ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES *et al.*,	)	
Petitioners,	)	
v.	)	No. 11-1131 (and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	
Respondents	)	

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

INTRODUCTION

Intervenor-defendant Sierra Club submits this opposition to the joint "emergency motion" filed October 19, 2011 by the National Association of Clean Water Agencies ("NACWA") and Hatfield Township Municipal Authority ("Hatfield Township") (together, "Industry") asking the Court to stay the Environmental Protection Agency ("EPA" or "Agency") action entitled "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units," 76 Fed. Reg. 15372 (Mar. 21, 2011) (the "SSI Rule" or "Rule").

Each of the four factors the Court considers when reviewing stay motions weigh against staying this important public health measure that was due nearly seven years ago. Industry assert injuries that are necessarily speculative and indirect, far short of the certain, imminent, and irreparable injury that this Court requires to justify a stay. In addition, Industry's arguments that the Rule is more stringent than the Clean Air Act allows have little likelihood of success on the merits. Finally, the impacts that a stay would have on Sierra Club members and the public weigh strongly against granting a stay.

FACTUAL AND LEGAL BACKGROUND

According to EPA, 204 sewage sludge incinerators (SSIs) are currently operating in the United States. 76 Fed. Reg. at 15403. The sludge these units burn

includes toxic metals and other hazardous chemicals. And EPA has estimated that they emit, each year, nearly a ton of mercury, more than two tons of lead, and nearly a ton of cadmium. Doc. 0154,[1] Eastern Research Group, Inc. (ERG), "Revised Estimation of Baseline Emissions from Existing Sewage Sludge Incineration Units" (January 2011), 1. They also emit, each year, more than 28 tons of hydrogen chloride, more than 300 tons of particulate matter, more than 700 tons of sulfur dioxide, more than 2,300 tons of nitrogen oxides, and more than 8,500 tons of carbon monoxide. *Id.*

Section 129 of the Clean Air Act requires EPA to set performance standards for all new and existing "solid waste incineration units." 42 U.S.C. § 7429(a)(1). The term "solid waste incineration unit" encompass "*any facility* which combusts *any solid waste* material from commercial or industrial establishments or the general public…," subject to four exceptions not relevant here. *Id*. § 7429(g)(1). *See NRDC v. E.P.A*, 489 F.3d 1250, 1257 (D.C. Cir. 2007) ("[a]pplying the usual" "all-inclusive" meaning of the word "any") (citation omitted). EPA committed to finalize standards for SSIs under § 129(a)(1)(E) by November 30, 2005. *See Sierra Club v. Whitman*, No. 01-1537, Partial Consent Decree, (D.D.C.), (Ex. 1).

When EPA regulates these pollutants, standards must "reflect the maximum

[1] Document numbers in this brief correspond to the last four digits of EPA's docket number for this rulemaking. Thus, Doc. 0154 can be found in EPA's rulemaking docket at EPA-HQ-OAR-2009-0559-0154.

[2] Thus, the emission guidelines for fluidized bed and multiple hearth units both

degree of reduction in emissions … that the Administrator … determines is achievable" after taking into account costs and non-air quality health and environmental impacts. *Id*. § 7429(a)(2). Regardless of cost, the standards for new units must be at least as strict as "the emissions control that is achieved in practice by the best controlled similar unit…," and standards for existing units must be at least as strict as "the average emissions limitation achieved by the best performing 12 percent of units in the category." *Id*.

EPA issued the standards at issue in this case on March 21 of this year. The new source standards (referred to in § 129 as "new source performance standards") became effective six months after promulgation. 42 U.S.C. § 7429(f)(1). Existing source standards (referred to in § 129 as "emission guidelines"), though, have no effect on existing units until the completion of one of two additional steps. The first requires individual states to submit to EPA a plan that implements and enforces the standards. *Id*. § 7429(f)(2). States have a year from the date of promulgation to submit such plans. *Id*. § 7429(b)(2). EPA has 180 days to approve plans, and incinerators may have up to 3 additional years (4.5 years from the initial promulgation) to come into compliance with the plan's requirements. *Id*. Alternatively, if a state fails to submit an acceptable plan, EPA must develop its own plan, which may delay compliance for up to 5 years from the date of initial promulgation. *Id*. § 7429(b)(3).

