰ *Id.*

²¹ Stevenson, *supra* note 4.

²² EPA, Hazard Summary: Cadmium Compounds (A) (Jan. 2000), <https://www.epa.gov/sites/default/files/2016-09/documents/cadmium-compounds.pdf>.

²³ Stevenson, *supra* note 4.

changes, impaired mental function, and – at higher levels – kidney effects, respiratory failure, and death.²⁴

9. Dioxins/furans

In 2005, large and small MWCs emitted 15 grams of toxic equivalent quantity of dioxins/furans.²⁵ Dioxin and furan exposure can cause a number of health effects, including changes in hormone levels, skin diseases, and cancer, and studies in animals show impacts on fetal development, decreased ability to reproduce, and suppressed immune system.²⁶

* * *

EPA's rulemaking docket demonstrates that sharp emission reductions are available if EPA required better controls at high-emitting large MWCs. For example, requiring just 21 large MWCs to install fabric-filter emission-control technology would reduce about 130 tons per year of emissions of particulate

²⁴ EPA, Integrated Risk Information System Chemical Assessment Summary: Mercury, elemental; CASRN 7439-97-6 (June 1, 1995), https://cfpub.epa.gov/ncea/iris/iris_documents/documents/subst/0370_summary.pdf.

²⁵ Stevenson, *supra* note 4.

²⁶ EPA, Dioxins and Furans, U.S. Environmental Protection Agency Fact Sheet, <https://archive.epa.gov/epawaste/hazard/wastemin/web/pdf/dioxfura.pdf>.

matter, mercury, cadmium, lead, and dioxins/furans into the surrounding communities.²⁷

B. The Clean Air Act’s Requirements for EPA to Regulate Incinerator Emissions

Congress enacted the Clean Air Act “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). The Act furthers this goal by requiring EPA to regulate air emissions from new and existing sources of pollution. *See, e.g., id.* §§ 7411, 7412.

In 1990, Congress amended the Clean Air Act to, among other changes, add Section 129 (codified at 42 U.S.C. § 7429), which sets forth both the parameters that EPA must follow to regulate emissions from incinerators and also the timetable the EPA must follow to issue and update those regulations. Clean Air Act, Amendments of 1990, PL 101–549, 104 Stat 2399, Sec. 305 (Nov. 15, 1990).

Specifically, Section 7429 requires EPA to promulgate incinerator standards that include numerical emission limits for the pollutants discussed above, *supra* Background Section A, and gives EPA discretion to set limits for additional pollutants. *Id.* § 7429(a)(4). These emission limits must reflect the “maximum

²⁷ Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 70 Fed. Reg. at 75,355 (proposed Dec. 19, 2005).

degree” of emission reduction that EPA determines is “achievable” for each category of incinerator (“maximum achievable control technology” or “MACT” standards). *Id.* § 7429(a)(2), (4). The MACT standards cannot be less stringent than certain “MACT floors” whose method of calculation differs for new and for existing units: standards for new incinerators must be at least as stringent as “the emissions control that is achieved in practice by the best controlled similar unit” in the category, while standards for existing units may not be “less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category.” *Id.* In addition to these numerical emission limits, EPA’s incinerator standards must include “methods and technologies for removal or destruction of pollutants before, during, or after combustion,” “siting requirements” for new units, monitoring requirements, and other provisions. *Id.* § 7429(a)(3), (c).

Section 7429 imposes clear deadlines on EPA to promulgate these standards, dividing all solid waste incineration units into five categories with different timeframes for promulgation. *Id.* § 7429(a). Among these categories, Congress required EPA to promulgate the large MWC standards first, no later than November 15, 1991. *Id.* § 7429(a)(1). Section 7429 then requires EPA to “review, and . . . revise such standards and requirements . . . [n]ot later than 5 years following the initial promulgation of any performance standards and other

requirements under this section . . . and at 5 year intervals thereafter.” *Id.* § 7429(a)(5).

C. EPA’s Inadequate Implementation of Section 7429 for Large MWCs

Despite the clear provisions of Section 7429, EPA has consistently failed to meet its deadlines to implement and revise its large MWC standards, and the standards, when promulgated, have failed to meet the substantive requirements of the Clean Air Act.

EPA promulgated its initial large MWC standards under Section 7429 over four years past Congress’s deadline, and only after agreeing to do so in a consent decree that resulted from litigation brought by Petitioner Sierra Club and other parties. *See* Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources, 60 Fed. Reg. 65,387, 65,390 (Dec. 19, 1995) (“1995 Large MWC Standards”) (discussing *Nat. Resources Def. Council v. EPA*, No. 92-cv-02093 (E.D.N.Y.)). In that rule, EPA replaced prior incinerator standards – which EPA admitted did not comply with Section 7429 – with new standards. *Id.* at 65,388.

