NACWA
A Clear Commitment to America's Waters

Sent Via Fax

September 9, 2009

Assistant Administrator Peter Silva
U.S. EPA Office of Water
Ariel Rios Building
1200 Pennsylvania Ave., NW (4101M)
Washington, DC 20460

Assistant Administrator Gina McCarthy
U.S. EPA Office of Air and Radiation
Ariel Rios Building
1200 Pennsylvania Avenue, N. W. (6101A)
Washington, DC 20460

Assistant Administrator Mathy Stanislaus
U.S. EPA Office of Solid Waste and Emergency Response
Ariel Rios Building
1200 Pennsylvania Avenue, N. W. (5101T)
Washington, DC 20460

Dear Assistant Administrators:

The National Association of Clean Water Agencies (NACWA)[1] and its members would like to express their serious concerns with the U.S. Environmental Protection Agency's (EPA or Agency) current rulemaking efforts regarding its voluntary remand of the Commercial and Industrial Solid Waste Incineration ("CISWI") Unit Rule following the challenge to the rule in *Sierra Club v. EPA* (No. 01-1048, D.C. Cir).

NACWA also has serious concerns with the parallel EPA effort to develop a definition of solid waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA) (EPA-HQ-RCRA-2008-0329) as part of the Agency's response

[1] NACWA is the leading representative of over 300 publicly owned wastewater treatment agencies across the nation. NACWA's membership collectively treats and reclaims over 18 billion gallons of wastewater per day and, while our membership includes utilities of all sizes, we represent the vast majority of major metropolitan agencies across the country. As leading environmental stewards, NACWA members work to ensure that the significant water quality improvements made in the 37 years since the Clean Water Act was passed continue and are not reversed.

National Association of
Clean Water Agencies
1816 Jefferson Place, NW
Washington DC 20036-2505

p 202.833.2672 f 202.833.4657
www.nacwa.org · info@nacwa.org

to *Natural Resources Defense Council v. Environmental Protection Agency*, 489 F.3d 1250 (D.C. Cir. 2007) [hereinafter *NRDC*] (vacating EPA's definitions of "commercial or industrial solid waste incineration unit" and "commercial or industrial waste").

EPA has informed NACWA that, as part of these rulemaking efforts, it is considering defining solid waste under RCRA Subtitle D to include municipal sewage sludge (biosolids). NACWA believes this approach is inconsistent with EPA's charge under the Clean Air Act (CAA) provisions at issue and is very concerned about the negative and unintended impacts such an action would have on the lawful management of sewage sludge, including beneficial reuse via land application, surface disposal and incineration, which together account for the proper management of sludge.

As discussed further in this letter, NACWA urges EPA to consider a different approach that will satisfy the relevant CAA mandates while not disrupting long-standing management programs for municipal sewage sludge. NACWA requests a meeting with you and the relevant Agency staff to discuss this issue further.

NACWA believes that EPA's prior determination that sewage sludge incinerators (SSIs) are not subject to regulation as solid waste incineration units (SWIUs) pursuant to § 129 of the CAA is consistent with the plain language of the statute. In particular, publicly owned treatment works, including SSIs, are explicitly regulated under CAA § 112, and therefore cannot be regulated under CAA § 129. Furthermore, NACWA is concerned that EPA's current rulemaking efforts to respond to the narrow CAA-specific *NRDC* decision will undermine the regulatory harmony that exists among the water, air, and waste programs that together provide comprehensive regulation of sewage sludge, including the management of sewage sludge in SSIs. Defining solid waste to include sewage sludge will create enormous uncertainty regarding the recycling and disposal programs that fully operate in compliance with the 40 CFR Part 503 (Use or Disposal of Sewage Sludge) regulation's clear mandates that are protective of human health and the environment.

NACWA urges EPA to:

(1) Maintain its existing regulatory determination that SSIs are not subject to § 129 of the CAA.

(2) Develop a regulatory definition of solid waste that recognizes the Agency's past interpretations of the RCRA definition of solid waste, the Clean Water Act (CWA), and the CAA.

These actions will maintain the careful regulatory balance that exists among all of these programs by carving out sewage sludge and its uses from any new Subtitle D regulatory definition of solid waste when such sludge is regulated under § 405 of the CWA and Part 503 regulations.

The remainder of this letter provides a detailed discussion of NACWA's four key points:

- EPA is precluded from regulating SSIs under CAA § 129 because the statute expressly regulates SSIs under the POTW provisions contained in CAA § 112. SSIs are part of POTWs, as defined in CAA § 112.[2] As such, EPA is correct in its longstanding determination that SSIs are regulated under CAA § 112, not under CAA § 129, even if EPA reached this conclusion for different reasons.

[2] CAA § 112 incorporates by reference the CWA definition of "treatment works."

- Regulation of SSIs under CAA § 112 is also consistent with the comprehensive program for regulation of POTW sewage sludge that has been in place for many years pursuant to broad CWA and RCRA mandates. These mandates, which predate the 1990 CAA Amendments under which CAA § 129 was added, provide a comprehensive and cohesive regulatory framework for the safe use and disposal of sewage sludge, including incineration and other beneficial uses. Regulating SSIs under CAA § 129 would significantly alter these longstanding programs' clear distinction between sewage sludge and solid waste and would severely disrupt and undermine these primary national programs for regulating the use and disposal of sewage sludge. There is nothing in CAA § 129 or its legislative history to suggest that Congress intended to dismantle or in any way disrupt the existing framework for sewage sludge management. To the contrary, Congress' express inclusion of POTWs, including SSIs, under CAA § 112 signifies a clear intent to provide for any further regulation of air emissions from SSIs under the CAA's § 112 framework.

- EPA has already properly determined that SSIs are not subject to regulation under CAA § 129. The Agency's determination is the result of more than 10 years of notice and comment rulemaking, judicial challenges, and negotiations involving all interested parties. Additional public comment submitted during EPA's prior reconsideration of this issue did not generate new information that would alter EPA's analysis. Furthermore, nothing in the *NRDC* decision warrants a different conclusion, because that case did not evaluate whether SSIs are regulated under CAA § 112 or § 129.

- Including sewage sludge in any new Subtitle D definition of solid waste would create confusion over past interpretations of the RCRA definition of solid waste and lead to cascading regulatory consequences that would call into question biosolids management programs under current federal and state law. This will also undermine the express right that Congress preserved to local communities to make local choices about sewage sludge management. EPA is obligated to uphold the carefully crafted regulation of sewage sludge, including sewage sludge incineration, which harmonizes the CAA, CWA, and RCRA authorities. Preserving the existing regulatory framework is not merely good policy, it is compelled by Congress under § 112 of the CAA (directing that POTWs be regulated under § 112), § 1004 of RCRA (defining solid waste to exclude solid material in domestic sewage), and 405 of the Clean Water Act (establishing a comprehensive regulatory framework for the solid material in domestic sewage).