In setting standards for existing SSIs, EPA first calculated the average emissions of the best-performing 12 percent of units in a given category (i.e. fluidized bed or multiple hearth) for each pollutant. EPA then adjusted that figure upward, often by a factor of three or more, allegedly to account for the variability of the data it had collected. It made further upward adjustments before finalizing the standards.[2] The resulting standards are so lenient that EPA estimates more than three quarters of all existing units already meet them. 76 Fed. Reg. at 15386. *Cf.* 42 U.S.C. § 7412(d)(3) (requiring standards to reflect emission levels achieved by best performing 12 percent of sources for which EPA has emissions information). Similar upward adjustments led to new source standards that allow three times more emissions than the top-performing unit emits. In some cases, the standards allow new units to emit more than the top 12 percent of existing units average.[3]

[2] Thus, the emission guidelines for fluidized bed and multiple hearth units both allow dioxin and dibenzofuran concentrations more than six times greater than the top 12 percent of existing units already achieve. Mercury emissions for the top 12 percent of existing fluidized bed incinerators averaged 0.01 milligrams per dry standard cubic meter. By comparison, the emission guidelines allow for emissions of 0.037 mg/dscm. Lead emissions from the top 12 percent of existing multiple hearth units averaged 0.082 mg/dscm, while the emission guideline allows concentrations of 0.30 mg/dscm. Doc. 0157, ERG, "Revised MACT Floor Analysis for the Sewage Sludge Incinerator Source Category" (Jan. 2011), 19.

[3] The top 12 percent of existing fluidized bed incinerators emit an average of 0.00049 mg/dscm of cadmium. The new source performance standards for fluidized bed units allow for cadmium emissions of 0.0011 mg/dscm, more than twice as much. *Id*. at 19.

STANDARD FOR GRANTING A STAY

A stay is an "extraordinary remedy," *Cuomo v. U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985), amounting to "an 'intrusion into the ordinary processes of administration and judicial review.'" *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). In considering whether to grant a stay, a court will examine four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 129 S. Ct. at 1761 (citation and internal quotations omitted).

Movants who fail to demonstrate irreparable harm will be denied a stay even if all three other factors weigh heavily in their favor. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). A showing of irreparable harm must be "both certain and great; it must be actual and not theoretical." *Wis. Gas Co.*, 758 F.2d at 674. The claimed injury must be "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (citation and internal quotations omitted). "Speculative" injuries are insufficient to establish irreparable harm, as are injuries that do not "directly result from the action which

the movant seeks to enjoin." *Id*. Likewise, "self-imposed costs are not properly the subject of inquiry on a motion for stay." *Cuomo*, 772 F.2d at 977*; see also Va. Petroleum Jobbers Ass'n*, 259 F.2d at 927 (holding that "hypothetical, self-inflicted losses" do not justify a stay). Movants must substantiate any claim that irreparable injury is likely to occur with "proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Id*. at 674; *see also Winter v. NRDC*, 129 S. Ct. 365, 375 (2008). "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Wis. Gas Co.*, 758 F.2d at 674.

However, a stay "is not a matter of right, even if irreparable injury might otherwise result" to the proponent. *Nken*, 129 S. Ct. at 1757. The likelihood of success factor requires movants to make a "strong" showing." *Nken*, 129 S. Ct. at 1761 (citation omitted). A "mere 'possibility' of relief" is insufficient to justify a stay regardless of Movants' showings with respect to the remaining factors. *Id*. (citation omitted). And even where movants meet the likelihood of success prong and show some irreparable injury, a stay must nonetheless be denied where movants have "failed to demonstrate that the balance of equities or the public interest strongly favors the granting of a stay." *Cuomo*, 772 F.2d at 978. For example, irreparable harm does not warrant a stay where "its prevention will visit similar harm on other interested parties." *Ambach v. Bell*, 686 F.2d 974, 979 (D.C.