Many of the MACT floors EPA calculated for the 1995 Large MWC Standards (the “1995 MACT Floors”) were based on EPA’s assessment of the performance of control technologies (for new units) and on EPA’s review of State air permit limits (for existing units). *Id.* at 65,395–97, 65,401; Standards of

Performance for New Stationary Sources: Municipal Waste Combustors, 59 Fed. Reg. 48,198, 48,214–15 (proposed Sept. 20, 1994); Emission Guidelines: Municipal Waste Combustors, 59 Fed. Reg. 48,228, 48,244–45 (proposed Sept. 20, 1994). EPA did not claim or explain that these floors represented emission levels “achieved in practice” by the best performing incinerator (for new units) or best performing twelve percent of incinerators (for existing units), as required by the Clean Air Act. 40 U.S.C. § 7429(a)(2).

The Clean Air Act required EPA to review and revise these initial standards by December 19, 2000. 42 U.S.C. § 7429(a)(5). After EPA failed to meet that deadline, Petitioner Sierra Club again challenged EPA’s delay in an action that was consolidated with other cases challenging other instances of EPA delay. *Sierra Club v. Whitman*, No. 01-1537 (D.D.C.). In a global consent decree in that case, EPA agreed to revise the large MWC standards by April 28, 2006. Consent Decree at 4, *Sierra Club v. Whitman*, No. 01-1537 (D.D.C., May 19, 2003), Exhibit B to Sierra Club Opp. Mot. Voluntary Remand, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir., Nov. 26, 2007) (attached as Exhibit 1).

On December 19, 2005, EPA issued a proposed revision to the 1995 Large MWC Standards, which did not propose any changes to the 1995 MACT Floors. Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 70 Fed. Reg. 75,348

(proposed Dec. 19, 2005) (“Proposed Rule”). Earthjustice submitted comments that noted a number of defects with EPA’s proposed standards. *See* Earthjustice, Comment Letter on Proposed Rules for Standards of Performance for New Stationary Sources and Emissions Guidelines for Existing Stationary Sources: Large Municipal Waste Combustor at 2 (Feb. 2006) (“Earthjustice Comments”), Exhibit A to Sierra Club Opp. Mot. Voluntary Remand, Ex. 1. *First*, Earthjustice noted that Section 7429 required EPA to redo the 1995 MACT Floors because these were unlawful and contrary to subsequent D.C. Circuit precedent. *Id.* at 2–5. Specifically, the comments noted that the D.C. Circuit had repeatedly held it impermissible for EPA to calculate MACT floors based on assessments of control technology and State permit limits without an adequate explanation about how those limits reflect actual performance. *See id.* (citing *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 953–54 (D.C. Cir. 2004) (finding impermissible EPA’s calculation of small municipal waste combustor MACT floors based on State air permits and control technology, but not actual performance); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 861–66 (D.C. Cir. 2001) (finding impermissible, under similar Clean Air Act provision, EPA’s hazardous waste incinerator MACT floors based on control technology)). The comments noted that this use of permit limits and technology assessments allows for “significant ‘backsliding’” because the resulting emission limits were higher

than actual performance and therefore allow large MWCs to *increase* their emissions above performance levels at the time. *Id.* (quoting Docket OAR-2005-0117, Item 0042 (E-mail from Walt Stevenson, EPA, to Edmond Toy, OMB (Nov. 9, 2005)); *see also id.* at 4 (noting that the record for the Proposed Rule shows actual incinerator emissions “more than 100 times [lower] than . . . the level that their State permits allowed.”).

Second, the comments questioned how EPA could continue to allow existing large MWCs to operate without fabric-filter emission-control technology, since the Proposed Rule itself noted that the vast majority of large MWCs used this technology, and thus units equipped with fabric filters – and not those without – would likely determine the MACT floor. Earthjustice Comments at 2. The comments also noted that EPA’s conclusion that fabric filters would not be “achievable” by large MWCs was arbitrary and capricious because it contradicted the Clean Air Act’s definition of “achievable,” *id.* at 14 (quoting *Nat. Res. Def. Council v. Thomas*, 805 F.2d 410, 423 (D.C. Cir. 1986)) (“Standards are achievable if they can be achieved by ‘a predominant segment of the industry.’”), and ignored the benefits of reducing emissions of six other pollutant categories, *id.* at 14–15.