NACWA urges EPA to adhere to Congress' clear intent to provide for the safe use and disposal of sewage sludge, to preserve local control over these management choices, to encourage the beneficial use of sewage sludge, and to preserve incineration as a safe, viable, and cost-effective management practice for sewage sludge where applicable, consistent with the clear and longstanding intent of Congress and EPA. EPA may do so and still fulfill the obligations created by the *NRDC* decision, by adopting the approach set forth in this letter.

I. Congress Regulated Air Emissions From POTWs, Including SSIs, Under CAA § 112, Not Under CAA § 129

Clean Air Act § 112(e)(5) requires EPA to establish emission standards for hazardous air pollutants (HAPs) for publicly owned treatment works (POTWs). In particular, this provision states:

> The Administrator shall promulgate standards pursuant to subsection (d) of this section applicable to publicly owned treatments works (as defined in Title II of the Federal Water Pollution Control Act [33 U.S.C.A. § 1281 et seq.]) not later than 5 years after November 15, 1990. 42 U.S.C. § 7412(e)(5).

The definition of "treatment works" contained in the Clean Water Act is broad and includes "*any* devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage . . . or necessary to recycle or reuse water . . . and any works... *that will be an integral part of the treatment process (including land for the storage of treated wastewater in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment.*" 33 U.S.C. § 212(2)(A) (emphasis added). This language clearly encompasses the many areas of a POTW used to manage sewage sludge, including treatment and storage equipment and areas, land areas where sludges are managed, and incinerators that are "used for ultimate disposal of residues resulting from such treatment."

Thus, CAA § 112(e)(5) regulates air emissions for HAPs from POTWs broadly and without limitation. As such, SSIs operated by POTWs, and other areas of POTWs used to generate and manage sludge, are "treatment works" under the CWA, and thus are covered by CAA § 112(e)(5). CAA § 112(n)(3) underscores this conclusion, as it expressly provides authority for EPA to work with POTWs to study and characterize emissions for purposes of regulating these under CAA § 112(e). *See also* CWA § 405(f)(1) which requires permits for POTWs under § 402 of the CWA to include requirements for the use or disposal of sewage sludge.

EPA has long understood that SSIs are an integral part of POTWs. For example, under the early CWA Title II construction grants program, in which Congress included the "treatment works" definition noted above, EPA approved funding for many SSI construction, upgrade and expansion projects. Indeed, based on information NACWA has collected, many if not all of the 231 SSIs operated by municipalities in the United States were constructed or upgraded at some point in time with federal construction grants. This would have been impossible if EPA did not consider SSIs to be part of "treatment works." EPA's recognition that sewage sludge management, including incineration, is an inherent part of POTW operations for which federal funding was made available, is reflected in the primary regulatory program for sewage sludge management, the "Part 503" program,[3] which was developed under the authority of CWA § 405 and RCRA. For example, EPA has stated that:

> Sewage sludge has been an important concern of the Agency since 1972, when EPA, through the Federal Water Pollution Control Act construction grants program, began assisting in the financing of wastewater treatment facilities. 58 Fed. Reg. 9248, 9260 (Feb. 19, 1993).
>
> Treatment works treating domestic sewage, as noted above, include facilities dedicated to the disposal of sewage sludge (i.e., surface disposal sites and incinerators). 58 Fed. Reg. 9248, 9359 (Feb. 19, 1993). See also 40 CFR 122.2 in which treatment works is defined to include sewage sludge treatment systems.

Thus, it is apparent that EPA has long understood, as has Congress, that SSIs are "treatment works" under the CWA. Congress' intentional use of this well-understood term in CAA § 112 has no other conceivable meaning. EPA should, therefore, continue to include SSIs as part of POTW regulation under CAA § 112.

[3] 40 CFR Part 503, Standards for the Use or Disposal of Sewage Sludge.

The legislative history of CAA § 112 also indicates that Congress intended the air emissions from POTW operations covered by CAA § 112 to include air emissions from SSIs. For example, Congress indicated that "The Administrator is specifically directed to include publicly owned treatment works (as defined in the Clean Water Act) and [certain RCRA facilities] among the categories of major sources pursuant to this subsection....The Agency has also indicated that air emission standards for POTWs may be promulgated under the Clean Water Act. There is no standard of protection of either human health or the environment from releases to air under that Act. It is more likely that appropriate standards would survive a legal test, if established pursuant to these new authorities of § 112 of the Clean Air Act."[4]

The CWA-derived air emission standards that CAA § 112 was intended to supplement include those that control emissions on SSIs. Thus, Congress was well aware that air emissions from SSIs were already regulated by the CWA § 405 requirements and chose § 112 as the means to update these requirements as warranted by the applicable protection requirements. In addition, POTWs and SSIs are both included on a list of source categories intended to be regulated under CAA § 112.[5] By contrast, as NACWA has noted in previous correspondence to EPA, the legislative history of CAA § 129 is silent as to both POTWs and SSIs.

Further demonstrating Congress' clear direction, EPA has already regulated SSIs as intended under CAA § 112, by identifying SSIs as an area source category under CAA § 112. EPA examined the issue of the CAA regulation of SSIs in 1992, when it issued its initial list of major and area source categories under § 112. That initial list included sewage sludge incinerators as a source category. In this notice EPA expressly states "the Agency does not consider sewage sludge incineration units to be covered under § 129 so it has authority to list and set standards for these units under § 112." See also, 58 Fed. Reg. 9248, 9262, 9276-77 (Feb. 19, 1993) (noting that SSIs are regulated under § 112 of the CAA). In 1999, EPA promulgated a NESHAP under § 112 for the treatment plant part of a POTW. 64 Fed. Reg. 57572 (Oct. 26, 1999). Significantly, while the definition of POTW treatment plant is appropriately focused on the treatment part of a POTW, the definition of POTW in that rule is much broader and encompasses everything that is eligible to receive grant assistance under Title II of the CWA. See, 40 CFR 63.1595. In February 2002, EPA revised its list of source categories under § 112 to delete SSIs, not because they were not covered by § 112, but because there were no major sources in that category. 67 Fed. Reg. 6521 (Feb. 12, 2002). EPA retains the authority to regulate SSIs under § 112. For example, in June 2002, after EPA deleted SSIs from the source category list for the development of NESHAPs, EPA added SSIs to the list of area source categories under §§ 112(c) and 112(k) of the CAA . 67 Fed. Reg. 43112 (Jun. 26, 2002; 67 Fed. Reg. 70427) (Nov. 22, 2002).