Cir. 1982). In litigation involving "the administration of regulatory statutes designed to promote the public interest, [the public interest factor] necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes." *Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925. Applying the public interest prong requires respecting the choices of "Congress, the elected representatives of the entire nation," as "decreed" by statute, *Cuomo*, 772 F.2d at 978, as well as "the decision of the [Administrator] as reflecting the best interests of the public in h[er] expert judgment," *Ambach*, 686 F.2d at 987. Movants must make strong, independent showings on all four of the factors—especially with respect to the first two factors—to justify issuance of a stay. See *Nken*, 129 S. Ct. at 1761; see also *Davis v. PBGC*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

ARGUMENT

I. INCINERATOR OPERATORS HAVE NOT DEMONSTRATED THAT ANY IRREPARABLE HARM WILL OCCUR.

A. Industry's Arguments About Harm To the Environment Are Speculative and Irrelevant To Their Request For a Stay.

Industry claim that: (1) some incinerator operators may choose to permanently shut down their incinerators rather than comply with the challenged standards, even before the present case is resolved, and (2) shutdowns could harm the environment because (a) sewage sludge currently being incinerated could be

landfilled, and (b) (in Industry's view) landfilling sewage sludge is worse for the environment than burning it without the required controls. Pet'r's Emergency Joint Mot. For Stay of the SSI Rule, 14-17 ("Pet'r's Mot."). Industry does not and cannot substantiate even one link in this chain of speculation, nor show that a stay would address these complaints. Furthermore, if these allegations were true, such harm would not constitute irreparable injury to Industry, but would be relevant only in assessing the public interest.

Although Industry seeks to rely on declarations from individual operators to argue that some may shut down their incinerators, Pet'r's Mot. 15, it does not identify a single one that will shut down, let alone do so while the present case is pending. The declarations provided merely claim some incinerators "potentially cannot comply" (Pet'r's Mot. Ex. 3, ¶ 8), or they express "uncertainty" as to whether some can. (Pet'r's Mot. Ex. 5, ¶ 7). Further, even assuming that the challenged rules might eventually cause some incinerators to shut down, Industry fails to demonstrate that any shutdowns will occur before the present case is decided—i.e. in the absence of a stay. The Clean Air Act does not require any existing incinerator to comply with the Rule before September 21, 2015 at the earliest. *See* 42 U.S.C. § 7429(f)(2). Even if the present case is not decided until September 2012, all incinerator operators will still have three years, if not longer,

before the statute requires they comply with the standards.[4]

Industry also argues that some States are forcing operators "to make immediate commitments either to take the uncertain path of retrofitting their SSIs or to abandon incineration and start the conversion to landfilling." Pet'r's Mot. 15. The State letters it cites, however, merely request that operators share their present intention with the state agency. Operators do not have to act on that intention. Indeed, they don't even have to state that intention: the letters advise operators to indicate whether they need additional time to respond.[5] Pet'r's Mot. Ex. 2, at 4. Industry provides nothing but speculation that some operators may choose to shut down before a decision is reached in this case. In any case, neither the letter nor the operator's decision would directly result from the absence of a stay. *See Wisc. Gas*, 758 F.2d at 674.

Industry also suggests that some SSIs may switch to landfilling. It does not identify a single SSI that will do so, however, let alone any that will be forced to as a result of the absence of a stay. For instance, although Industry seeks to rely on a

[4] EPA notes in the preamble that it "anticipates that states may choose to provide the 3-year compliance period allowed by CAA section 129(f)(2)." 76 Fed. Reg. at 15379. Industry does not identify a single instance when a State has provided less than the full statutory compliance time, far less demonstrate that any State is certain to do so here.

[5] The similar allegation that the State of Virginia says it plans to "move quickly" to implement the Rule, see Pet'r's Mot. Ex. 3, ¶ 8, would also fail to support a finding of irreparable harm even if it were not vague hearsay.

declaration from the Northeast Ohio Regional Sewer District, Pet'r's Mot. 16, that entity does not allege that it will switch to landfilling, but merely speculates about the harms it imagines would occur "if" it were to switch. Pet'r's Mot. Ex. 4, ¶ 12. In any event, Industry fails to show that the environmental impacts of landfilling are worse than those from incineration without the required controls. Industry focuses on potential increases in greenhouse gas emissions resulting from landfilling, but entirely ignores reductions in mercury and other hazardous air pollutants from shutting down incinerators. This is especially important because those reductions are precisely the concern of the statute and the subject of the Rule. They are also more localized—and thus more likely to impact the communities who use incinerators—than greenhouse gases. In addition, Industry exaggerates the increase in greenhouse gas emissions from landfilling by crediting incinerators for *potential* energy recovery projects while ignoring the possibility of similar projects at landfills.[6]

