ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES,	)	
Petitioner,	)	
v.	)	**No. 11-1131 (consolidated with 11-1167 and 11-1185)**
ENVIRONMENTAL PROTECTION AGENCY and LISA PEREZ JACKSON, ADMINISTRATOR, EPA,	)	
Respondents.	)	

EPA'S OPPOSITION TO EMERGENCY JOINT MOTION FOR STAY OF THE SEWAGE SLUDGE INCINERATION RULE

Respondents, the Environmental Protection Agency and Lisa Perez Jackson ("EPA" or "Agency") submit this Opposition to the "Emergency Joint Motion for Stay of the SSI Rule" filed by Petitioners, the National Association of Clean Water Agencies and Hatfield Township Municipal Authority (collectively "NACWA"). *See* Doc. #1330427 ("NACWA Mot."). For the reasons stated below, NACWA's Motion must be denied.

BACKGROUND

Petitioners seek to stay EPA's final rule entitled "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units," 76 Fed. Reg. 15,372 (Mar. 21, 2011) ("SSI Rule" or "Rule"). That Rule sets New Source Performance Standards and Emission Guidelines under Clean Air Act ("CAA" or "the Act") Section 129, 42 U.S.C. § 7429, to reduce emissions of nine air pollutants from new and existing sewage sludge incinerators.[1]

CAA Section 129, entitled "Solid Waste Combustion," requires EPA to establish emissions standards for certain categories of "solid waste incineration units." *Id*. A "solid waste incineration unit" is "a distinct operating unit of any

[1] The nine pollutants are: cadmium, carbon monoxide, hydrogen chloride, lead, mercury, nitrogen oxides, particulate matter, polycholorinated dibenzo-p-dioxins and polychlorinated dibenzofurans, and sulfur dioxide. 42 U.S.C. § 7429(a)(4).

facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels)." *Id.* § 7429(g)(1). Section 129 specifies categories of solid waste incineration units for which EPA must establish standards: those combusting municipal solid waste, hospital and medical waste, industrial or commercial waste, and "other categories of solid waste incineration units" that combust waste not specifically identified. *Id.* § 7429(a)(1)(A)-(E); *see Davis County v. Solid Waste Mgmt. v. EPA*, 101 F.3d 1395, 1403 (D.C. Cir. 1996); *NRDC v. EPA*, 489 F.3d 1250, 1255 (D.C. Cir. 2007).

Sewage sludge incinerators are one of the "other categories of solid waste incineration units" that EPA is required to regulate under Section 129. A sewage sludge incinerator is a device at a wastewater treatment facility that combusts domestic sewage sludge to reduce the volume of sludge. 76 Fed. Reg. at 15,374. This combustion releases various air pollutants. *Id.* at 15,375. EPA's SSI Rule regulates two subcategories of new and existing sewage sludge incinerators: multiple hearth incinerators and fluidized bed incinerators.[2] *Id.* at 15,376.

Section 129 directs EPA to set emissions standards that "reflect the

[2] Section 129 gives EPA discretion to "distinguish among classes, types . . . and sizes of units within a category" to establish the standards. 42 U.S.C. § 7429(a)(2).

maximum degree of reduction in emissions" of air pollutants, "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements [that EPA] determines is achievable for new or existing units in each category." 42 U.S.C. § 7429(a)(2). This is referred to as the "maximum achievable control technology" level of control, or "MACT." *See Ne. Md. Waste Disposal Auth. v. EPA Maryland*, 358 F.3d 936, 940 (D.C. Cir. 2004); *NRDC*, 489 F.3d at 1254.

EPA develops MACT standards through a two-step process. First, EPA determines the minimum level of stringency that the Act requires – the "MACT floor." For new units, the MACT floor is "the emissions control . . . achieved in practice by the best controlled similar unit . . . ." 42 U.S.C. § 7429(a)(2). For existing units, the MACT floor is "the average emissions limitation achieved by the best performing 12 percent of units in the category." *Id.* Second, EPA determines whether more stringent beyond-the-floor standards are achievable based on costs, non-air quality health and environmental impacts, and energy requirements. *Id*.

Here, EPA determined that beyond-the-floor MACT standards were not warranted and adopted MACT floor standards for each of the nine pollutants emitted from the multiple hearth and fluidized bed sewage sludge incinerators. 76 Fed. Reg. at 15,394.

