ORAL ARGUMENT NOT YET SCHEDULED

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

No. 11-1131 (and consolidated cases)

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*
Respondents.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

PROOF BRIEF FOR RESPONDENT-INTERVENOR SIERRA CLUB

James S. Pew
Jonathan A. Wiener
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington, DC 20036
(202) 667-4500
jpew@earthjustice.org
jwiener@earthjustice.org

Counsel for Sierra Club

Dated: November 5, 2012

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

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LISA P. JACKSON, Administrator, United States Environmental Protection Agency, *Respondents.*	)	No. 11-1131 (and consolidated cases)

INTERVENOR SIERRA CLUB'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rules 27(a)(4) and 28(a)(1), intervenor Sierra Club hereby certifies as follows:

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioners:

Petitioner in cases nos. 11-1131 and 12-1236 is National Association of Clean Water Agencies.

Petitioner in case no. 11-1167 is Hatfield Township Municipal Authority.

Petitioner in cases nos. 11-1185 and 12-1237 is Sierra Club.

Respondents:

The respondents are the United States Environmental Protection Agency and Lisa P. Jackson, Administrator (collectively, "EPA").

Intervenors:

On the side of respondents in case no. 11-1131 is Sierra Club.

On the side of petitioners in cases nos. 11-1131 and 11-1167 is MaxWest Environmental Systems, Inc.

On the side of respondents in case no. 11-1185 are National Association of Clean Water Agencies and Hatfield Township Municipal Authority.

(iii) *Amici* in This Case

As yet, there are no *amici curiae*.

(iv) Circuit Rule 26.1 Disclosures for Petitioners

See the attached Rule 26.1 Disclosure Statement.

(B) Rulings Under Review

Petitioners seek review of the final actions taken by EPA at 76 Fed. Reg. 15,372 (March 21, 2011), entitled "Standards of Performance for New Stationary

Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units; Final Rule," and 77 Fed. Reg. 25,087 (April 27, 2012) and titled "Denial of Reconsideration Petitions on Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units."

(C) Related Cases

This case has not previously been before this Court or any other court. Sierra Club is unaware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

DATED: November 5, 2012.

Respectfully submitted,

/s/James S. Pew
James S. Pew
Jonathan A. Wiener
Earthjustice
1625 Massachusetts Ave., NW, Suite 702
Washington, DC 20036
(202) 667-4500
jpew@earthjustice.org
jwiener@earthjustice.org

Counsel for Intervenor Sierra Club

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, intervenor Sierra Club makes the following disclosures:

The following are parent companies, subsidiaries, or affiliates of Sierra Club that have issued shares or debt securities to the public: None.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

DATED: November 5, 2012

Respectfully submitted,

/s/ James S. Pew
James S. Pew
Jonathan A. Wiener
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington, DC 20036
(202) 667-4500
jpew@earthjustice.org
jwiener@earthjustice.org

Counsel for Intervenor Sierra Club

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

* Authorities upon which we chiefly rely are marked with an asterisk.

STATUTES

LEGISLATIVE AUTHORITIES

FEDERAL REGISTER

OTHER AUTHORITIES

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

1990 CAAA Leg. Hist.	A Legislative History of the Clean Air Act Amendments of 1990
Baseline Emissions Memo	EPA-HQ-OAR-2009-0559-0154
EPA or the agency	U.S. Environmental Protection Agency
EPA Br.	Brief of Respondent U.S. Environmental Protection Agency
MACT Floors	Statutory minimum stringencies
NACWA	Petitioners the National Association of Clean Water Agencies and Hatfield Township Municipal Authority
NACWA Br.	Brief of Petitioners the National Association of Clean Water Agencies and Hatfield Township Municipal Authority
POTW	Publicly Owned Treatment Works

ISSUES PRESENTED

(1) Can EPA regulate sewage sludge incinerators under the provisions of Section 129 of the Clean Air Act, which governs incinerators, or must it regulate them under Section 112(e)(5), which governs publicly owned treatment works (POTWs)?

(2) If the Court finds that the Environmental Protection Agency "EPA" EPA failed to properly set standards for sewage sludge incinerators under Section 129, should it vacate them even though they are needed and long overdue and EPA could justify similarly protective standards on remand?

STATEMENT OF FACTS

Relevant facts are provided in Sierra Club's opening brief.