Third, the comments noted that, despite Congress’s directive that these standards “shall be based on methods and technologies for removal or destruction

of pollutants *before*, during, or after combustion,” 42 U.S.C. § 7429(a)(3) (emphasis added), the Proposed Rule failed to include any precombustion requirements to reduce or eliminate the burning of batteries, switches, PVC plastics, and other wastes that emit mercury, lead, and other pollutants that EPA must regulate. Earthjustice Comments at 2, 5–8. The comments noted that EPA admitted such precombustion requirements yield “beneficial effects on . . . emissions” at costs that were “negligible or negative,” and would therefore pass “any imaginable” cost-benefit test. *Id.* at 6–7 (quoting EPA, Docket No. A-89-08, Item-11-A-8, Municipal Waste Combustion Study: Sampling and Analysis at 17 (July 1987); EPA, Docket No. A-89-08, Item IV-B-46, EPA Responses to Administration Comments on EPA’s Draft Final Materials Separation Rules for Municipal Waste Combustors at 4 (Dec. 13, 1990)); *see also Sierra Club v. EPA*, 167 F.3d 658, 666 (D.C. Cir. 1999) (“The EPA does not deny that the waste stream reductions the Sierra Club calls for would reduce pollution [from incinerators]. The less mercury in, the less mercury out . . .”).

Fourth, the comments noted that EPA failed to require emission monitoring for each of its emission limits, despite the Act’s plain language that “[EPA] *shall*, as part of *each* [Section 7429] performance standard . . . promulgate regulations requiring the owner or operator of each solid waste incineration unit— (1) to *monitor emissions* from the unit . . .” 42 U.S.C. § 7429(c) (emphasis added).

In addition to pointing out other deficiencies in the Proposed Rule, the comments included, in an abundance of caution, an administrative petition to EPA for the Agency to reopen the 1995 Large MWC Standards and remedy any deficiencies that carried over from the 1995 rulemaking (the “Administrative Petition”). *Id.* at 4–5, 8, 13–14.

On May 10, 2006, EPA finalized large MWC standards that were largely the same as in the Proposed Rule and continued to be based on the 1995 MACT Floors. Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors, 71 Fed. Reg. 27,324 (May 10, 2006) (“Final Rule” or “2006 Large MWC Standards”). Petitioner Sierra Club subsequently filed a petition in the D.C. Circuit challenging this Final Rule. Petition for Review, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir., July 7, 2006). Sierra Club also filed a petition under Clean Air Act Section 7607(d)(7)(B) for EPA to reconsider four discrete aspects of the Final Rule that arose after the comment period. Sierra Club, Petition for Reconsideration on Final Rule of Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors (July 7, 2007). On October 31, 2006, the Court held the judicial proceeding in abeyance in light of EPA’s evaluation of the Petition for Reconsideration. Order, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir., Oct. 31, 2006).

On November 9, 2007, EPA moved for voluntary remand of this petition for review. EPA Mot. for Voluntary Remand, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir., Nov. 9, 2007) (“Remand Motion”) (attached as Exhibit 2). EPA’s basis for the Remand Motion was its stated intent to grant the Administrative Petition and re-analyze the 1995 MACT Floors, citing three additional, subsequent decisions of this Court that found impermissible the method EPA used to set the 1995 MACT Floors. *Id.* at 7–9 (noting that one such decision “holds that EPA cannot base its floors exclusively on technology”); EPA’s Reply In further Support of Its Mot. for Voluntary Remand, *Sierra Club v. EPA*, No. 06-1250, at 3 (D.C. Cir., Dec. 6, 2007) (attached as Exhibit 3) (“The primary reason for granting th[e] administrative petition is that the floors in the 1995 rule were calculated in a manner that is not consistent with the principles later set forth in *Northeast Maryland*. . . . [discussing] floors . . . derived from state-issued permit limits. In reviewing the 1995 [large] MWC rule and the administrative petition to re-open that rulemaking, EPA recognized that the deficiency identified by the Court in *Northeast Maryland* is present in the 1995 [large] MWC rule.”). EPA represented to the Court that it would also address other deficiencies of the 2006 Large MWC Standards raised in public comments, such as the lack of a requirement to install fabric filters, the lack of precombustion controls, and EPA’s choice of monitoring requirements. Mot. at 10–11. EPA asked the Court to reject Sierra Club’s request

to set a deadline for the Agency to review and finalize the standards because, according to EPA, “Petitioner here has the remedy of mandamus in the event the Agency unduly delays its final action upon remand.” EPA Reply at 4–5.

Despite Sierra Club’s objections, the Court granted EPA’s Remand Motion and voluntarily remanded the rule back to the Agency without a deadline, noting that “the appropriate remedy for an agency’s delay in issuing a final decision is mandamus.” Order, No. 06-1250 (D.C. Cir., Feb. 15, 2008) (citing *Natural Resources Defense Council v. EPA*, 489 F.3d 1364, 1375 (D.C. Cir. 2007)) (“Remand Order”) (attached as Exhibit 4).