Industry's final complaint of environmental harm is that the absence of a stay is "chilling beneficial projects" like potential retrofits and energy recovery. But these projects are speculative to begin with, as movants have not identified any

[6] Record evidence also suggests that other environmental impacts (e.g. water consumption and dust) would decrease if some units were to switch to landfilling. Doc. 0007, ERG, "Secondary Impacts of Control Options for the Sewage Sludge Incineration Source Category" (June 2010), 3.

that certainly *would* occur but for the absence of a stay. See, e.g., Pet'r's Mot. Ex. 5, ¶ 5("[T]he City of Cedar Rapids *may* be forced to *postpone* or eliminate otherwise beneficial upgrades…") (emphasis added). Regardless, dampened enthusiasm for such projects is hardly the "certain and great" harm necessary for a stay.

B. The Impact That Denying a Stay Will Have On Potential Future MACT Standards Is Speculative At Best.

Industry also speculates that it will suffer harm in the absence of a stay as a result of the following hypothetical chain of events: (1) though the statute does not require compliance with the Rule for four years, some SSIs will reduce their emissions by installing control equipment even before this case is resolved, (2) despite the Rule's laxity, those SSIs will reduce their emissions enough to be among the lowest-emitting 12 percent of facilities when EPA next sets (or resets) MACT standards for existing units, and (3) EPA will rely on data from those SSIs in setting future MACT standards stringent enough to require other SSIs to install more expensive control technologies. Pet'r's Mot. 17-18.

The speculative nature of this claimed harm is apparent at every step. It begins by again ignoring the extended time period for compliance with the Rule. Although Industry claims that some SSIs will "inevitably … install new control equipment," it fails to identify a single one that will do so while this case is

pending, or explain why that is even likely to happen. *Id.* at 17

Even if some SSIs do take steps to comply with the Rule this far in advance, it is speculative to assume that they will reduce their emissions so much as to place among the cleanest 12 percent of SSIs at some indefinite point in the future. If the Rule is ultimately upheld, other SSIs will likely install additional controls and reduce their emissions. If it is not, it is still possible that SSIs will voluntarily shut down or otherwise reduce their emissions,[7] thus raising the standard for what it takes to be among the 12 percent of best-performing units. Even being among the top 12 percent may not be enough to affect a future standard, as the Agency can always set future MACT standards tighter than the statutory floor. In any event, the challenged standards—so lax that more than 75 percent of existing SSIs already meet them—do not guarantee that a plant that meets them will be in the top 12 percent of performers in a future rulemaking. And should it somehow come to pass that these newly compliant SSIs factor into a future standard-setting process, it is still speculative to assume that the resulting standards will necessarily constitute an injury to Industry.

[7] SSIs could accomplish this either by installing controls or changing the composition of the sludge they burn, see, e.g., Doc. 0085, Comment by City of Palo Alto, Nov. 29, 2010, p. 82-86 (describing efforts to reduce mercury from dental amalgam before it enters sewer system).

C. The Absence Of A Stay Will Not Result In Increased Compliance Costs.

Industry's claim that "many municipalities have already been forced to incur irretrievable costs" due to the absence of a stay has similar weaknesses and overstates the declarations Movants provide in support. The Northeast Ohio Regional Sewer District, for example, does not declare that the Rule—let alone the absence of a stay—is responsible for actual or imminent cost increases, but only that it "could" be. Pet'r's Mot. Ex. 4, ¶ 15. While the district claims it may face "an enormous economic loss," that is only "[if] NEORSD is forced to abandon incineration." Id. *See also Id*. at ¶ 10 ("*Were* the above-described capital improvements made….") (emphasis added), ¶ 12 ("If NEORSD were to shut down its incinerator and utilize another method…"). As noted above, Industry does not claim, far less demonstrate, that any unit will be forced to shut down.

Industry also complains that the aforementioned letter from the New York State Department of Environmental Conservation is forcing the district to increase debt service "for capital improvements, engineering and other compliance burdens." Pet'r's Mot. Ex. 6, ¶ 9. As described above, the letter in question does not force SSIs to do anything, but merely requests a response. In any event, New York's decision to send such a letter was not a result of the SSI Rule, which does not require state plans to be submitted until next March.