SUMMARY OF THE ARGUMENT

Authority under Section 129. The text, structure, and history of Clean Air Act Section 129 confirm that sewage sludge incinerators are "solid waste incineration units" within the meaning of Section 129(g)(1). At a minimum, EPA's interpretation of Section 129(g)(1) as encompassing sewage sludge incinerators is reasonable.

Contrary to NACWA's claim, sewage sludge incinerators are not sewage treatment works within the meaning of Clean Water Act Section 1292(2).

Accordingly, Clean Air Act Section 112(e)(5) neither requires nor authorizes EPA to regulate them as POTWs.

Remedy. If the Court finds EPA did not properly calculate standards under Section 129, the Court should remand the standards without vacating them. Vacatur is inappropriate given the standard's public health benefits and the agency's ability to justify the same standards on remand.

STANDARD OF REVIEW

For purposes of this brief, Sierra Club adopts the standard of review described by EPA. EPA Br. 12-14.

ARGUMENT

I. EPA PROPERLY REGULATED SEWAGE SLUDGE INCINERATORS UNDER SECTION 129

A. Section 129 Requires EPA to Regulate Sewage Sludge Incinerators

1. Sewage Sludge Incinerators Burn Waste from the General Public

NACWA claims that sewage sludge incinerators are not incinerators because the waste they burn does not come "from commercial or industrial establishments or the general public." NACWA argues: (1) the word "from" can only mean "proximately from;" and (2) the "proximate" source of sewage sludge is a POTW, and not commercial or industrial establishments or the general public. NACWA Br. 21-22.

Section 129(g)(1) defines incinerators as facilities that combust waste "from

commercial or industrial establishments or the general public," not "proximately" or "directly" from these sources. The ordinary meaning of "from" is far broader than "proximately from;" it encompasses the concept of "starting from" or "originating from." Black's Law Dictionary, for example, defines "from" as "impl[ying] a starting point … having a starting point of motion, noting the point of departure, *origin*, withdrawal, etc." Black's Law Dictionary 668 (6th ed. 1990) (emphasis added). Because the term "from" is not defined in the statute, it must be given this ordinary meaning. *Ass'n of Private Sector Colls. and Univs. v. Duncan*, 681 F.3d 427, 443, 446-47 (D.C. Cir. 2012).

The alternative meaning that NACWA seeks to impose reads into the text of Section 129(g)(1) a limiting word that Congress did not put there. But unwritten limiting words should not be read into statutes unless absolutely necessary. *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) ("[R]eading the word 'attorney' … to refer to 'debtors' attorneys' … would have us read an absent word into the statute. … With a plain, nonabsurd meaning in view, we need not proceed in this way."); *see also Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 816-17 (D.C. Cir. 2008) ("The principal problem with RMA's reading is that the italicized words do not appear in the statute.").

Where Congress wished to limit the scope of Section 129's coverage, it did so explicitly, precisely describing and excluding four types of incinerators. 42

U.S.C. § 7429(g)(1) (excluding, *e.g.*, "small qualifying power production facilities as defined in section 796(17)(C) of Title 16"). In light of these express exclusions, the D.C. Circuit has interpreted the definition of "solid waste incineration unit" broadly, noting that "when the Congress wanted to exempt a particular kind of solid waste combustor from Section 129's coverage—based on the desirability of resource recovery or any other interest—it knew how to accomplish this through an express statutory exception and in fact did so." *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1257-58 (D.C. Cir. 2007) (NRDC). Though NACWA does not acknowledge the *NRDC* court's decision, the reasoning behind that decision applies with equal force to this case. Had Congress desired to limit the scope of Section 129's coverage to facilities receiving waste directly from the public, it would have done so explicitly. *See id.*; *see also Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (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.").

The history of the phrase also refutes NACWA's effort to read "from commercial or industrial establishments or the general public" as a hidden restriction on what qualifies as an incinerator. Earlier versions of the bill's incinerator provisions directed EPA to set standards just for municipal waste incinerators. The term "municipal waste incineration unit" had a definition similar