CAA § 129(h)(2) states that: "no solid waste incineration units subject to performance standards under [§§ 129 and 111] shall be subject to standards under [§ 112(d)]." Thus, the language of CAA § 129(h) makes clear that EPA's regulation of sources under CAA § 129 or CAA § 112 is mutually exclusive. EPA has consistently recognized that sources regulated under CAA § 112 cannot also be regulated under CAA § 129. Since area source categories are subject to the promulgation of emission standards under CAA § 112(d), SSIs cannot also be regulated under CAA § 129. As the D.C. Circuit exhorted EPA in *NRDC*, EPA must follow the plain language of the statute. In this case, however, the plain language of the statute directs EPA to regulate POTWs (including SSIs) under § 112. Nothing in § 129 leads to a different result because it is axiomatic that a specific provision of a statute is controlling over a general provision. "However inclusive may be the general language of a statute, it

[4] Senate Report No. 100-231, Committee on Environment and Public Works, 1990 CAA Legislative History 9436, 9668.
[5] Senate report No. 101-228, Committee on Environment and Public Works, 1990 CAA Legislative History 8338, 8528.

will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957).

The bottom line is that Congress mandated, and EPA must stand by its original and longstanding determination, that POTW SSIs fall under CAA § 112. Indeed, EPA has already adopted regulations based on this conclusion. While EPA can change its mind on policy issues if the Agency develops a reasoned analysis to support the change, *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual,* 463 U.S. 29 (1983), it cannot act contrary to a statutory directive that compels a singular outcome, as it does here. *NRDC* does not alter these fundamental principles of statutory construction and, indeed, is based on an admonition to EPA to apply the CAA as written. Any action seeking to regulate SSIs under CAA § 129 rather than CAA § 112 would be contrary to the statute.

II. CAA § 129 Does Not Apply to SSIs

CAA § 129 applies to solid waste incineration units that combust solid waste. To determine the coverage of CAA § 129, EPA must look at both components – whether a material being combusted is a solid waste and whether the combustion unit is of the type specified by Congress. SSIs do not fit under either of these components. As noted above, SSIs are part of POTWs regulated under CAA § 112 and thus are not included in the types of combustion units Congress sought to regulate under CAA § 129. This is clear from the statutory language in CAA § 129, as well.

The legislative history of CAA § 129 indicates that SSIs were not intended to be regulated as "solid waste incineration units." The provisions now codified in CAA § 129 originated in a bill entitled "Municipal Waste Combustion Control Act of 1989," introduced in Congress on January 25, 1989. S. 196, 101st Cong. (1989). The express purpose of the proposed legislation was to address the "garbage crisis" facing the nation in the late 1980s and to "establish the needed regulatory program to make *municipal waste incineration* an environmentally sound part of our Nation's waste management."[6] While subsequent legislative history reveals Congress' concern with other specific types of large incinerators in addition to municipal waste combustors (*e.g.*, medical waste incinerators and industrial incinerators burning waste paper, wood, yard wastes, food wastes, batteries and plastics), Congress did not once mention POTW sewage sludge or SSIs as a type of incineration to be covered under CAA § 129, or in any way suggest that its concerns over the incineration of municipal solid waste extended to the incineration of sewage sludge. This silence in the context of CAA § 129 is fully consistent with the fact that Congress expressly covered POTWs and SSIs in CAA § 112.

The concept EPA is reportedly exploring, which would establish a regulatory definition of solid waste under Subtitle D of RCRA that includes sewage sludge, would upset the carefully wrought provisions of CWA § 405, the RCRA definition of solid waste, and the scope of the Domestic Sewage Exclusion which Congress included in order to *avoid* duplicative RCRA and CWA regulation of POTWs. Both Congress and EPA gave comprehensive and careful thought to the proper regulation of use and disposal of sewage sludge under CWA and RCRA authorities that were in place long before CAA § 129 was enacted. Nothing in CAA § 129 or its legislative history suggests that Congress provided EPA with authority to undo or seriously undermine the comprehensive sludge management programs already in place under these other laws. Moreover, EPA must recognize that these longstanding sewage sludge management regulations were not before the *NRDC* court. Although the court's admonitions to EPA may superficially suggest that the court mandated a broad definition

[6] *Id.* (emphasis added).

of solid waste for purposes of CAA § 129, such a reading simply makes no sense, particularly where it is clear that other types of incineration are covered in other Sections of the CAA. EPA has a responsibility to apply the court's decision carefully, recognizing both the limits of CAA § 129 and the mandates of unrelated statutes that would be adversely affected by a broad new definition of solid waste.

The discussion immediately below addresses the interplay between the CAA and RCRA and how it impacts the applicability of CAA § 129. Part III of this letter, which follows, addresses the CWA Part 503 regulations and programs developed under RCRA that provide a comprehensive regulatory framework for the management of sewage sludge. This discussion explains why, in addition to the CAA analysis, other laws prohibit EPA from regulating the combustion of sewage sludge as solid waste under CAA § 129.

A. Sewage Sludge Has Not Been Regulated as Solid Waste by EPA or Viewed as Solid Waste by Congress

Sewage sludges generated by POTWs, including those combusted in SSIs, have historically not been viewed as solid wastes by Congress and (as discussed in the next section) generally have not been regulated as solid wastes by EPA. Therefore, POTW sewage sludge should not be defined as solid waste for the purposes of the definition of "solid waste incineration unit" provided in CAA § 129(g)(1).[7] CAA § 129(g)(6) specifically provides that the term "solid waste" is to have the meaning as set forth and established under RCRA.[8]

> RCRA defines "solid waste" as:
>
> 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, but *does not include solid or dissolved material in domestic sewage* . . . . RCRA § 1004(27) (emphasis added).

Solid or dissolved material in domestic sewage is excluded from this definition – this exception is commonly referred to as the "Domestic Sewage Exclusion" under RCRA. The Domestic Sewage Exclusion expresses Congress' clear intent to forego RCRA regulation when a material is already regulated under the CWA.