STANDARD OF REVIEW

A stay is a disfavored remedy and "it is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). To determine whether a stay is warranted, the Court stringently applies four factors: (1) whether the movant has demonstrated a substantial likelihood that it will prevail on the merits; (2) the prospect of irreparable injury to the movant if relief is withheld; (3) the possibility of harm to other parties if relief is granted; and (4) the public interest. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 1760 (citation omitted).

Demonstrating a substantial likelihood of success on the merits requires a showing that NACWA is likely to persuade this Court that EPA's SSI Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). This narrow, deferential standard presumes the validity of agency actions and prohibits the Court from substituting its judgment for that of the Agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983). Judicial deference also typically extends to any agency's interpretation of a statute it administers. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S.. 837, 842-45 (1984).

Irreparable harm requires injury that is "both certain and great, it must be actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). The injury must be "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (citation omitted); *see also Nken*, 129 S. Ct. at 1761 (more than a "mere possibility" of success on the merits is required, and the standard for irreparable harm requires more than showing the "possibility" of harm).

ARGUMENT

I. INDUSTRY PETITIONERS CANNOT DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. EPA Reasonably Regulated Sewage Sludge Incinerators Under CAA Section 129.

Chevron guides review of NACWA's claim that the SSI Rule conflicts with the Clean Air Act. The Court "must decide (1) whether the statute unambiguously forbids the Agency's interpretation, and if not, (2) whether the interpretation, for other reasons exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). Here, under *Chevron* step one, EPA's regulation of sewage sludge incinerators under Section 129 is reasonable.

First, this Court in *Natural Resources Defense Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007), specifically determined that Section 129 "plainly and broadly" defines "solid waste incineration unit" "to include 'a distinct operating

unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public . . . .'" *Id.* at 1257 (quoting 42 U.S.C. § 7429(g)(1)). "The word 'any' is usually understood to be all inclusive." *Id.* (citation and internal quotation marks omitted). Consistent with that unambiguously broad language, EPA determined that Section 129 covers incineration units that combust sewage sludge – a type of solid waste – and established emission standards for such units. NACWA's attempt to distinguish *NRDC* on the ground that it involved a different type of incinerator is irrelevant. NACWA Mot. at 10. The Court's opinion regarding the definition of "solid waste incineration unit" is directly on-point and NACWA should not be allowed to constrict "the scope of this plain, broad language." 489 F.3d at 1258.

Second, Section 129(a)(1)(E) requires EPA to establish standards for "other categories of solid waste incineration units," in addition to the specific categories of solid waste incineration units listed in subsections (a)(1)(B) through (D). 42 U.S.C. § 7429(a)(1)(B)-(E). As this Court has found, that broad language specifically allows EPA the "discretion to identify '*other* categories of solid waste incineration units.'" *Davis County*, 101 F.3d at 1405 (emphasis in original). Here, EPA reasonably interpreted that phrase to include sewage sludge incinerators – which are solid waste incinerators – as one of the "other categories" under Section 129.

NACWA disagrees, arguing that sewage sludge incinerators do not fall under "other categories" because sewage sludge comes from *within* the publicly owned treatment works ("POTW") rather than "'from commercial or industrial establishments or the general public' under § 129(g)(1)." NACWA Mot. at 9. This is a distinction without difference. Sewage sludge is "a solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a [POTW] . . . ." EPA-HQ-OAR-2009-0559-0028 at 1 (Exh. 1 relevant pages attached hereto). "Domestic sewage is generated by residences, businesses, etc. . . ." *Id.* Sewage sludge therefore originates from the general public and residential and commercial facilities. The POTW's treatment of that domestic waste to separate out from the waste stream the sewage sludge that will be combusted does not change the original source of the sewage sludge. 76 Fed. Reg. at 15,383.[3]

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[3] Under Clean Air Act Section 7429(g)(6), the term "solid waste" has the definition established by EPA under the Resource Conservation and Recovery Act ("RCRA"). NACWA argues that EPA "concluded that these [sewage] sludges are not solid waste" in a 1990 rulemaking. NACWA Mot. at 9 (citing 55 Fed. Reg. 46,354, 46364 (Nov. 2, 1990)). On March 21, 2011, however, EPA finalized a rule under RCRA, which included sewage sludge in the definition of non-hazardous solid waste. *See* 76 Fed. Reg. 15,456, 15,513 (Mar. 21, 2011). NACWA filed a petition for review of that RCRA solid waste definition in this court. Plus, the 1990 Federal Register notice to which NACWA refers addresses only hazardous waste, for which EPA has established a separate regulatory definition under RCRA. *See* 40 C.F.R. Pt. 261.