to what later became Section 129(g)(1). S. 1894, as reported in S. Rep. No. 100-231, 1990 U.S. Senate, A Legislative History of the Clean Air Act Amendments of 1990 (S. Print 103-38) (Nov. 1993) ("1990 CAAA Leg. Hist."), p. 9378 (covering any facilities burning "any solid waste material collected from commercial or industrial establishments or the general public (including single and multiple residences, hotels and motels."). Some drafters of Section 129 expressed concern that this definition was so broad it would encompass not just the large municipal garbage incinerators it targeted but also small municipal incinerators, hospital incinerators, and other types of incinerators, none of which could meet the same standards. 1990 CAAA Leg. Hist. 7049. Rather than narrowing the definition of incinerator to address this concern, however, Congress made Section 129 apply to all solid waste incineration units, 42 U.S.C. § 7429(g)(1), and required EPA to set separate standards for the different incinerator types, *id.* § 7429(a)(1). Congress's decision to use a sweepingly broad definition of incinerator but require different standards for different types must be respected, especially in light of its simultaneous decision to exclude only four carefully described incinerator types from the Section 129(g)(1) definition.

Although NACWA admits that the word "from" does not necessarily mean "proximately from," it argues that without the word "proximately" inserted, the phrase "from commercial or industrial establishments or the general public"

becomes redundant because all waste comes "from" commercial or industrial establishments or the general public in the ordinary sense of the word. NACWA Br. 21.

NACWA has not shown that the phrase "from commercial or industrial establishments or the general public" is redundant without its desired insertion. The phrase could, for example, exclude the burning of waste in private homes—*e.g.*, burning private yard waste in a barrel—that arguably would be covered if Section 129(g)(1) defined incinerator only as any facility that burns any waste and did not also require the waste come from commercial or industrial facilities or the general public.

Even if the phrase were redundant, however, it would not justify reading the word "proximately" into the statute. The Supreme Court and this Court have made clear that redundancy in a statute can "reflect[] the broad purpose" of a statute, *Babbitt v. Sweet Home Chapter of Comtys. for a Greater Or.*, 515 U.S. 687, 698 n.11 (1995), "avoid underinclusiveness," *Schindler Elevator Corp. v. U.S.*, 131 S.Ct. 1885, 1891 (2011), or make a "statute crystal clear rather than just clear," *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 734 (D.C. Cir. 2005).

Like the provisions construed in these cases, Section 129(g)(1) is deliberately sweeping and "all-inclusive." *NRDC*, 489 F.3d at 1257. Section 129(g)(1) emphasizes Congress's intent to define "solid waste incineration unit"

broadly by using expansive words and phrases, such as the repeated use of the word "any." 42 U.S.C. § 7429(g)(1); s*ee also NRDC*, 489 F.3d at 1257. Likewise, breadth is the only conceivable meaning of Section 129(g)'s identification of "the general public" as "including single and multiple residences, hotels and motels." 42 U.S.C. § 7429(g)(1). Residences are obviously part of the general public, and the definition already covers hotels and motels, because they are "commercial … establishments." *Id*. And where Congress wished to exclude facilities from the definition of incinerator, it did so expressly and narrowly. *Id.*; *see also Whitman*, 531 U.S. at 468.

The text, structure, and history of Section 129 as well as this Court's precedent make plain that Congress intended the phrase "from commercial or industrial establishments or the general public" to have the meaning EPA has given it. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). At a minimum, EPA's reading is reasonable under *Chevron* step two. *Id*. at 843.

2. Sewage Sludge Also Comes from Commercial or Industrial Establishments.

Even if "from" did necessarily mean "proximately from," Section 129 would still cover sewage sludge incinerators because they burn waste from POTWs and POTWs are "commercial or industrial establishments." 42 U.S.C. § 7429(g)(1).

POTWs are "commercial or industrial establishments." They engage in commerce by charging money to receive and treat sewage, and are widely referred

to as an "industry" in Congress and by the very trade associations that represent them. For example, a Senate Report on proposed legislation known as the Wastewater Treatment Security Act of 2003, refers to the "wastewater industries." S. Rep. No. 108-149, at 11 (2003). In testimony to the House Subcommittee on Water Resources and the Environment, the Association of Metropolitan Sewerage Agencies (which would later change its name to the National Association of Clean Water Agencies) 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 (emphasis added) (Ex. 2 to Sierra Club's Opp. to Emergency Joint Mot. for Stay, Document #1334719). Senator Durenberger, a principal author of the 1990 Amendments, also considered POTWs to be "commercial or industrial establishments." See 1990 CAAA Leg. Hist. 4995 (dividing sources regulated by the bill into "commercial facilities," "industrial point sources" and "motor vehicles"), 5000 ("[S]ources of air toxics, like … wastewater treatment plants, will be grouped into *industrial* categories.") (emphasis added).