While the legislative history of CAA § 129 is silent as to the definition of "solid waste" (other than, as discussed below, to make clear that Congress was primarily concerned with *municipal* solid waste), the Domestic Sewage Exclusion had been written into RCRA for 25 years at the time Congress passed the 1990 CAA Amendments. Accordingly, in incorporating RCRA's definition of "solid waste" in CAA § 129, Congress was well aware of the Domestic Sewage Exclusion encompassed in the definition of "solid waste" and of EPA's interpretation and application of that definition with respect to the regulation of sewage sludge from POTWs.

---

[7] We also acknowledge EPA's statement in the Agency's 2000 regulatory agenda that sewage sludge *when combusted in SSIs* is a solid waste. 65 Fed. Reg. 23,430, 23,460 (Apr. 24, 2000). That statement, however, was not made in the context of a rulemaking preamble but rather in a semi-annual regulatory agenda and it has not been subjected to public comment. It also is countermanded by numerous statutory and regulatory provisions discussed herein, and is entitled to little weight.

[8] CAA § 129(g)(6) (The term "solid waste" shall have the meaning established by the Administrator pursuant to the Solid Waste Disposal Act.)

Moreover, shortly after Congress passed the 1990 CAA, Congress amended RCRA to expand the scope of the Domestic Sewage Exclusion to cover Federally Owned Treatment Works. At the time of passage of this amendment (and after a year of debate and revision), Senator Chafee confirmed Congress' understanding that the Domestic Sewage Exclusion exempts POTW sludge from RCRA regulation:

> Sewage treatment plants operated by local governments – POTWs – have a special exemption called the domestic sewage exclusion under RCRA. *If most of the waste received by a POTW is domestic sewage, their sludge and wastewater is exempt from hazardous industrial waste regulation even if they are also receiving hazardous industrial waste through sewer connections*. 138 Cong. Rec. 514755, 514758 (Sept. 23, 1992) (emphasis added).

Accordingly, in using the definition of "solid waste" under RCRA for purposes of defining the scope of CAA § 129, Congress was aware that POTW sewage sludge would be excluded from the CAA § 129(g) definitions, which, in turn, would preclude regulation of SSIs under CAA § 129. Express exemption of SSIs from the definition of "Solid Waste Incineration Units" under CAA § 129 was therefore unnecessary.

In RCRA rulemakings, EPA has similarly interpreted the scope of the Domestic Sewage Exclusion to include sewage sludge generated by POTWs. The clearest example of this exclusion of POTW sewage sludge from the definition of "solid waste" under the RCRA regulatory framework is found in EPA's promulgation of a rule to identify and list hazardous wastes for petroleum refinery process wastewaters. In the preamble to the Agency's 1990 Final Rule, EPA concluded that POTW sewage sludge falls within the Domestic Sewage Exclusion:

> These wastes [P038 and K048 wastes] are being added to the list of [hazardous] wastes . . . in order to regulate sludges generated at wastewater treatment facilities on site at petroleum refineries as well as sludges generated at off-site wastewater treatment facilities.[9] 55 Fed. Reg. 46,354, 46,364 (Nov. 2, 1990) (emphasis added).

Accordingly, both Congress and EPA have consistently recognized the possibility of duplicative regulation under both the RCRA and CWA programs and have consistently concluded that POTW sewage sludge should be excluded from regulation under RCRA as a waste. NACWA believes EPA must be consistent and confirm that POTW sewage sludge is not "solid waste" for regulatory purposes, and incinerators which combust POTW sewage sludge do not qualify as "solid waste incineration units" under CAA § 129.

B. EPA Properly Determined that SSIs are Not "Solid Waste Incineration Units" and, Therefore, They are Not Subject to Regulation Under CAA § 129

Section 129 of the CAA requires EPA to develop and adopt new source performance standards and emissions guidelines for "solid waste incineration units." The potential scope of incineration units covered by CAA § 129 is expressly limited by the definition of "solid waste incineration units." In CAA § 129(g)(1), Congress defined this term to mean:

---

[9] It should be noted that if wastewaters generated at petroleum refineries are discharged to a POTW and such wastewaters are mixed with domestic sewage from nonindustrial sources, *the sludges generated in the POTW are covered under the domestic sewage exclusion* and are not included in today's listings.

> A distinct operating unit of any facility which combusts any solid waste material from any commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels) . . . .[10] CAA § 129(g)(1).

As fully explained above (and in NACWA's March 17, 1997 and August 14, 2006 comment letters), biosolids generated by POTWs are not a "solid waste." Furthermore, sewage sludge generated by POTWs are not "from commercial or industrial establishments or the general public." Simply stated, incinerators which combust sewage sludge from POTWs are not "solid waste incineration units" and do not fall within the scope of EPA's duty to regulate pursuant to CAA § 129.

As EPA has previously determined, SSIs are not subject to regulation under CAA § 129 because the sludge combusted by SSIs come from POTWs, not "commercial or industrial establishments or the general public." POTWs are not properly characterized as "commercial or industrial establishments" or "the general public." The fact that the sewered population served by a POTW is assessed at a monetary rate for the collection and treatment services provided by the POTW does not transform it into a "commercial establishment" within the commonly understood meaning of that term, which must presumably be the meaning intended by Congress in CAA § 129(g)(1). Moreover, the fact that Congress and NACWA refer to POTWs as "plants" or "facilities," or that they refer to their works collectively as an "industry," does not transform POTWs into "commercial or industrial establishments" for purposes of CAA § 129. In enacting § 129, Congress was clearly concerned about municipal solid waste – trash, or garbage – generated by households and businesses. It was not at all concerned in § 129 with sewage sludge management, and adopting an approach to the CISWI definitions that ignores CAA § 112's coverage of POTWs and SSIs would be contrary to statute.

These conclusions about the scope of CAA § 129 are further validated when one considers that Congress explicitly included POTWs under CAA § 112 and prohibited regulation of sources under both CAA §§ 112 and 129. By doing so, Congress purposefully excluded POTWs, including SSIs, from the types of combustion units intended to be covered by CAA § 129.

In sum, Congress did not intend SSIs to be subject to CAA § 129 regulation. Section 129 applies to certain types of incinerators that combust "solid waste" as defined under RCRA, and Congress fully understood the exclusion of sewage sludge from the definition of solid waste at the time CAA § 129 was enacted. Furthermore, SSIs burn sewage residues, not solid waste "from commercial or industrial establishments or the general public." SSIs do not fall within this definition, and therefore, cannot be regulated under CAA § 129. The plain language of CAA § 129, as further validated by its legislative history, supports no other conclusion.