Finally, Section 129 explicitly excludes certain incinerators from the definition of solid waste incineration units, 42 U.S.C. § 7429(g)(1); *see Davis County,* 101 F.3d at 1398, and sewage sludge incinerators are not among those exclusions. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir. 2008), cert denied, 130 S. Ct. 1735 (2010) (citation omitted).

NACWA argues that EPA *must* regulate sewage sludge incinerators under Section 112, which requires EPA to establish emissions standards for sources of hazardous air pollutants. NACWA Mot. at 5-8. To support its view, NACWA isolates a single provision of Section 112 – subsection (e)(5) – which is contained in the section entitled "Schedule for standards and review." 42 U.S.C. § 7412(e). That provision, however, merely provides a deadline for EPA to establish emissions standards for hazardous air pollutants from POTWs. 42 U.S.C. § 7412(e)(5); *see* 76 Fed. Reg. at 15,383. Subsection (e)(5) does not require EPA to regulate sewage sludge incinerators under Section 112.

Reading Section 112 in conjunction with Section 129 dispels NACWA's argument. Read together, it is clear that Congress did not intend for Section 112 to trump regulation of solid waste incinerators under Section 129. Section 112 is a more general provision that applies to hazardous air pollutants from all listed

source categories, whereas Section 129 is more specific and applies to certain pollutants (some of which are not hazardous air pollutants) from a particular type of source – solid waste incineration units. *See NRDC*, 489 F.3d at 1256. "The principle that a specific statutory provision prevails over a more general provision is established beyond question." *F.T.C. v. Manager, Retail Credit Co., Miami Beach Branch Office*, 515 F.2d 988, 993 (D.C. Cir. 1975) (citations omitted). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . ." *Id.* at 994, n.10 (citations and internal quotation marks omitted). Here, EPA's interpretation is a reasonable one that gives meaning and effect to both Sections: Section 129 requires (and EPA has established) emissions standards for certain pollutants from sewage sludge incinerators at POTWs, whereas Section 112 requires emissions standards for hazardous air pollutants from other parts of the POTW that do not combust solid waste and, thus, are not solid waste incineration units.[4]

NACWA prefers to focus on the interplay between Section 112(e)(5) and the Clean Water Act, rather than the structural relationship in the Clean Air Act

[4] As noted below, EPA set POTW standards years ago under Section 112 and did not include sewage sludge incinerators.

between Sections 112 and 129. NACWA is correct that Section 112(e)(5) incorporates the Clean Water Act's definition of POTW or "treatment works." The relationship between Section 112(e)(5) and the Clean Water Act, however, has no bearing on which emissions standards – Section 112 or Section 129 – should apply to sewage sludge incinerators.[5] The salient point is that Section 112(e)(5) says nothing that requires regulation of emissions from solid waste incinerators, whereas Section 129 does.

To buttress its view that EPA must regulate sewage sludge incinerators under Section 112, NACWA resorts to prior EPA "regulatory pronouncements." NACWA Mot. at 6, 7. Such statements are irrelevant to whether the plain language of Section 129 allows EPA to regulate sewage sludge incinerators. Moreover, the regulatory statements on which NACWA relies *pre-date* this Court's opinion in *NRDC*.[6] Even if prior EPA pronouncements were relevant, however, NACWA dismisses EPA's 1999 emissions standards for POTWs under

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[5] EPA's regulation of sewage sludge incinerators under Section 129 does not undermine its regulation of the final use and disposal of sewage sludge under the Clean Water Act regulations at 40 C.F.R. Pt. 503. *See* 76 Fed. Reg. at 15,375. Importantly, Clean Water Action Section 405 specifically states that nothing is intended to waive more stringent requirements of the Clean Water Act or any other federal law. 33 U.S.C. § 1345.

[6] Additionally, NACWA's reliance on these notices is misplaced as EPA explained in the final rule. 76 Fed. Reg. at 15,383.