NACWA's opening brief fails to address whether POTWs are "commercial or industrial establishments," and, if they are not, what they might be instead. *See* NACWA Br. 21 (quoting statute as requiring regulation of facilities that burn waste "from … the general public."). To the extent NACWA believes that

municipal ownership somehow qualifies POTWs as something other than "commercial or industrial establishments or the general public," NACWA has failed to say what that category of sources would be.

In any case, the mere fact of municipal ownership does not pull a source outside the scope of Section 129(g)(1). Otherwise, Section 129 would not require standards for incinerators that burn waste from municipal waste treatment centers and hospitals, many of which are municipally owned. 42 U.S.C. § 7429(a)(1)(B-C). If the waste these facilities burn were not from "commercial or industrial establishments," then Section 129 again would absurdly require standards for incinerators that are by definition not incinerators. "That would be a very strange result and one that Congress could not possibly have intended." *The Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 888 (D.C. Cir. 1999).

B. Neither the Clean Water Act Definition of "Treatment Works" nor Clean Air Act Section 112(e)(5) Applies to Sewage Sludge Incinerators.

1. The Plain Text of the Clean Water Act's Definition of "Treatment Works" Excludes Sewage Sludge Incinerators.

In an attempt to support its reading of Section 129, NACWA argues that sewage sludge incinerators fall within the Clean Water Act's definition of "treatment works." NACWA Br. 22. As a result of their alleged coverage under that definition, NACWA claims sewage sludge incinerators are covered by Section 112(e)(5) of the Clean Air Act, which references that definition in setting a

deadline for EPA to set standards for POTWs. Id. 25-26. And, because Section 129(h)(2) makes regulation of a source category under Section 112 mutually exclusive from regulation under Section 129, NACWA claims that Section 129 cannot apply to sewage sludge incinerators.

The principal problem with this argument is that the definition of "treatment works" does not refer to sewage sludge incinerators. It instead refers to treatment of "municipal sewage or industrial wastes of a *liquid* nature." 33 U.S.C. § 1292(2)(A)(emphasis added). By definition, a solid waste incineration unit burns solid waste. 42 U.S.C. § 7429(g)(1). EPA has found that sewage sludge incinerators burn solid waste, and NACWA has not challenged that finding in this case. 76 Fed. Reg. 15372, 15383 (Mar. 21, 2011), JA____, ____. Indeed, NACWA repeatedly points out that sludge is qualitatively different than sewage "of a liquid nature." *E.g*. NACWA Br. 22.

NACWA attempts to get around this by relying on snippets from each of the two sections of Section 1292(2). Neither section supports its argument.

a. Section 1292(2)(A)

The portion of Section 1292(2)(A) on which NACWA appears to rely covers:

> 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. § 1292(2)(A).

NACWA appears to read this phrase as referring to "any works … used for ultimate disposal of residues resulting from such treatment. *See* NACWA Br. 7 (italicizing the phrases quoted here); *see also* NACWA Br. 23 ("[T]he POTW includes land and equipment 'used for the ultimate disposal of residues resulting from such treatment.'").

NACWA's reading of that phrase, however, misrepresents the statute and violates the rules of English grammar, punctuation and the rule of the last antecedent, "one of the simplest canons of statutory construction." *U.S. v. Pritchett*, 470 F.2d 455, 459 n.9 (D.C. Cir. 1972) (*quoting U.S. v. Hughes*, 116 F.2d 613, 616 (3d Cir. 1940)).

The phrase "used for the ultimate disposal of residues resulting from such treatment" does not refer to "any works" or any other sort of equipment, but "land," the last antecedent. 33 U.S.C. § 1292(2)(A); *Pritchett*, 470 F.2d at 459; *see also Sacramento Reg'l Cnty. 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.'") (ellipsis in original). To support NACWA's interpretation, the definition would need to be rewritten by adding a comma after the parenthetical phrase and deleting the phrase "or is." But

NACWA cannot rewrite the statute to delete words it finds inconvenient. *See, e.g.*, *U.S. v. $6,976,934.65*, 554 F.3d 123, 129 (D.C. Cir. 2009); *see also Pritchett*, 470 F.2d at 459 (noting that Congress could have reached different result by either omitting, or adding comma in front of, the word "or" before last antecedent modified by restrictive phrase).