The holding in *NRDC* does not alter this analysis. The *NRDC* decision directs EPA to use RCRA's definition of solid waste in determining the scope of regulation for covered units under CAA § 129. Since POTWs and SSIs are not covered by CAA § 129, the *NRDC* decision does not require or authorize EPA to develop a definition of solid waste that includes or affects sewage sludge. Therefore, EPA's response to the *NRDC* decision should be appropriately narrow, as well, since POTWs and SSIs are explicitly covered under CAA § 112. EPA has

[10] The definition of "solid waste incineration unit" excludes: (1) incinerators or other units which are Treatment, Storage and Disposal Facilities (TSDFs) under RCRA; (2) materials recovery facilities which combust waste for the primary purpose of recovering metals; (3) "qualifying small power production facilities" and "qualifying cogeneration facilities" which burn homogeneous waste (such as tires or used oil) for the production of electric energy or electric energy and steam or forms of useful energy; and (4) air curtain incinerators, provided that such incinerators burn only wood wastes, yard wastes, and clean lumber. CAA § 129(g)(1).

previously and properly determined that POTWs and SSIs are covered under CAA § 112, and, as such, the review directed by the court in *NRDC* simply does not apply to SSIs or to sewage sludge.

For all of these reasons, EPA lacks authority to regulate SSIs under CAA § 129. EPA previously made this determination and nothing in *NRDC* supports a different conclusion. Moreover, CAA § 112 clearly applies to SSIs, thereby precluding application of CAA § 129 to SSIs.

III. Sewage Sludge Management Is Already Comprehensively Regulated and Regulation of SSIs Under CAA § 129 Would Conflict with Existing Laws

The current regulatory harmony that exists for sewage sludge management is implemented through and supported by the comprehensive program that has been carefully developed under CWA § 405 and several key provisions and exclusions that exist under the RCRA regulatory framework. The statutory and regulatory provisions that contain and implement the sewage sludge management program distinguish between sewage sludge and solid waste, and thereby demonstrate that they are different types of material. As a result, EPA's reported effort to categorically deem sewage sludge a solid waste for regulatory purposes under RCRA Subtitle D, for the limited purposes of implementing the requirements of CAA § 129 (which does not apply to SSIs in any event), is misdirected.

If EPA moves forward with the notion of deeming sewage sludge a solid waste for regulatory purposes under RCRA Subtitle D, such action will severely conflict with the carefully crafted distinctions made by Congress and EPA over many years to provide for proper sewage sludge management. This action will also place RCRA regulatory responsibilities on POTWs that Congress fully intended would not apply due to strict regulation of POTWs under the CWA and its NPDES program. In addition, such action could severely limit how sewage sludge may be managed, which directly contravenes Congress' preservation in the CWA of local control over sewage sludge management options.

In short, if EPA erroneously deems sewage sludge a solid waste in an effort to guide its implementation of the CAA, it will wreak havoc on well-established programs for comprehensive sewage sludge management that Congress deliberately crafted with care under the CWA and RCRA many years before the enactment of CAA § 129 in 1990. NACWA doubts the existence of any support in the relevant statutes or legislative histories for such an approach, and we are equally confident that Congress had no intention for CAA § 129 to be read in a way that undermines these longstanding programs.

Instead of pursuing the approach EPA is reportedly considering, NACWA respectfully suggests that any new definition of solid waste that EPA believes is necessary in order to carry out CAA § 129 should be drafted to include an express regulatory exclusion for sewage sludge that is managed in accordance with other pre-existing regulatory requirements. The discussion below details the reasons why this approach is critical. Since CAA § 129 does not apply to sewage sludge, this approach should also serve EPA's purposes in implementing that provision consistent with *NRDC* and other legal requirements.

A. Interplay of RCRA and CWA § 405

Congress established the concept of a broad POTW exemption from the then-nascent federal solid waste laws as early as 1965.[11] This was an early recognition that a comprehensive solid waste program, designed primarily to address hazardous wastes, was not necessary to apply at POTWs as long as they were effectively regulated under the CWA, which has always been and remains the primary statutory authority for comprehensive regulation of POTW operations. The Solid Waste Disposal Act and RCRA included the Domestic Sewage Exclusion in explicit recognition of this critical policy choice.[12]

Indeed, as EPA began its long efforts to define "solid waste" and "hazardous waste" for purposes of Subtitle C of RCRA, the Agency explicitly understood and discussed the importance of the comprehensive federal sewage sludge management program it was beginning to develop to carry out Congress' intent and to complement the RCRA rules being developed for solid wastes.

For example, in the 1980 preamble to EPA's development of the Subtitle C regulations, EPA describes the importance, scope, and ultimate supremacy of the to-be developed CWA § 405 program, indicating that, once this program was in place, it would serve as the comprehensive regulations for use and disposal of sewage sludge. 45 Fed. Reg. 33,084, 33,102 (May 19, 1980) ("Once such a regulation is in place, sewage sludge will be exempted from coverage under other sets of regulations."). Thus, there has been a clear recognition for over 30 years that sewage sludge is different than solid waste for regulatory purposes, and that sewage sludge is primarily regulated under the CWA. This recognition has not been challenged and stands today.

EPA proposed its CWA § 405 regulations in 1989, and enacted the final rules, known as the Part 503 regulations, in 1993 (40 CFR Part 503). As EPA explained at length in the preamble to the proposed rules, CWA § 405 established requirements for a comprehensive program to develop appropriate regulations for use and disposal of sewage sludge. EPA described the lengthy and complex process it undertook to develop rigorous scientific studies to ensure the safe management of sewage sludges whether they were to be used or disposed. 54 Fed. Reg. 5746, 5764-5791 (Feb. 6, 1989) (describing the Agency's exposure assessment models, human health and environmental criteria, aggregate effects assessment, and the alternative regulatory approaches the agency considered when developing the sewage sludge disposal regulations). EPA also explained the major effort undertaken to ensure that the requirements of the CWA and RCRA as well as those in the CAA were considered and reconciled in the Part 503 program requirements. *Id.* at 5748 (noting that EPA "carefully examined the requirements of other media programs and media-specific statutes" in developing the proposed rules and "where possible . . . used the tools and standards developed under these other programs"). NACWA strongly urges EPA to be consistent with its past regulatory determinations and do the same in its forthcoming Subtitle D definition of solid waste.