Notwithstanding EPA’s representations to this Court over 14 years ago, EPA has yet to formally respond to the Administrative Petition, finalize its evaluation of the Petition for Reconsideration, or propose or finalize a rule to correct the deficiencies in the 2006 Large MWC Standards that EPA admitted were “not consistent” with this Court’s precedent. EPA Reply at 3.

SUMMARY OF ARGUMENT

In 2008, this Court remanded to EPA emission standards that the Agency admitted did not comply with the Clean Air Act. Thirteen years later, EPA has not given any indication that it has taken a single action to comply with the Court’s mandate. EPA’s delay has harmed, and will continue to harm, communities across the country who are exposed to levels of pollution from large municipal waste

incinerators well above levels allowed by Congress. The Court should grant the mandamus relief that it has already deemed “appropriate” for just such a situation.

STANDING

Petitioners have standing to pursue this writ of mandamus for multiple reasons. *First*, Petitioner Sierra Club filed the petition for review of EPA’s 2006 Large MWC Standards that resulted in the judicial mandate that Petitioners seek to enforce. *See Salazar v. Buono*, 559 U.S. 700, 712 (2010) (finding a party that obtains a favorable judgment has standing to “ensur[e] compliance with that judgment”).

Second, Petitioners have standing to bring this suit on behalf of their members under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). *See also Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 181 (2000). Petitioners’ members live, work, and recreate near large MWCs, and are exposed to the harmful pollutants that they emit. *See* W. Amaya Decl. ¶¶ 5, 12; K. Amaya Decl. Decl. ¶¶ 1, 7–10; Carman Decl. ¶ 9; Fashho Decl. ¶ 4; Pierce Decl. ¶¶ 1, 5–10.²⁸ As a result, they suffer harms that include adverse health effects and injury to recreational, aesthetic, educational, professional, and other interests. *See id.*

²⁸ Standing declarations are provided in a separate addendum. D.C. Cir. R. 28(a)(7).

Third, Petitioners are organizations dedicated to reducing exposure to environmental pollution in the communities they serve. *See* W. Amaya Decl. ¶ 3; Lopez Nuñez Decl. ¶ 4; Carman Decl. ¶¶ 1, 4. EPA’s failure to update the 2006 Large MWC Standards prevents Petitioners from pursuing enforcement actions and seeking redress for emission exceedances that violate the requirements of the Clean Air Act but are otherwise permitted under EPA’s current standards. *See* W. Amaya Decl. ¶ 10; Lopez Nuñez Decl. ¶ 10; Carman Decl. ¶ 6; *see also People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, 797 F.3d 1087, 1095 (D.C. Cir. 2015). Petitioners have had to divert resources from their community-based programming in order to address the high levels of incinerator pollution that affect the communities they serve. *See* W. Amaya Decl. ¶ 9; Lopez Nuñez Decl. ¶ 11; Carman Decl. ¶ 7.

EPA’s continuing failure to update the 2006 Large MWC Standards causes Petitioners’ harms. The Court may redress these injuries by requiring EPA to comply with the Remand Order and complete a rulemaking process to revise the outdated standards.

ARGUMENT

“Congress has empowered federal courts to issue a writ such as mandamus if necessary to effectuate or prevent the frustration of orders previously issued.”

Potomac Elec. Power Co. v. I.C.C., 702 F.2d 1026, 1032 (D.C. Cir.),

supplemented, 705 F.2d 1343 (D.C. Cir. 1983) (citations omitted). To issue a writ of mandamus for an agency's failure to comply with a duty to act, the Court "not only must satisfy [itself] that there indeed exists such a duty, but that the agency has unreasonably delayed the contemplated action." *In re People's Mojahedin Org. of Iran* ("PMOI"), 680 F.3d 832, 836 (D.C. Cir. 2012) (citing *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000)). This Circuit normally uses the six-factor test elucidated in *Telecommunications Research & Action Center v. F.C.C.* ("TRAC"), 750 F.2d 70 (D.C. Cir. 1984), to determine whether an agency's delay is unreasonable. But in circumstances where an agency fails to respond to a judicial mandate, the TRAC factors, while "not unimportant," take a backseat to the "overriding concern" that the agency's delay "effectively nullifie[s]" the Court's order and "insulate[s]" the agency action or inaction from further review. *PMOI*, 680 F.3d at 838 (quoting *In re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008)).

Here, EPA's duty to comply with the Court's Remand Order is clear, and mandamus relief is warranted because EPA's thirteen-year delay in complying with the judicial mandate is egregious and insulates from the Court's review standards that EPA itself admits are deficient.