By contrast, "any works" is a general term—the very one being defined—at the end of a list of other terms referring to treatment of "sewage," not "residues resulting from such treatment." 33 U.S.C. § 1292(2)(A). Under the doctrine of ejusdem generis, "works" should be "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Edison Elec. Inst. v. Occupational Safety & Health Admin.*, 411 F.3d 272, 281 (D.C. Cir. 2005). In this case, those preceding specific words all address waste "of a liquid nature," and works must be interpreted to do the same. *Id*. NACWA's reading, by contrast, would sweep in facilities that are unlike those Congress listed and are not "devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature…." 33 U.S.C. § 1292(2)(A).

The history of this provision reinforces its plain text. Congress added the phrase "site acquisition of the land that will be an integral part of the treatment process or is used for ultimate disposal of residues resulting from such treatment" during the 1972 amendments to the Federal Water Pollution Control Act of 1948.

Compare Pub. L. 92-500, 86 Stat. 844 *with* Pub. L. 80-845, 62 Stat. 1161. The Senate Public Works Committee Report made clear the amendments were expanding the definition to encompass land—not equipment—and only certain types of land at that:

> "And in addition to the elements included in existing law, 'treatment works' would include acquisition of land to be used in the treatment process (as in land disposal by spray irrigation) or for the ultimate disposal of sludge and other residues. … Lands which are merely a site for the placement of buildings or equipment are not considered to be a part of the treatment process…."

S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, 3707.

b. Section 1292(2)(B)

NACWA's attempt to shoehorn sewage sludge incinerators into Section 1292(2)(B) also fails. That part of the definition includes "any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems." 33 U.S.C. § 1292(2)(B).

NACWA appears to claim a sewage sludge incinerator is a "method or system for … reducing … or disposing of … waste in combined storm water and sanitary sewer systems." NACWA Br. 7 (italicizing phrases quoted here). But, as noted above, NACWA contradicts that argument throughout its brief by arguing that "waste in combined storm water and sanitary sewer systems" is qualitatively

different than sewage sludge. *Id*. at 22 ("[I]t is clear that sewage sludge is … unlike domestic sewage…."). NACWA gives the game away when it claims that this very definition "reveals Congressional awareness" that sewage and sewage sludge are two different things. *Id*. at 23. As Section 1292(2)(A)'s reference to "disposal of residues resulting from such treatment" shows, Congress knew how to reference sludge disposal when it wanted to, and it did so only with respect to acquisition of land. 33 U.S.C. § 1292(2)(A); *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

NACWA's argument also proves too much. Without the limitation to the treatment of liquid waste, Section 1292(2)(B) would be so broad that it would sweep in municipal waste incinerators as well. Like sewage sludge incinerators, they "dispos[e] of municipal waste" by burning it, making them treatment works under NACWA's interpretation of the Clean Water Act. Accordingly, under NACWA's interpretation of Section 112(e)(5) of the Clean Air Act, these incinerators would be exempt from Section 129, even though that section explicitly calls on EPA to regulate them. 42 U.S.C. § 7429(a)(1)(B), (C). If such an absurd result were even possible under the plain text of the statute, the Court should avoid it. *The Original Honey Baked Ham Co.*, 172 F.3d at 888.

Even if Section 1292(2)(B) were not also—like Section 1292(2)(A)—limited to waste "of a liquid nature," its reference to "waste in combined storm water and sanitary sewer systems" is, by its terms, a reference to "industrial

waste." If sewage sludge were in fact "industrial waste," it would necessarily be "from commercial or industrial establishments," which would put sewage sludge incinerators squarely within the Clean Air Act's definition of "solid waste incineration unit" and this Court's decision in *NRDC*. 42 U.S.C. § 7429(g)(1); *NRDC*, 489 F.3d at 1257.