In its CWA § 405 proposed rulemaking, EPA also described the relationship of the new Part 503 rules to RCRA regulations in 40 CFR Parts 257 and 258. Part 257, which establishes criteria for what constitutes a sanitary landfill versus an open dump, 44 Fed. Reg. 53,438 (Sept. 13, 1979), was promulgated under RCRA and the CWA. *See* 58 Fed. Reg. at 9261. EPA explained at that time that Part 257 exempted land application of sewage sludge

[11] Solid Waste Disposal Act, Pub. L. 89-272, 79 Stat. 992 (1965).
[12] Solid Waste Disposal Act, Pub. L. No. 89-272, § 203(4), 79 Stat. 992, 998 (1965) (defining the term "solid waste" to exclude "solids or dissolved material in domestic sewage or other significant pollutants in water resources . . . ."); *accord* Resource Conservation and Recovery Act, Pub. L. No. 94-580, § 1004, 90 Stat. 2795, 2801 (1976).

because that activity is not solid waste disposal. *Id.* Additionally, Parts 258 and 503 together provided that, as long as disposal of sewage sludge in a municipal solid waste landfill met the specific requirements of Part 258 for that activity, this would constitute compliance with the Part 503 regulations and CWA § 405. When EPA promulgated the Part 503 final rule in 1993, the Agency recognized that the 1990 CAA Amendments might subject SSIs to new requirements in addition to the incineration standards already established in Part 503. *Id.* at 9276-9277.

Both the 1980 RCRA preamble and the CWA Part 503 rulemaking history, including the discussion of how Parts 257 and 258 apply when sewage sludge is permanently placed on land surfaces for disposal purposes, show the primacy of the CWA § 405 program with respect to the regulation of sewage sludge. 45 Fed. Reg. at 33101; 58 Fed. Reg. at 9261. These are all illustrative of the careful harmonization among CWA, RCRA and CAA requirements that EPA undertook in crafting the Part 503 regulations that serve as the cornerstone of proper sewage sludge management. EPA must not undo this carefully crafted reconciliation of statutory authorities as it seeks to address its obligations and, indeed, it would be arbitrary and capricious for EPA to do so.

This history of the RCRA and CWA interplay specifically related to sewage sludge indicates that Congress provided a thoughtful framework for how to safely and effectively exempt sewage sludge management from RCRA regulation, except in the case where the sewage sludge was hazardous. This framework cannot be reconciled with an approach by which all sewage sludge would be regulated as solid waste.

B. Part 503 Distinguishes Sewage Sludge and Solid Waste

In keeping with this framework, EPA's careful regulatory approach in the Part 503 regulations distinguishes between sewage sludge and solid waste. This is consistent with the distinctions drawn by Congress, and by EPA in its implementing regulations, that sewage sludge management is not the same as solid waste disposal. *See, e.g.,* 40 CFR Part 503 (identifying distinct standards for land application (Subpart B), surface disposal (Subpart C), or incineration (Subpart E) of sewage sludge); 58 Fed. Reg. at 9256-57 (distinguishing between sewage use and disposal methods).

In addition, EPA's description of sewage sludge as it moves through the wastewater treatment process indicates recognition that solids and dissolved substances are still present in sewage sludge before and after it is processed, and, following treatment, sewage sludge contains the residues of domestic sewage.[13] This recognition indicates that EPA has always intended sludges being generated and processed during and after wastewater treatment, to be exempt from RCRA regulation when managed in accordance with the Part 503 regulations. EPA and Congress recognized that regulating the wastewater treatment process, which is fully regulated under the CWA, under RCRA would be duplicative.

Other EPA guidance also demonstrates the distinction the Agency has consistently made between biosolids and solid waste. For example, EPA's "Plain English Guide to the EPA Part 503 Biosolids Rule" (EPA/832/R-93/003 September 1994) states:

[13] 58 Fed. Reg. at 9255-9256 (observing that unprocessed sewage sludge contains the solids and dissolved substances that were present in wastewater and that treatment processes also result in the development of sludge that contains organic materials and constituents that were present in the wastewater).

> If municipal solid waste accounts for more than 30% (by dry weight) of the mixture of biosolids and auxiliary fuel, however, the municipal solid waste is not considered auxiliary fuel under Part 503. (Instead, the process would be covered by 40 CFR Part 60 and 61.)[14]

Also § 503.41(b) of the Part 503 Rule states:

> Auxiliary fuel is fuel used to augment the fuel value of sewage sludge. This includes, but is not limited to, natural gas, fuel oil, coal, gas generated during anaerobic digestion of sewage sludge, and municipal solid waste (not to exceed 30 percent of the dry weight of sewage sludge and auxiliary fuel together). Hazardous wastes are not auxiliary fuel.

All of this means that EPA must be extremely careful in any discussion that would imply that the Domestic Sewage Exclusion does not apply to these sludges. How EPA explains what it considers to be the scope of the Domestic Sewage Exclusion could have major impacts not only with respect to sludges still awaiting decisions about use or disposal, but also the regulatory status of the treated wastewater, which EPA has long recognized is "still considered to be domestic sewage for purposes of the Act [following treatment and solids removal in such treatment]." 44 Fed. Reg. 53,438, 53,440 (Sept. 13, 1979).

In sum, Congress' intent with CWA § 405 and the Domestic Sewage Exclusion under RCRA was to ensure that sewage sludge was not subject to regulation as solid waste as long as it is properly managed under Part 503 requirements. These requirements, as noted, pull in RCRA-based requirements for land-based disposal of sewage sludge. As such, the general rule is clear that the generation and management of sewage sludge, including the beneficial uses or disposal of sewage sludge, are not solid wastes for RCRA regulatory purposes, as long as the management of these sludges complies with Part 503 regulations. EPA must be consistent with this past regulatory determination and ensure it creates no conflicts between the CWA and RCRA in its Subtitle D definition of solid waste.

C. Serious Consequences Would Ensue if EPA Asserts that the Domestic Sewage Exemption Only Applies up to a POTW's "Headworks"

The framework noted above is clearly based on the understanding that solids moving through the wastewater treatment process, including sludges generated in that process, are subject to the Domestic Sewage Exclusion. This is consistant with the RCRA § 1004(26A) and (27) definitions of solid waste and "sludge," which are tied to "discarded" and "waste" language and concepts. Sewage sludge generated by the treatment process may be beneficially used in a number of ways. Therefore, to deem it solid waste as it is generated in the treatment process, or even as it undergoes further processing prior to being removed "from" the treatment plant, contravenes these fundamental RCRA principles. Case law under RCRA is clear that the statute regulates as solid wastes only truly discarded materials. *Cordiano v. Metacon Gun Club, Inc.*, 2009 U.S. App. LEXIS 16980 (2d Cir. July 31, 2009) (discussing at length the definition of "solid waste" and noting that RCRA requires a showing that materials are "discarded").

[14] Page 81, third paragraph, second sentence.