Section 112(d), which specifically *excluded* sewage sludge incinerators. *See* 64 Fed. Reg. 57,572 (Oct. 26, 1999). In fact, in the proposal for those standards, EPA stated that "[s]ewage sludge incineration will be regulated under section 129 of the CAA, and will be included in the source category Other Solid Waste Incinerators[.]" 63 Fed. Reg. 66,084, 66,087 (Dec. 1, 1998).

For these reasons, EPA's interpretation of Section 129 is reasonable.

B. EPA Reasonably Used A Statistical Methodology To Determine The MACT Floor for Existing Units Under Section 129.

NACWA's challenge to EPA's use of a statistical methodology to help determine the MACT floors for existing units also is subject to a *Chevron* analysis.[7] Section 129 provides that the MACT floor for existing units "shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category[.]" 42 U.S.C. § 7429(a)(2). There are 204 sewage sludge incinerators in operation, and out of those, 144 are multiple hearth units and 60 are fluidized bed units. *See* EPA-HQ-OAR-2009-0559-0157 at 3 (Exh. 2 attached hereto). Thus, 12 percent of each of those units (rounding up to the nearest whole integer) is 18 multiple hearth units and 8 fluidized bed units. *Id.* at 6. EPA was able to collect actual data for 20 multiple hearth units and 6

[7] NACWA does not challenge EPA's methodology for determining the MACT-floor for new units.

fluidized bed units, but not all of these units had data for every pollutant.[8] *Id.*

For those pollutants where EPA did not have enough data, EPA used all of the quality-assured data it did have to determine the MACT floor, and then verified this data using a statistical methodology to determine the minimum number of observations (or actual data) needed to reflect the performance of the best 12 percent of units. Here, the number of observations or data that EPA collected actually equaled or exceeded the minimum number of observations that were necessary according to this statistical methodology. EPA therefore was able to determine that the collected data mirrored the data of the best performing 12 percent of units in the source category. Thus, the MACT floor calculation from the collected data is consistent with what it would have been if EPA had collected actual data from the best performing 12 percent of units. Exh 2 at 6-10.

The issue at hand is whether EPA must, in all cases, use only actual data from the best performing 12 percent or units, or if EPA can use other approaches (such as the statistical methodology used here) in conjunction with actual data to determine the MACT floors. In *Sierra Club v. EPA*, 167 F.3d 658 (D.C. Cir. 1999), this Court answered that question and determined that the phrase "average

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[8] EPA collected actual data for mercury and particulate matter for 12 percent of the multiple hearth units and, thus, was able to base the MACT floor for those units and pollutants on that data.

emissions limitation achieved by the best performing 12 percent of units" "does not by its plain meaning exclude estimation, either by sampling or some other reliable means." *Id.* at 661-62. Under *Chevron*, the Court determined that Section 129 says "nothing about how the performance of the best units is to be calculated." *Id.* at 661. Also, "EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem" and the Court "generally defer[s] to an agency's decision to proceed on the basis of imperfect scientific information, rather than to invest the resources to conduct the perfect study." *Id.* at 662 (citation and internal quotation marks omitted). As long as EPA's approach for making the estimation bears a "rational relationship to the reality it purports to represent," EPA's methodology will be upheld. *Id.*

Here, EPA's statistical methodology is permissible because it allowed a "reasonable inference" based on actual data "as to the performance of the top 12 percent of units." *Sierra Club*, 167 F.3d at 663. EPA also explained "*why* its methodology yields the required estimate." *Cement Kiln Recycling Ass'n v. EPA*, 255 F.3d 855, 862 (D.C. Cir. 2001); *see* Exh. 2 at 6-10. As EPA explained, this statistical methodology assures that the data EPA collected adequately represent data from the best performing 12 percent of units in each subcategory. Exh. 2 at 9. The methodology also accounts for various factors to ensure that the minimum number of observations necessary to make that determination is not an arbitrary

number. The fact that EPA's collected data equaled or exceeded the minimum number of observations determined under the methodology assures that the MACT floor calculations are what they would have been if EPA had been able to collect a complete dataset from the best performing 12 percent of units.[9]

C. EPA Reasonably Accounted For Variability In Sewage Sludge Emissions.

This Court has recognized EPA's authority to account for variability in setting MACT floors, *Cement Kiln*, 255 F.3d at 863 (quoting *Sierra Club*, 167 F.3d at 665), which reflects the fact that even the performance of the best units will not always be the same. Here, EPA collected emissions data from nine different facilities in nine different states across the country. 76 Fed. Reg. at 15,391. The facilities represent residential and commercial populations as well as varying winter and early spring climates – the seasons during which the majority of the air