2. The History of Both The Definition of "Treatment Works" and Section 112(e)(5) Reinforces the Definition's Plain Text.

The history and context of the definition of "treatment works" confirm that it does not cover sewage sludge incinerators. The definition of "treatment works" appears in and applies to a subchapter of the Clean Water Act creating a grant program intended to eliminate the negative environmental impacts of sewage management by funding state-of-the-art treatment plants. Congress established that program in part to make sewage sludge incineration unnecessary and to prevent its negative effects on air quality. S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3690 (stating goal of grant program that "pollutants do not escape or migrate to cause degradation of the water, air or land environment."), 3674 (describing insufficiency of current sewage treatment methods that often resulted in, inter alia, sludge incineration). Although this first grant program sought to promote forms of sewage management (including land application of sludge) that did not involve incineration, Congress created a separate grant program 15 years later specifically to assist with sludge management and incineration. Pub. L. 100-4, 101 Stat. 73,

codified at 33 U.S.C. § 1345(g); *See also* Comments of Rep. Howard, 133 Cong. Rec. H131-01, 167, Jan. 7, 1987, (setting out committee chairman's section-by-section analysis describing late grant program as funding "projects related to incineration of sludge"). Congress's decision to fund sewage sludge incinerators in a separate and subsequent grant program demonstrates Congressional understanding that the earlier program, which could fund only facilities that fall within the definition of "treatment works," could not fund construction of sewage sludge incinerators. Thus, it confirms the definition does not cover sewage sludge incinerators. *Scheidler v. Nat'l. Org. for Women*, 547 U.S. 9, 21 (2006) ("[I]n 1994, Congress enacted a specific statute aimed directly at the type of abortion clinic violence and other activity at issue in this litigation, thereby suggesting it did not believe that the Hobbs Act already addressed that activity.")

NACWA also attempts to rely on two bits of legislative history—a floor speech by Senator Durenberger and the Senate Environment & Public Works Committee's Report on Senate bill S.1630—to argue that Section 112(e)(5) requires standards for POTWs. NACWA Br. 25-26. As EPA notes, that argument is irrelevant, because it does not address whether Section 112(e)(5) requires standards for *sewage sludge incinerators*. EPA Br. 28. In fact, both Senator Durenberger's floor speech and the Senate Committee Report differentiated between POTWs and sewage sludge incinerators. 1990 CAAA Leg. Hist. 4996,

8528. Senator Durenberger displayed a chart listing significant source categories addressed by the bill, including separate entries for POTWs and sewage sludge incinerators. *Id*. at 4995-96. He had the contents of the chart read into the record, and the Senate Report adopted them. *Id*. at 4995, 8528.

In describing the problem of air pollution from POTWs, neither Senator Durenberger nor the Senate Report mentioned sludge incineration or the pollutants that it causes, even when the report discussed "other treatment steps taken at a POTW may contribute to air pollution directly." *Id*. at 8537 (focusing on emissions from volatilization of dissolved solvents and creation of chlorine gasses from "addition of chlorine to kill bacterial agents"). Because Congress did not have sewage sludge incinerators in mind in drafting Section 112(e)(5), its text should not be stretched to cover them. *Petit v. Dep't. of Educ.*, 675 F.3d 769, 781-82 (D.C. Cir. 2012) ("[W]e must consider not only the ordinary meaning …, but also, among other things, the problem Congress sought to solve in enacting the statute in the first place.") (quotation omitted).

II. EPA'S MACT FLOOR CALCULATIONS SHOULD NOT BE VACATED

NACWA also claims that EPA made a number of errors in establishing the minimum stringencies (also known as MACT floors) for its standards for existing sewage sludge incinerators under Section 129. NACWA Br. 32-43. If the Court agrees with NACWA, it should remand the standards without vacatur, because

vacating them would deprive the public of important and long-overdue protection from toxic pollution. *See Natural Res. Def. Council v. EPA* 489 F.3d 1364, 1374-75 (2007); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

Emissions from sewage sludge incinerators, which include highly toxic and persistent pollutants such as mercury and dioxins, will continue unabated unless these standards are allowed to take effect. EPA-HQ-OAR-2009-0559-0042, JA____. Vacating the particulate matter standards alone would lead to increased premature deaths, emergency room visits, asthma attacks and other suffering. *Id*. More than 20 years have passed since Congress enacted Section 129, and eight years have passed since EPA was ordered to promulgate the standards. *See* Partial Consent Decree, *Sierra Club v. Whitman*, No. 01-1537 (D.D.C.) (Ex. 1 to Sierra Club's Opp. to Emergency Joint Mot. for Stay, Document #1334719). Families and individuals that live near sewage sludge incinerators have already suffered from the absence of statutorily required emission standards for sewage sludge incinerators for far too long.

Moreover, EPA could address NACWA's data-related complaints about the standards on remand without changing the standards. The new data NACWA seeks may justify tighter standards and, even if they point to weaker standards under Section 129's minimum stringency requirements, EPA could retain the current standards as reflecting the maximum "achievable" degree of reduction. 42 U.S.C.