Other alleged costs are irrelevant to a stay, as they are also self-imposed and

will not be incurred before challenges to this petition are resolved. *See*, *e.g.*, Pet'r's Mot. Ex. 3, ¶¶ 7 ("Should HRSD continue to operate our MHIs, we estimate that it will cost.…"), 9 (referring to "cost estimates that HRSD has prepared should it choose to abandon incineration") (Ex. 3); *See also* Pet'r's Mot. Ex. 5, ¶¶ 5–6.

II. INDUSTRY IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

A. SSIs Must Be Regulated Under § 129, Because They Are Solid Waste Incineration Units and Not POTWs.

Industry argues that standards for solid waste incineration units required by § 129 cannot apply to SSIs, because SSIs are part of publicly owned treatment works (POTWs), which are sources of hazardous air pollutants that must be regulated under § 112. Specifically, Industry claims that because § 112(e)(5) sets a deadline for EPA to issue standards for POTWs as defined by the Clean Water Act, and because that definition can be read to include SSIs, SSIs must be regulated under § 112(d). Pet. Mot. 5. But § 112(e)(5) is a scheduling provision, not a hidden exemption for SSIs from § 129's incinerator requirements. And Clean Water Act's definition of POTW does not cover SSIs.

Section 129(a)(1) requires EPA to set performance standards for "each category" of new and existing "solid waste incineration units." 42 U.S.C. § 7429(a)(1). As described *infra*, SSIs are covered by the statutory definition of "solid waste incineration unit" because they combust "solid waste material from

commercial or industrial establishments or the general public." *Id*. § 7429(g)(1).

The structure of § 112 demonstrates that § 112(e)(5) does not exempt SSIs from § 129. Section 112 is organized by function. Subsection (a) provides definitions. Subsection (b) lists the pollutants to be covered. Subsection (c) establishes source categories to be regulated. Subsection (d) describes minimum requirements for standards EPA must set. Finally, subsection 112(e)—captioned "Schedule for standards and review"—sets deadlines for these standards.[8] Section 112(d)(1) reinforces the importance of this structure, directing EPA to look to paragraph (c) to determine which source categories to regulate and to paragraph (e) only for the deadlines by which to do so. *Id*. § 7412(d)(1).

If Congress had wanted to ensure that SSIs were regulated as POTWs and not as solid waste incinerators, it would have done so explicitly rather than by hinting obliquely at the issue in a scheduling provision. *See Whitman v. Am. Trucking Ass'ns*, 121 S.Ct. 903, 910 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); *See also*

[8] Section 112(e)(5) reads in full:

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

42 U.S.C. § 7412(e)(5).

Roeder v. Islamic Republic, 646 F.3d 56, 61 (D.C. Cir. 2011) ("If Congress had meant to embrace more than just pending cases, it might have … placed § 1083(c)(3) outside of a section entitled 'Application to Pending Cases.'"). That is especially true in § 112 of the Clean Air Act, which Congress drafted precisely and prescriptively to eliminate agency discretion. *New Jersey v. EPA*, 517 F.3d 574, 578-79 (D.C. Cir. 2008).

The few mentions of 112(e) in the legislative history likewise indicate that it is simply a scheduling provision. The Senate Committee on Environment and Public Works described § 112(e) as containing "exceptions to the general rules for scheduling standard-setting." S. Rep. No. 101-228, p. 174 (December 20, 1989), 1990 U.S.C.C.A.N. 3385, 3559 and made clear that the purpose of § 112(e)(5) is to give EPA additional time to set POTW standards, not to define a source category or limit the reach of § 129. *Id*. at 175, 198 ("[B]ecause the emissions and control technologies for POTWs are not well-characterized presently, [the provision][9] delays the promulgation of any MACT emission standard applicable to POTWs to the date five years after enactment of the legislation.").

Even if § 112(e)(5) were relevant to the scope of 129, the Clean Water Act definition of "treatment works" does not do what Industry claim it does.

[9] The report's reference to "paragraph (6) of section 112(e)" appears to be a typo. The bill under consideration, like that ultimately enacted, contained only five paragraphs in that section.

Specifically, the definition does not include "any works … used for ultimate disposal of residues resulting from such treatment." *But see* Pet. Mot. 5. Rather, it includes

> any works, including site acquisition of ***the land that*** will be an integral part of the treatment process (including land used 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. § 1290(a)(2) (emphasis added).