[9] Section 129's MACT floor provision for existing sources stands in contrast to the corresponding MACT floor provision in Section 112. Section 112 requires the MACT floor to reflect the average emissions limitation achieved by the best performing 12 percent of sources "for which the Administrator has emissions information." 42 U.S.C § 7412(d)(3)(A). Section 129 does not contain this qualifier. Because Congress envisioned that Section 129 standards would be based on the average of all sources in the top 12 percent of the source category, the ability to reasonably estimate the sources' emissions, rather than rely only on actual emissions testing data for each source, is appropriate to ensure that MACT floor standards are established in a timely manner, and do in fact reflect the emissions performance of the top 12 percent of sources.

emissions testing were conducted. *Id.* Taken together, these data – from a variety of facilities – adequately incorporate variability in air emissions from wastewater treatment systems across the country. *Id.*

NACWA wants EPA to account for variability in a different way – by looking at the variability of the sludge feed in addition to looking at the variability of the air emissions. NACWA Mot. at 12-14. EPA, however, already appropriately accounted for geographic variability by gathering emissions data from facilities that are spread across the country in different climates. 76 Fed. Reg. at 15,391. Additionally, EPA applied a statistical methodology (the Upper Predictive Limit) that analyzed variability of air emissions tests within a unit over time based on various factors to account for future variability. Exh. 2 at 10-14, 11-12. Thus, the MACT-floors reflect the potential variations in the air emissions that may result from variations in the sludge content.[10]

II. INDUSTRY PETITIONERS CANNOT DEMONSTRATE AN IMMINENT THREAT OF IRREPARABLE HARM

None of NACWA's alleged economic injuries is sufficient to warrant a stay.

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[10] NACWA does not dispute the reasonableness of EPA's use of the UPL to account for variability and, instead, argues that EPA should have used inadequate sampling data under the Clean Water Act and incomplete stack test data to account for variability. NACWA Mot. at 13-14. It is not for this Court, however, to substitute its judgment for that of the Agency concerning how to best account for variability. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43-44.

First, NACWA relies on a request by New York State asking POTWs either to certify, by June 30, 2011, that they will comply with the SSI Rule, or to shut down their sewage sludge incinerator by March 21, 2012. *See* NACWA Mot. at 15. NACWA also argues that the Commonwealth of Virginia is "planning to 'move quickly' to implement the SSI Rule." NACWA Mot. at 15, Ex. 3, ¶ 8. Both of these State actions or representations – which neither EPA nor the SSI Rule requires – come at least two and a half years *before* the Rule's compliance date for existing units.[11] Moreover, NACWA's purported harm from independent actions by States – not EPA – to require early compliance commitments or shutdowns, or to fast-track implementation of the SSI Rule, does not "directly result *from the action which the movant seeks to enjoin*," *i.e.*, the SSI Rule. *See Wis. Gas*, 758 F.2d at 674 (emphasis added).

Second, NACWA claims its members will suffer unrecoverable economic losses because the installation of new pollution control devices is time-consuming and costly. NACWA Mot. at 17-18. Allegations of mere economic injuries,

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[11] Under the SSI Rule, the compliance date for new sources is the earlier of 60 days after the unit reaches the feed rate at which it will operate or within 180 days after initial startup. 76 Fed. Reg. at 15,373. Existing sources must come into compliance either three years after EPA approves a state plan implementing the emissions guidelines, or five years after promulgation of the Rule, whichever is earlier.

"however substantial, in terms of money, time, and energy" simply are not enough to support granting a stay. *Wis. Gas*, 758 F.2d at 674. NACWA's expenditures for pollution control equipment represent the costs of compliance with government regulation, which "ordinarily is not irreparable harm." *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980). As the Third Circuit has explained, "[a]ny time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction," *i.e.*, an irreparable injury. *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527 (3rd Cir. 1976).