§ 7429(a)(2). Indeed, given that the agency expects 75 percent of units to be able to meet the standards without installing any additional control technology, it is difficult to see how it could avoid that determination. *See* 76 Fed. Reg. at 15386, JA____.

These considerations apply with particular force to standards for new and modified units, which are already in effect, *see id.* at 15378-79, JA____-__, and which NACWA has not even challenged. Apart from eliminating protection that is currently in place, vacating new unit standards would "permanently lower the emissions limits applicable to some of these units." *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1458 (D.C. Cir. 1997).

CONCLUSION

For the foregoing reasons, Sierra Club respectfully requests the Court deny NACWA's challenge to EPA's statutory authority to regulate sewage sludge incinerators under Section 129 of the Clean Air Act. Should the Court find EPA acted unlawfully or arbitrarily in calculating standards under Section 129, Sierra Club requests that the Court remand the standards to EPA without vacating them.

DATED: November 5, 2012

Respectfully submitted,

/s/ James S. Pew
James S. Pew
Jonathan A. Wiener
Earthjustice
1625 Massachusetts Ave., NW
Suite 702
Washington, DC 20036
(202) 667-4500
jpew@earthjustice.org
jwiener@earthjustice.org

Counsel for Sierra Club

CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Proof Brief for Respondent-Intervenor Sierra Club contains 4,283 words, as counted by counsel's word processing system.

DATED: November 5, 2012

/s/ James S. Pew
James S. Pew

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2012 I have served the foregoing **Proof Brief for Respondent-Intervenor Sierra Club** on all registered counsel through the Court's electronic filing system (ECF).

/s/ James S. Pew
James S. Pew

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

STATUTES **Page**

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter II. Grants for Construction of Treatment Works (Refs & Annos)

33 U.S.C.A. § 1292

§ 1292. Definitions

Currentness

As used in this subchapter--

(1) The term "construction" means any one or more of the following: preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, field testing of innovative or alternative waste water treatment processes and techniques meeting guidelines promulgated under section 1314(d)(3) of this title, or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or the inspection or supervision of any of the foregoing items.

(2)(A) The term "treatment works" means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 1281 of this title, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and 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.

(B) In addition to the definition contained in subparagraph (A) of this paragraph, "treatment works" means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems. Any application for construction grants which includes wholly or in part such methods or systems shall, in accordance with guidelines published by the Administrator pursuant to subparagraph (C) of this paragraph, contain adequate data and analysis demonstrating such proposal to be, over the life of such works, the most cost efficient alternative to comply with sections 1311 or 1312 of this title, or the requirements of section 1281 of this title.

(C) For the purposes of subparagraph (B) of this paragraph, the Administrator shall, within one hundred and eighty days after October 18, 1972, publish and thereafter revise no less often than annually, guidelines for the evaluation of methods, including cost-effective analysis, described in subparagraph (B) of this paragraph.

(3) The term "replacement" as used in this subchapter means those expenditures for obtaining and installing equipment, accessories, or appurtenances during the useful life of the treatment works necessary to maintain the capacity and performance for which such works are designed and constructed.

Credits

(June 30, 1948, c. 758, Title II, § 212, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 844; amended Dec. 27, 1977, Pub.L. 95-217, § 37, 91 Stat. 1581; Dec. 29, 1981, Pub.L. 97-117, § 8(d), 95 Stat. 1626.)

Notes of Decisions (3)

33 U.S.C.A. § 1292, 33 USCA § 1292
Current through P.L. 112-195 (excluding P.L. 112-140 and 112-141) approved 10-5-12

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1345

§ 1345. Disposal or use of sewage sludge

Currentness

(a) Permit

Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) Issuance of permit; regulations

The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) State permit program

Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

(d) Regulations

(1) Regulations

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall--

(A) identify uses for sludge, including disposal;

(B) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(C) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

(2) Identification and regulation of toxic pollutants

(A) On basis of available information

(i) Proposed regulations

Not later than November 30, 1986,[1] the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

(ii) Final regulations

Not later than August 31, 1987, and after opportunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

(B) Others

(i) Proposed regulations

Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each pollutant for each such use identified under paragraph (1)(A).