After reinserting the section Industry elided, it is apparent the phrase "used for ultimate disposal of residues resulting from such treatment" modifies "land," rather than "works." *See Sacramento Regional County Sanitation Dist. v. Reilly*, 905 F.2d 1262, 1268 (9th Cir. 1990) ("[T]he statute, properly construed, only permits 'site acquisition of land that will be an integral part of the treatment process ... or is used for ultimate disposal of residues resulting from such treatment.'") (quoting 33 U.S.C. § 1292(2)(A)). The term "works" is included as part of a list defined as "any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature…." SSIs, of course, are not land. And the sludge they incinerate is neither "sewage" nor "industrial wastes of a liquid nature." Accordingly, neither this definition, nor the scheduling provision that incorporates it, can exempt SSIs from § 129's incinerator requirements.

B. SSIs Are "Solid Waste Incineration Units" Because They Receive Waste From The General Public Or Commercial And Industrial Establishments.

Industry also argues that SSIs are not "solid waste incineration units" as defined in § 129, because they receive waste from POTWs rather than "from the general public or commercial or industrial establishments."

Section 129(g)(1) defines "solid waste incineration unit" as a "distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public" subject to four exceptions not relevant here. Id § 7429(g)(1). The statute's use of the word "any" is "all inclusive," and the definition "unambiguously include[s] … any facility that combusts any commercial or industrial solid waste material at all-subject to the four statutory exceptions…." *NRDC,* 489 F.3d at 1257-58.

Though sewage plainly fits the definition of "solid waste material from commercial or industrial establishments or the general public," Industry argues that § 129 ceases to apply once that waste is treated in a POTW. Pet. Mot. 9. But the statute nowhere distinguishes between waste that is delivered to an incinerator directly from the public and waste that is delivered from the public through an intermediary. And the *NRDC v. E.P.A.* decision prohibits the creation of any additional exceptions to the definition of incinerator. *NRDC*, 489 F.3d at 1257-58.

Moreover, the term "solid waste incineration units" appears in the

description of each category for which § 129(a)(1) requires standards. These categories include "solid waste incineration units combusting hospital waste, medical waste and infectious waste." 7429(a)(1)(C). Many hospital and medical waste incinerators burn waste that comes from publicly owned facilities. Industry's argument requires the absurd assumption that Congress expressly required standards for this category of incinerators while failing to mention that many or most such incinerators would not be covered.

In any case, SSIs would qualify as solid waste incineration units because POTWs are "commercial or industrial establishments." 42 U.S.C. § 7429(g)(1). They are "commercial establishments" because they charge money to receive and treat waste and are engaged in commerce. And they are not only large "industrial" plants, but are also widely referred to as an "industry" in Congress and by the very trade associations that represent POTWs. For example, a Senate Report on proposed legislation known as the Wastewater Treatment Security Act of 2003, refers to the "wastewater industries." S. Rep. 149, 108th Cong., 1st Sess. (2003). In testimony to the House Subcommittee on Water Resources and the Environment, the Association of Metropolitan Sewerage Agencies (AMSA) stated, "[t]he events of the past month have revealed how little *our industry* knows about the unique risks posed by terrorist threats…." "Testimony of the Association of Metropolitan

Sewerage Agencies," (October 10, 2001), 1 (Ex. 2) (emphasis added).[10]

III. A STAY WOULD HARM OTHER PARTIES AND THE PUBLIC INTEREST

A stay is manifestly contrary to the public interest and would harm other parties for the reasons stated by EPA in its opposition to Industry's motion. It bears emphasis that this Rule was due nearly seven years ago, and the additional delay urged by Industry would prolong and increase the harm this existing delay already has caused.

CONCLUSION

For these reasons, Intervenor-defendant respectfully requests that the Court deny Incinerators' Operators motion for a stay of the SSI Rule.

DATED: October 11, 2011

Respectfully submitted,

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[10] Contrary to Incinerator Operators' claim, Pet Mot. 8, EPA did justify its decision that it had authority to regulate SSIs under Section 129, pointing to Section 129(g) and *NRDC v. EPA*, and explaining why its prior statements do not control. 76 Fed. Reg. at 15382.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2011 I have served the foregoing **Sierra Club's Opposition To Emergency Joint Motion For Stay Of The Sewage Sludge Incineration Rule** on all registered counsel through the Court's electronic filing system (ECF).

/s/ James S. Pew
James S. Pew