Compliance costs would be sufficient only if the "very existence" of the POTW itself is threatened, *see Wis. Gas*, 758 F.2d at 674, which none of NACWA's declarations alleges.[12] Moreover, out of the 204 operating sewage sludge incinerators, EPA estimates that 155 of them *currently* are meeting the emissions limitations in the SSI Rule. 76 Fed. Reg. at 15,386. The fact that approximately 75% of sewage sludge incinerators already meet the SSI Rule

[12] None of NACWA's declarants state that their POTWs actually will decide to shut down their sewage sludge incinerators or that doing so would threaten the existence of the entire facility as opposed to just the use of the sewage sludge incinerator within the facility.

standards belies NACWA's notion that compliance costs are so harmful as to warrant a stay, or that installation of pollution control measures is impracticable.

Third, NACWA claims that the SSI Rule will cause environmental harm because some facilities will be "forced" to switch to landfilling, and some may stop conducting environmentally beneficial projects such as incineration. *See* NACWA Mot. at 15-16.[13] As EPA explained, the method chosen to treat sewage sludge is a local choice – not a choice "forced" upon these facilities by EPA or the SSI Rule – which depends on "environmental protection concerns, community needs, geographic constraints, and economic conditions." 76 Fed. Reg. at 15,395.[14] Thus, a municipality's choice to pursue a potentially more costly landfilling option rather than the less costly incineration option is not a harm that directly results from the SSI Rule – it results from the municipality's choice.

Finally, NACWA argues that if POTWs install new control equipment to comply with the SSI Rule and the Court invalidates the SSI Rule, EPA will be able

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[13] NACWA also argues that there will be "environmental impacts" if municipalities are "forced" to switch to landfilling, such as increased methane emissions from the landfill and increased emissions from trucking the sewage sludge to the landfills. NACWA Mot. at 27. Although EPA disagrees with NACWA's increased greenhouse gas argument, such an impact, even if true, is not an irreparable harm *to NACWA*.

[14] Some municipalities may find landfilling to be a more cost-effective and environmentally-friendly alternative. 76 Fed. Reg. at 15,395.

to use the lower emissions from the new control equipment to set future MACT floors. NACWA Mot. at 17. This alleged harm, however, is too speculative, *i.e.*, *if* a unit installs pollution control equipment, *if* the Rule is vacated, and *if* EPA subsequently uses those new controls to set MACT floors, NACWA may be harmed. Such conjectural harm is insufficient. *See Nken*, 129 S. Ct. at 1761.

III. A STAY WOULD HARM THE ENVIRONMENT AND THIRD PARTIES AND BE CONTRARY TO THE PUBLIC INTEREST

We address the last two stay factors together because the harm to each is similar. As to the harm to third parties, the Court must consider whether "despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a serious adverse effect on other interested persons." *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). As for where the public interest lies, "[i]n litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial." *Id.* Here, the interests of NACWA "must give way to the realization of public purposes." *Id.*

The Clean Air Act "protect[s] and enhance[s] 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). To that end, the SSI Rule reduces the emission of nine air pollutants that are known or suspected of causing

cancer and other serious health effects. Specifically, EPA estimates that the Rule will reduce nationwide emissions from sewage sludge incinerators by:

- 19-30 tons per year of hydrogen chloride
- 430-700 tons per year of acid gases
- 58-70 tons per year of particulate matter, and
- 1.7 tons per year of lead

76 Fed. Reg. at 15,398; *see id.* 15,400 (charts summarizing monetized benefits); EPA-HQ-OAR-2009-0559-0159 (Exh. 3 attached hereto) (summarizing predicted health incidences for particulate matter); EPA-HQ-OAR-2009-0559-0042 at Section 5 (Exh. 4 relevant pages attached hereto). Also, EPA expects that the SSI Rule will result in annual health benefits that will decrease premature death, certain illnesses, incidences of emergency room visits, days when people miss work, and days when people must restrict their activities. Exh. 4 at Section 5. Finally, as compared to the compliance costs about which NACWA complains, EPA estimates the net benefits from the SSI Rule to be $26 million to $220 million, depending on the type of discount rate applied. *Id.* p. 1-2 and Section 5. A stay of this Rule will only further delay these important environmental and health benefits.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court deny the Emergency Joint Motion for Stay of the SSI Rule.

Respectfully Submitted,

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Dated: October 11, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 11, 2011, a true and correct copy of the foregoing EPA'S OPPOSITION TO EMERGENCY JOINT MOTION FOR STAY OF THE SEWAGE SLUDGE INCINERATION RULE, was served electronically through the ECF system on all registered counsel.

_/s/ Michele L. Walter _____
MICHELE L. WALTER