I. THIS COURT HAS JURISDICTION TO ENFORCE ITS MANDATE BY ISSUING A WRIT OF MANDAMUS.

This Court has continuing jurisdiction to enforce its previous orders under the All Writs Act, U.S.C. § 1651(a), by “compel[ling] agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). *See Int’l Ladies’ Garment Workers’ Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984) (“The power of an original panel to grant relief enforcing the terms of its earlier mandate is clearly established in this Circuit . . . in cases that have been remanded directly to an administrative agency.”) (citations omitted). The Court’s Remand Order itself recognizes this, stating that “the appropriate remedy for an agency’s delay in issuing a final decision is mandamus.” Remand Order at 1 (citing *Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1375 (D.C. Cir. 2007)).

In addition, this Court has exclusive jurisdiction over EPA’s nationally applicable Clean Air Act regulations, 42 U.S.C. § 7607(b)(1), and therefore has jurisdiction over suits challenging EPA’s delay in promulgating or updating such regulations. *See TRAC*, 750 F.2d at 76.

II. EPA HAS A CLEAR DUTY TO ACT.

The Remand Order imposes on EPA a clear duty to review and revise its large MWC standards. This 2008 Order spoke in no uncertain terms: it granted EPA’s Remand Motion in order “to allow [EPA] to review its [2006 Large MWC Standards].” Remand Order at 1.

EPA's duty to comply with the Remand Order and review the 2006 Large MWC Standards is further buttressed by the Clean Air Act's clear requirement that EPA review and revise such standards "[n]ot later than 5 years following the initial promulgation of [these standards] . . . and at 5 year intervals thereafter." 42 U.S.C. § 7429(a)(5). The statute thus "indisputably commands" EPA to take the action that EPA has delayed for over a decade. *See Bluewater Network*, 234 F.3d at 1315; *Cutler v. Hayes*, 818 F.2d 879, 895 (D.C. Cir. 1987) ("the agency lacks authority to simply do nothing to effectuate the purpose of the Act").

Thus, both this Court's Order and the plain language of the Clean Air Act allow for only one interpretation: EPA has a clear duty to review and revise the 2006 Large MWC Standards.

III. EPA HAS DEFIED THE COURT'S MANDATE AND THWARTED THE COURT'S JURISDICTION BY SHIELDING THE EXEMPTION RULE FROM REVIEW.

As noted above, when reviewing an agency's failure to comply with a court mandate, the court's "overriding concern" is that "the agency's delay 'effectively nullifie[s] [the court's] determination that [its] . . . rules are invalid' and 'insulate[s]' the . . . rules from 'further review' by making it impossible for the petitioners to 'mount a challenge to the rules.'" *PMOI*, 680 F.3d at 838 (quoting *Core Commc'ns, Inc.*, 531 F.3d 849). This Court has repeatedly found an agency's failure to comply with the Court's own mandate to be a "decisive" factor when

granting mandamus relief for the agency's delay. *PMOI*, 680 F.3d at 837–38; *see also Core Commc'ns*, 531 F.3d at 856 (granting mandamus “when faced with the agency's failure – for six years – to respond to our own remand.”); *Potomac Elec. Power Co.*, 702 F.2d at 1032 (collecting cases) (“If our earlier mandate compelled the Commission to act in a timely manner, and if it has failed to do so, we may correct its error by use of a writ of mandamus.”); *Radio-Television News Directors Ass'n v. F.C.C.*, 229 F.3d 269, 270, 72 (D.C. Cir. 2000) (“In these extraordinary circumstances” where “the Commission had taken no action to respond to the remand,” “the court's decision is preordained and the mandamus will issue.”). The Court should do the same here.

A writ of mandamus is also appropriate because EPA's delay is thwarting the Court's jurisdiction by preventing judicial review of the 2006 Large MWC Standards. As discussed above, EPA admitted in its Remand Motion that the 2006 Large MWC Standards were “deficien[t]” in light of this Circuit's precedent. EPA Reply at 3. EPA's flouting of the Remand Order has insulated the 2006 Large MWC Standards from scrutiny. “[T]he primary purpose of the writ in circumstances like these is to ensure that an agency does not thwart [the court's] jurisdiction by withholding a reviewable decision.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (citation omitted); *see also Core Comm'ns*, 531 F.3d at 855–56.

The Court should issue a writ of mandamus requiring prompt agency action to protect its jurisdiction, which EPA has thwarted by seeking dismissal of the Petition for Review and then defying the Remand Order by ceasing all work on revising the 2006 Large MWC Standards. Mandamus is especially appropriate because EPA's 2006 standards continue to undermine public health and welfare and defy both the language of Congress and numerous decisions of this Court holding those standards impermissible.

IV. MANDAMUS IS WARRANTED BECAUSE EPA HAS UNREASONABLY DELAYED COMPLIANCE WITH THE COURT'S MANDATE.

Mandamus is also appropriate because EPA has unreasonably delayed its compliance with the Remand Order. In *TRAC*, this Court identified six factors to consider when determining whether agency action is “unreasonably delayed” within the meaning of 5 U.S.C. § 706(1):

(1) the time agencies take to make decisions must be governed by a “rule of reason”; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not “find any impropriety lurking behind agency lassitude in

order to hold that agency action is ‘unreasonably delayed.’”