In fact, not all sewage sludge is discarded or disposed; indeed, some is beneficially used by recycling nutrients to farm land or generating energy in combustion units. EPA has recognized this in the Part 503 distinctions between use and disposal. This regulation already provides a cogent, well-thought out and well-understood framework. There is no need for EPA to invent a new framework for purposes of an unrelated and inapplicable CAA provisions.

In addition, the Domestic Sewage Exemption applies without condition to "solid or dissolved material in domestic sewage." A practical consideration of what this means in the context of POTW operations also demonstrates the illogic of EPA seeking to apply the Domestic Sewage Exclusion at a POTW's headworks.

For example, solids in domestic sewage do not drop out at the headworks of a POTW; instead, solids that enter the headworks are part of what is treated during the treatment process. Thus, disconnecting the Domestic Sewage Exclusion at the headworks is contrary to the statutory definition and common sense. Moreover, sewage sludge is both a product of the wastewater treatment process as well as material that provides a treatment function during this process. Applying the Domestic Sewage Sludge Exclusion at the headworks fails to recognize this and, again, would violate the statutory definition. Finally, decisions about use or disposal occur after this processing is complete. If EPA applies the Domestic Sewage Sludge Exclusion at the headworks, this dictates a regulatory status for treatment process material well ahead of decisions about its management disposition. This approach will severely limit local choices about sewage sludge management, which is directly contrary to the requirements of CWA § 405.

This practical review demonstrates that a regulation that would apply the Domestic Sewage Exclusion only up to the headworks of a POTW would ignore how the wastewater treatment process works in reality and undercut the broad RCRA exemption Congress intended for CWA-regulated POTW operations. The unintended result of such a reading would be to give POTWs hazardous waste generator responsibilities for material that enters the treatment works, *see, e.g.*, 40 CFR 262.4 (hazardous waste determination). Such an outcome is contrary to Congress' intent, as Congress created the Domestic Sewage Exclusion to avoid duplicating CWA regulations already being implemented by POTWs with new RCRA obligations.

D. EPA's Suggested Approach Would Violate RCRA § 1006(b)

RCRA § 1006(b) requires EPA to integrate RCRA requirements with the requirements of the CWA and the CAA, as well as other laws. EPA is reportedly considering an approach that would deem sewage sludge a solid waste in order to promulgate a rule under a CAA provision that does not even apply to POTWs. Such an action would violate EPA's non-discretionary duty under RCRA. Furthermore, developing an interpretation of the Domestic Sewage Exclusion or of the definition of solid waste that eviscerates the CWA § 405 program like wise would violate EPA's duty of integration. Nothing in CAA § 129 suggests Congress intended the Draconian approach EPA is reportedly considering. Indeed, CAA § 129(g) explicitly states that the definitions contained therein (including the definition of solid waste incineration unit and of solid waste) are for purposes of CAA § 306 [federal procurement] and "this section *only*" (emphasis added). Thus, any effort by EPA to develop a broadly applicable definition of nonhazardous solid waste goes well beyond what is authorized by or required to implement CAA § 129.

In sum, any definition of solid waste or regulatory provision that would subject POTWs to regulation under RCRA would violate several other federal laws and would wreak havoc on existing and longstanding regulatory programs for safe and effective sewage sludge management programs that are protective of human health and the environment. Furthermore, such action is unnecessary for EPA to fulfill its duties under CAA § 129, since that provision does not apply to POTWs or SSIs.

E. SSI Emissions Are Already Stringently Regulated Under Part 503 / CWA § 405

Emissions from SSIs are already heavily regulated by other Congressionally-mandated, comprehensive regulations that are adequately protective of human health and the environment. Accordingly, no public health or environmental benefit will be realized from the expensive control measures that CAA § 129 would impose if SSIs were erroneously included in the EPA's proposed rule for solid waste combustion sources.

Since 1993, POTWs that practice incineration have been subject to a comprehensive, risk-based program for reducing the potential environmental risks of sewage sludge pursuant to CWA § 405 and the implementing regulations set forth Part 503. Section 405(d) of the Clean Water Act requires EPA to establish numeric limits and management practices that protect public health and the environment from the adverse effects of toxic pollutants in biosolids. Section 405(e) of the Clean Water Act prohibits any person from disposing of sewage sludge from a POTW or other treatment works treating domestic sewage through any use or disposal practice for which regulations have been established pursuant to § 405, except in compliance with the Part 503 regulations.

In Part 503 regulations, EPA has identified the pollutants in sewage sludge that may adversely affect public health or the environment and has specified the management practices for the utilization and disposal of sewage sludge that are protective of public health and the environment. For disposal by incineration, the Part 503 regulations require, among other requirements:

(i) numerous management practices and general requirements;

(ii) risk-based, site-specific limits for arsenic, cadmium, chromium, lead, and nickel content in the sewage sludge incinerated;

(iii) compliance with National Standards for Hazardous Air Pollutants (NESHAPs) for mercury and beryllium (as discussed below);

(iv) operational technology-based emission limits for total hydrocarbon (THC) or an alternative emission limit for carbon monoxide (CO); and

(v) monitoring, recordkeeping and reporting requirements.

40 CFR Part 503, Subpart E.

Furthermore, in the course of developing the Part 503 regulations, EPA also proposed to establish requirements for dioxins (including specific congeners of dioxin, dibenzofuran, and coplanar PCBs).[15] However, after evaluating the emissions from dioxins from sewage sludge incineration, as well as surface disposal and land application, EPA decided such requirements were not warranted.[16] This decision was based on the results of a comprehensive risk assessment that demonstrated that dioxin levels in biosolids and biosolids incinerator exhaust gases do not pose a significant risk to human health or the environment.[17]

As explained in detail in NACWA's 1997 comments to EPA (pages 15-17), the numeric emission limits and management practices requirements established under the Part 503 regulations were derived from years of study and evaluation of the potential risks to human health and the environment which could be posed by the incineration of biosolids. The regulation of SSIs under this existing regime are risk-based standards that were developed to protect human health and the environment from any reasonably anticipated adverse effects from pollutants that may be present in sewage sludge. In fact, the Part 503 regulations for SSIs were developed through a partnership between EPA's water and air offices – a partnership that continues today as EPA conducts its mandated review of the Part 503 standards. As a result, SSIs can clearly demonstrate that the emissions from their units are *not* adversely impacting human health and the environment by demonstrating compliance with the Part 503 requirements. Moreover, the statutory framework of this regime provides for ample means for EPA to identify and regulate additional concerns if supported by scientific evidence. For example, CWA § 405 provides for a biennial review process that was specifically established for identifying and regulating any additional pollutants of concern. EPA has repeatedly emphasized its confidence that the Part 503 regulations are adequately protective of public health and the environment.[18]

Additionally, since 1975, EPA has imposed NESHAPs for mercury and beryllium emissions which apply to certain SSIs. *See* 40 CFR Part 61, Subpart E and C. The mercury NESHAP applies, in relevant part, to any source that incinerates wastewater treatment plant sludge and imposes emission limits for mercury, as well as imposes stack testing, sampling, and monitoring requirements. *See* 40 CFR Part 61, Subpart E. The beryllium NESHAP applies, in relevant part, to incinerators which process beryllium-containing waste and imposes emission limits for beryllium, as well as sampling requirements. *See* 40 CFR Part 61, Subpart C. These NESHAPs are expressly incorporated into the 40 CFR Part 503 requirements for POTWs.