(ii) Final regulations

Not later than June 15, 1988, the Administrator shall promulgate the regulations required by subparagraph (B)(i).

(C) Review

From time to time, but not less often than every 2 years, the Administrator shall review the regulations promulgated under this paragraph for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants consistent with the requirements of this paragraph.

(D) Minimum standards; compliance date

The management practices and numerical criteria established under subparagraphs (A), (B), and (C) shall be adequate to protect public health and the environment from any reasonably anticipated adverse effects of each pollutant. Such regulations shall require compliance as expeditiously as practicable but in no case later than 12 months after their publication, unless such regulations require the construction of new pollution control facilities, in which case the regulations shall require compliance as expeditiously as practicable but in no case later than two years from the date of their publication.

(3) Alternative standards

For purposes of this subsection, if, in the judgment of the Administrator, it is not feasible to prescribe or enforce a numerical limitation for a pollutant identified under paragraph (2), the Administrator may instead promulgate a design, equipment, management practice, or operational standard, or combination thereof, which in the Administrator's judgment is adequate to protect public health and the environment from any reasonably anticipated adverse effects of such pollutant. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(4) Conditions on permits

Prior to the promulgation of the regulations required by paragraph (2), the Administrator shall impose conditions in permits issued to publicly owned treatment works under section 1342 of this title or take such other measures as the Administrator deems appropriate to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge.

(5) Limitation on statutory construction

Nothing in this section is intended to waive more stringent requirements established by this chapter or any other law.

(e) Manner of sludge disposal

The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.

(f) Implementation of regulations

(1) Through section 1342 permits

Any permit issued under section 1342 of this title to a publicly owned treatment works or any other treatment works treating domestic sewage shall include requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section, unless such requirements have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], part C of the Safe Drinking Water Act [42 U.S.C.A. § 300h et seq.], the Marine Protection, Research, and Sanctuaries Act of 1972 [33 U.S.C.A. § 1401 et seq.],

or the Clean Air Act [42 U.S.C.A. § 7401 et seq.], or under State permit programs approved by the Administrator, where the Administrator determines that such programs assure compliance with any applicable requirements of this section. Not later than December 15, 1986,[2] the Administrator shall promulgate procedures for approval of State programs pursuant to this paragraph.

(2) Through other permits

In the case of a treatment works described in paragraph (1) that is not subject to section 1342 of this title and to which none of the other above listed permit programs nor approved State permit authority apply, the Administrator may issue a permit to such treatment works solely to impose requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section. The Administrator shall include in the permit appropriate requirements to assure compliance with the regulations established pursuant to subsection (d) of this section. The Administrator shall establish procedures for issuing permits pursuant to this paragraph.

(g) Studies and projects

(1) Grant program; information gathering

The Administrator is authorized to conduct or initiate scientific studies, demonstration projects, and public information and education projects which are designed to promote the safe and beneficial management or use of sewage sludge for such purposes as aiding the restoration of abandoned mine sites, conditioning soil for parks and recreation areas, agricultural and horticultural uses, and other beneficial purposes. For the purposes of carrying out this subsection, the Administrator may make grants to State water pollution control agencies, other public or nonprofit agencies, institutions, organizations, and individuals. In cooperation with other Federal departments and agencies, other public and private agencies, institutions, and organizations, the Administrator is authorized to collect and disseminate information pertaining to the safe and beneficial use of sewage sludge.

(2) Authorization of appropriations

For the purposes of carrying out the scientific studies, demonstration projects, and public information and education projects authorized in this section, there is authorized to be appropriated for fiscal years beginning after September 30, 1986, not to exceed $5,000,000.

Credits

(June 30, 1948, c. 758, Title IV, § 405, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 884; amended Dec. 27, 1977, Pub.L. 95-217, §§ 54(d), 68, 91 Stat. 1591, 1606; Feb. 4, 1987, Pub.L. 100-4, Title IV, § 406(a)-(c), (f), 101 Stat. 71, 72, 74.)

Notes of Decisions (11)

Footnotes

1 So in original. Subsec. (d)(2) was enacted by Pub.L. 100-4, which was approved Feb. 4, 1987.

2 So in original. Subsec. (f) was enacted by Pub.L. 100-4, which was approved Feb. 4, 1987.

33 U.S.C.A. § 1345, 33 USCA § 1345

Current through P.L. 112-195 (excluding P.L. 112-140 and 112-141) approved 10-5-12

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