TRAC, 750 F.2d 70, 80 (D.C. Cir. 1984) (citations omitted).²⁹ Applying these factors, this Court has issued numerous writs of mandamus compelling agency action. *See, e.g., Core Commc’ns*, 531 F.3d at 861–62; *Am. Rivers*, 372 F.3d at 414; *Bluewater Network*, 234 F.3d at 1316; *In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992). These factors compel mandamus here: EPA’s thirteen-year delay to comply with the Remand Order exceeds the rule of reason and the timeframes contemplated by Congress, in addition to prejudicing Petitioners and communities nationwide by allowing EPA’s current health-harming standards to avoid judicial review.

A. EPA’s Thirteen-Year Delay Exceeds the Rule of Reason.

Generally, “[t]he first and most important factor is that ‘the time agencies take to make decisions must be governed by a rule of reason.’” *Core Commc’ns*, 531 F.3d at 855 (quoting *TRAC*, 750 F.2d at 80). Although there is no per se rule as

²⁹ While the *TRAC* factors strongly support issuance of a writ of mandamus, these factors are not dispositive in context such as this one where EPA has not only “unreasonably delayed,” but also defied the Remand Order and insulated the 2006 Large MWC Standards from judicial review, thwarting the Court’s jurisdiction, as discussed above. *See Core Commc’ns*, 531 F.3d at 855–56 (while *TRAC* factors “are not unimportant here,” more important is the fact that the agency is defying the court’s remand order and effectively nullifying its decision); *PMOI*, 680 F.3d at 837 (discussing *TRAC* factors, but concluding that the “decisive” consideration is that the agency failed to heed the court’s remand order).

to the amount of time that constitutes undue delay, “a reasonable time for agency action is typically counted in weeks or months, not years.” *Am. Rivers*, 372 F.3d at 419; *see also Midwest Gas Users Ass’n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) (“[A] reasonable time for an agency decision could encompass ‘months, occasionally a year or two, but not several years or a decade.’”) (quoting *MCI Telecommunications Corp. v. F.C.C.*, 627 F.2d 322, 340 (D.C. Cir. 1980)). This Court has found delays of much shorter than thirteen years to be unreasonable. *See Am. Rivers*, 372 F.3d at 419 (finding six-year delay to be “nothing less than egregious”); *Air Line Pilots Ass’n, Int’l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (finding five-year delay unreasonable “under any set of circumstances”); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (finding three-year delay to be “simply too long”).

In 2008, this Court remanded the 2006 Large MWC Standards with express instructions for the Agency to review those standards. The Court’s “remand . . . implicitly included the understanding that [EPA] would respond to [the Court’s] mandate in a timely manner.” *Potomac Elec. Power Co.*, 702 F.2d at 1034; *see also Core Commc’ns*, 531 F.3d at 857 n.7 (“[T]imeliness is implicit in every remand by this court.”).

Thirteen years later, EPA has posted no new documents to the rulemaking docket, EPA-HQ-OAR-2005-0117, let alone finalized its rulemaking. This delay of

over thirteen years grossly exceeds any reasonable timeframe for the Agency to comply with this Court's mandate.

B. EPA's Delay is Unreasonable in Light of Congress's Timeframe.

TRAC provides that “where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason.” 750 F.2d at 80; *see also Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) (noting the Court should consider “whether the statutory scheme implicitly contemplates timely final action.”). Even comparatively short delays are unreasonable and warrant mandamus relief when they are longer than Congress's desired timeframe. *See PMOI*, 680 F.3d at 838 (“We have been given no sufficient reason why the Secretary, in the last 600 days, has not been able to make a decision which the Congress gave her only 180 days to make.”).

Here, EPA's thirteen-year delay in complying with the Court's mandate to review the 2006 Large MWC Standards is informed by Congress's mandate that such review occur no later than every five years. *See* 42 U.S.C. § 7429(a)(5). EPA's egregious delay in complying with the Court's mandate thus undermines the goals of the Clean Air Act to ensure that incinerator standards are reviewed, revised, and strengthened at regular intervals. *See Cutler*, 818 F.2d at 897–98 (quoting *Nader v. F.C.C.*, 520 F.2d 182, 207 (D.C. Cir. 1975)) (“The court must

also estimate the extent to which delay may be undermining the statutory scheme, either by frustrating the statutory goal or by creating a situation in which the agency is ‘losing its ability to effectively regulate at all.’”). And in instances, like here, where EPA has left in place admittedly “deficien[t]” standards for over twenty-five years, EPA Reply at 3–4, EPA’s failure to promptly rectify these infirmities frustrates Congress’s statutory goals.