Since 1974, EPA has also imposed New Source Performance Standards (NSPS) for SSIs under CAA § 111. *See* 40 CFR Part 60, Subpart O. These regulations apply to any incinerator constructed or modified after June 11, 1973 that (1) combusts wastes containing more than 10% sludge (dry basis) produced by municipal sewage treatment plants; or (2) charges more than 1,000 kg (2,205 lbs.) per day municipal sewage sludge (dry basis). *See* 40 CFR § 160.150. Under the existing NSPS for SSIs, regulated incinerators must comply with emission limits for particulate matter and opacity, as well as operational, monitoring, testing and reporting requirements.

Thus, of the eleven pollutants identified in CAA § 129, many are already directly regulated under EPA regulations at Parts 503, 60, or 61, including total particulate matter, opacity, lead, cadmium, mercury, and CO

---

[15] *See Standards for the Use or Disposal of Sewage Sludge: Proposed Rule*, 64 Fed. Reg. 72,045 (Dec. 23, 1999).
[16] *See Standards for the Use or Disposal of Sewage Sludge: Final Notice*, 66 Fed. Reg. 66,028 (Dec. 21, 2001).
[17] *See id.*
[18] *See* Letter from James A. Hanlon, Director of EPA Office of Wastewater Management, to Greg Kester, State of Wisconsin Department of Environmental Resources (Sept. 20, 2004) ("EPA believes that 40 CFR Part [503] regulations are protective of public health and the environment and we continue to support biosolids management in full compliance with the Part 503 regulation.") (attached hereto at Attachment C).

(optional, as a surrogate for THC). CAA § 129(a)(4); 40 CFR Parts 60, 61, 503. Additionally, EPA and NACWA have both also determined that SSIs are only very minor sources of several other of the CAA § 129 pollutants, including dioxins, sulfur dioxide, and hydrogen chloride. NACWA's March 17, 1997 comment letter (pages 13-14) documents in detail many specific examples of existing SSI regulations, or information regarding emissions from SSIs, for each of the pollutants listed in § 129.

In addition to the federal requirements applicable to SSIs outlined above, public agencies operating SSIs are also required to obtain a Title V operating permit if they are "major sources" as defined by the CAA. Pursuant to 40 CFR Part 403, POTWs additionally implement, through local regulatory authority, pretreatment standards to prevent discharge of pollutants to the POTW that may pass through or interfere with treatment processes. Pretreatment is an effective way to reduce harmful constituents in the sewage sludge combusted by SSIs. States also have authority to regulate and, in fact, do regulate air emissions from SSIs under their respective CAA State Implementation Plans. Together, these federal, state, and local regulations form an existing and effective regulatory scheme for regulating emissions from SSIs. Further regulation of SSIs under § 129 is not appropriate or necessary for the protection of public health and the environment.

EPA appears to have agreed with this analysis[19] and nothing in the *NRDC* decision undermines this result.

F. Regulation of SSIs under CAA § 129 Would Result in Prohibitive Costs and Only Negligible Beneficial Impacts.

Congress' decision not to include SSIs among the categories of combustion sources covered by CAA § 129, and EPA's longstanding recognition of this exclusion, is also supported by an analysis of costs and benefits. The additional regulatory burdens imposed under CAA § 129 would be substantial to SSI operators, while offering no discernable corresponding benefits. The added costs then imposed upon POTW ratepayers would be considerable, and could potentially lead to the elimination of incineration as a biosolids management option for many communities.

Costs would invariably increase under CAA § 129 as SSI operators face competing MACT standards for pollutants that cannot be simultaneously achieved (e.g., NO_x and CO). For further discussion *see* NACWA's 1997 comment letter (pages 17-19).

An overwhelming cost or regulatory burden on SSIs would be inconsistent with EPA's declarations that incineration is a safe and acceptable sewage sludge disposal method. It would also be contrary to the congressional intent expressed in CWA § 405, in which Congress mandates that EPA must provide for safe management practices for the use and disposal of biosolids, and not to dictate "preferred" practices and eliminate others. For example, CWA § 405(e) states that "[t]he determination of the manner of disposal or use of sludge is a local determination," as long as the practice is in accordance with EPA's regulations.

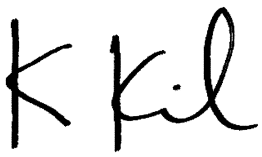
---

[19] 72 Fed. Reg. 2620, 2620-2624 (Jan. 22, 2007) (evaluating CAA § 129, its legislative history, and policy considerations to determine that (1) "EPA has the discretion to define which categories of combustion units should be subject to regulation under CAA § 129" and that SSI would be regulated under CAA § 112); 72 Fed. Reg. at 2627 (acknowledging that "various CWA and CAA regulations currently apply to SSI" and that "[t]hese other regulations provide some additional support for our decision not to regulate under CAA § 129 because these other regulations provide protection of human health and the environment for many of the pollutants regulated by CAA § 129 regulations").

For all of these reasons, NACWA believes that EPA has properly interpreted CAA §§ 112 and 129 to conclude that § 112, not § 129, applies to POTWs and SSIs. This determination under the CAA is fully consistent with the CWA and RCRA authorities and requirements discussed herein. As such, it is unnecessary, and would be very problematic as described herein, for EPA to develop a definition of solid waste for the purposes of CAA § 129 that inadvertently eviscerates longstanding and well-understood programs for sewage sludge management developed over many years under the CWA and RCRA.

I look forward to discussing this matter with you and your staff. Please contact me at 202-833-4653 or Chris Hornback of my staff at chornback@nacwa.org should you have any questions.

Sincerely,



Ken Kirk
Executive Director