Ultimately, “[a]dministrative agencies cannot decide which duties to perform and which duties to ignore, rather they must perform the duties which Congress intends them to perform.” *Orion Reserves Ltd. P’ship v. Kempthorne*, 516 F. Supp. 2d 8, 12 (D.D.C. 2007). EPA’s protracted inaction upends the balanced timeline created by Congress and thwarts the goals of the Clean Air Act.

C. EPA’s Delay Harms Human Health and Welfare and is Unreasonable.

The third *TRAC* factor directs courts to consider whether the agency’s delay negatively impacts human health and welfare. *See TRAC*, 750 F.2d at 80. *TRAC* noted that “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake.” *Id*; *see also Int’l Chem. Workers Union*, 958 F.2d at 1150 (finding that a six year delay is “an extraordinarily long time” in the face of serious health risks); *Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) (“When lives are at stake, . . . [the agency] must press forward with energy and perseverance in

adopting regulatory protections”); *Pub. Citizen Health Rsch. Grp. v. Comm’r, Food & Drug Admin.*, 740 F.2d 21, 34 (D.C. Cir. 1984) (“[T]he pace of agency decisionmaking is unreasonably dilatory” given that the “agency is charged with the administration of a statutory scheme whose paramount concern is protection of the public health”); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d at 1157 (“Three years from announced intent to regulate to final rule is simply too long given the significant risk of grave danger [ethylene oxide] poses to the lives of current workers and the lives and well-being of their offspring.”).

Here, it is undisputed that large incinerators emit air pollutants that harm public health. *See supra* Background A. But EPA’s improperly calculated 1995 MACT Floors allow these facilities to emit air pollutants at levels that are orders of magnitude higher than the levels contemplated by the Clean Air Act. *See* Earthjustice Comments at 4. EPA’s Remand Motion represented to the Court that it would review these 1995 MACT Floors, as well as other aspects of the 2006 Large MWC Standards that could require incinerators to lower and better monitor their emissions. Remand Motion at 11; EPA Reply at 4. EPA’s delay in conducting this review and revision has allowed these incinerators to emit pollution that – as EPA itself acknowledged – exceed the levels that Congress envisioned, affecting the health and welfare of the already overburdened communities across the country that breathe in those emissions. *See supra* Background A; *see also* W. Amaya

Decl. ¶¶ 5, 12; K. Amaya Decl. ¶¶ 1, 7–12; Lopez Nuñez Decl. ¶¶ 5–6, 8, 12–15; Carman Decl. ¶ 9; Fashho Decl. ¶ 4; Pierce Decl. ¶¶ 1, 5–10.

D. Competing Priorities Do Not Justify Thirteen Years of Delay.

No competing priorities can justify EPA’s egregious delay here, and the Court should not give deference to any potential arguments from EPA about why it must further delay action. Federal agencies inevitably face the challenge of limited resources with which to address competing priorities, many of which are technically and administratively complex. Courts must bear this in mind while weighing the reasonableness of agency delay. *See TRAC*, 750 F.2d at 80. But “[h]owever many priorities the agency may have, and however modest its personnel and budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction in the face of the congressional command to act . . .” *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 554 (D.C. Cir. 1999); *see also Cobell v. Norton*, 240 F.3d 1081, 1097 (D.C. Cir. 2001). Any deference awarded to EPA to decide how to prioritize in the face of limited resources “become[s] less persuasive as delay progresses, and must always be balanced against the potential for harm.” *Cutler*, 818 F.2d at 898.

Here, EPA’s delay is so egregious – and the harms caused by EPA’s failure to revise the 2006 Large MWC Standards so serious – that no reasoning could

justify even further delay. EPA's thirteen-year delay exceeds any excusable time period to comply with a mandate of this Court. *See supra* Argument IV.A.

E. EPA's Delay Prejudices Petitioners and Communities Nationwide.

The fifth *TRAC* factor – the nature and extent of the harm caused by delay – weighs strongly in favor of issuing a writ of mandamus in this case. *TRAC*, 750 F.2d at 80. As noted above, every year that EPA delays revision of its large MWC standards is another year that communities across the country are exposed to increased levels of health-harming pollution from these facilities. *See supra* Argument IV.C.

In addition, EPA's delay in complying with the Court's mandate to review standards that the Agency itself admits are deficient "thwart[s] [the court's] jurisdiction by withholding a reviewable decision." *Am. Rivers*, 372 F.3d at 419 (citation omitted); *see also supra* Argument III. EPA's delay "effectively nullifies" the Court's Remand Order and prevents Petitioners from challenging the substance of those standards. *Core Commc'ns*, 531 F.3d at 856; *see also PMOI*, 680 F.3d at 837 ("[B]ecause of the Secretary's inaction, [the petitioner] is stuck in administrative limbo; it enjoys neither a favorable ruling on its petition nor the opportunity to challenge an unfavorable one.").

Thus, the harm to public health experienced by communities nationwide, and the procedural harms experienced by Petitioners specifically, weigh strongly in favor of mandamus relief.

F. A Finding of Impropriety Is Not Necessary for the Court to Grant Mandamus Relief.

TRAC instructs that a finding of agency impropriety or bad faith is not necessary to grant mandamus relief. *TRAC*, 750 F.2d at 80. While a good faith effort by the agency to address the delay could weigh against mandamus relief, *see Brock*, 823 F.2d at 629, here, EPA has provided no public indication that it has made any effort to comply with the Remand Order. *See supra* Argument IV.A. EPA's pattern of missed deadlines undermines any potential new promise EPA may make that mandamus is not needed because the rule will be forthcoming. *See Int'l Chem. Workers Union*, 958 F.2d at 1150 (the Court should "have grave cause for concern that if [it] do[es] not insist on a deadline now, some new impediment will be pleaded five months hence"); *id.* ("[w]hether the delays at every stage are the result of the agency's persistent excess of optimism, or attributable to bureaucratic inefficiencies, there must be an end to the process sometime soon.") (internal citations and quotation marks omitted); *Brock*, 823 F.2d at 627; *United Mine Workers*, 190 F.3d at 554–55.

CONCLUSION AND RELIEF REQUESTED

In the decades since Congress's 1990 Clean Air Act amendments required EPA to more stringently regulate large incinerators, EPA has allowed these facilities to emit pollutants at levels the Agency admits are not permissible under the statute. And for over thirteen years, EPA has failed to act in compliance with the Court's mandate and to rectify those deficiencies. As a result, EPA's admittedly impermissible large MWC standards have evaded judicial review and continue to allow elevated levels of pollution across the country. The Court has already noted that mandamus relief is "appropriate" for this delay. Remand Order at 1.

For the foregoing reasons, Petitioners respectfully ask the Court to issue a writ of mandamus directing EPA to comply with the Court's mandate by proposing revisions to its large MWC standards within eighteen months of the Court's writ and finalize those standards nine months after such proposal. Petitioners further request that the Court retain jurisdiction pending full compliance with the writ of mandamus and require status reports from EPA at periods no longer than every six months.

DATED: December 21, 2021

Respectfully Submitted,

/s/ Jonathan J. Smith
Jonathan J. Smith, Esq.

Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
jjsmith@earthjustice.org
(212) 845-7379

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

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because it contains 7,385 words, excluding the parts of the petition exempted by Fed. R. App. P. 21(a)(2)(C) and Circuit Rule 32(e)(1). Microsoft Word 2010 computed the word count.

This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Microsoft Word Times New Roman) in 14 point font.

This petition has been scanned for viruses and is virus free.

Dated: December 21, 2021

/s/ Jonathan J. Smith

CERTIFICATE AS TO PARTIES AND AMICI

In accordance with Circuit Rules 21(d) and 28(a)(1)(A), Petitioners East Yard Communities for Environmental Justice, Ironbound Community Corporation, and Sierra Club submit this Certificate as to Parties and Amici.

1. Petitioners: East Yard Communities for Environmental Justice, Ironbound Community Corporation, and Sierra Club. Sierra Club was Petitioner in Case No. 06-1250.
2. Respondents: U.S. Environmental Protection Agency and Michael Regan, Administrator, U.S. Environmental Protection Agency.
3. Intervenors: There are presently no intervenors. York County Solid Waste and Refuse Authority and Integrated Waste Services Association were intervenors in Case No. 06-1250.
4. Amici Curiae: There are presently no *amici curiae*.

Dated: December 21, 2021

/s/ Jonathan J. Smith

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Circuit Rule 26.1(a), Petitioners East Yard Communities for Environmental Justice, Ironbound Community Corporation, and Sierra Club state that they are nonprofit organizations, have no parent corporations, and no publicly held corporation owns 10% or more of their stock.

Dated: December 21, 2021

/s/ Jonathan J. Smith

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2021, I caused copies of the foregoing Petition for Writ of Mandamus, the Exhibits thereto, Certificate of Parties and Amici Curiae, and Corporate Disclosure Statement, and the attached Petitioners' Addendum of Declarations to be served via Federal Express on the entities or persons at the addresses listed below:

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

Correspondence Control Unit
Office of General Counsel (2311)
U.S. Environmental Protection
Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Matthew M. Graves
U.S. Attorney for the District of
Columbia
Attn: Civil Process Clerk
555 4th St. NW
Washington, DC 20530

Dated: December 21, 2021

/s/ Jonathan J. Smith