**ORAL ARGUMENT NOT YET SCHEDULED**

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

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

**REPLY TO EPA'S OPPOSITION TO MOTION FOR STAY**

The National Association of Clean Water Agencies ("NACWA") and Hatfield Township (together, "Movants") hereby reply to EPA's opposition to Movants' Emergency Motion for Stay ("Mot.").

The SSI Rule stands in clear conflict with the text and purpose of the Clean Air Act ("CAA") and the Clean Water Act ("CWA"). For instance, when EPA established emission standards under CAA § 129, it violated Congress' mandate to regulate SSIs under the more flexible CAA § 112. EPA also violated the minimum database requirements in CAA § 129 and ignored important data for illegitimate,

and now undefended, reasons. As a result, EPA cannot demonstrate that even the top performing SSIs can achieve the standards.

For these and other reasons, the Court will very likely vacate the SSI Rule. Nevertheless, because the rule remains in effect, local governments must spend many millions of dollars on uncertain compliance efforts and interrupt or halt beneficial upgrades and energy saving projects that were underway before the SSI Rule was promulgated. Several local agencies confirm that, absent a stay, they will be forced to commit millions more in local funds directly because of the SSI Rule. Some also predict that they will be forced to eliminate their SSIs before the Court decides the merits of legal challenges to the SSI Rule. Under both outcomes, the harm to communities and their environment is imminent and irreversible. More than 100 communities face this dilemma.

Given the likely demise of the SSI Rule in this Court, the magnitude of harm to communities, and the undisputed public interest in allowing full and meaningful judicial review, Movants respectfully urge this Court to stay the SSI Rule.

## I. SUCCESS ON THE MERITS

### A. EPA's Use of § 129 Is Contrary to the CAA.

By its opposition, EPA eliminates any question whether challenges to the SSI Rule are highly likely to succeed. EPA does not dispute that SSIs are within the meaning of publicly owned treatment works ("POTW") under CAA

§ 112(e)(5) and CWA § 212(2)(A), and concedes that SSIs are "part" of the POTW. EPA Opp'n at 9. Rather, EPA appears to conflate Chevron "step one" and "step two" analysis in arguing that the "plain language" of § 129 "allows" EPA to regulate SSIs as solid waste incineration units (EPA Opp'n at 10) and, consequently, EPA's decision to do so is "reasonable" (id. at 5-6, 9). To the contrary, nothing in either § 112 or § 129 allows EPA to regulate SSIs as anything other than POTWs under § 112. Furthermore, by placing SSIs under § 112, Congress provided room for flexibility in regulating POTWs and sewage sludge, in furtherance of the national policy expressed in CWA § 405(e). The SSI Rule scheme attacks this flexibility and runs counter to Congress' intent that CWA § 405 play the primary role in regulating sewage sludge.

CAA § 112(e)(5) states that EPA "shall promulgate" standards under § 112(d) for POTWs, as defined by the CWA, within five years after the 1990 amendments to the CAA. The mandate to promulgate standards under § 112(d) is clear and unqualified. Nothing in the text or purpose of § 112(e)(5) suggests, as EPA claims, that Congress intended to allow EPA to set standards for "some parts" of POTWs under § 112 and for "other parts" under § 129. Because, as EPA agrees, SSIs are part of POTWs, standards for SSIs may only be set under § 112.

In response, EPA contends that (1) the "more specific" § 129 should trump the "more general" § 112; (2) § 112(e)(5) merely creates a deadline; and (3) the

plain language of § 129 allows EPA to regulate SSIs.[1] EPA Opp'n at 8-9. None of these arguments withstand scrutiny.

EPA's first argument sets up a false comparison between all of § 112 and § 129. By contrast, § 112(e)(5) deals specifically with POTWs, including their SSIs, while § 129 deals broadly with solid waste incineration, including categories of incinerators burning commercial and industrial waste and hospital and medical waste. See CAA § 129(a)(1)(A)-(E). The argument also merely begs the question whether § 129 has any application to SSIs.

Second, on its face § 112(e)(5) does far more than merely establish a deadline. It directs EPA to take an action using a specified statutory program by a date certain for a source category that Congress, not EPA, has defined. Contrary to EPA's view, the clear mandate that EPA "shall promulgate" standards under § 112(d) for POTWs cannot be read to grant EPA discretion to regulate "parts" of POTWs under § 129. Given such a clear mandate, there is no need to look to the title of § 112(e) to interpret § 112(e)(5). Even if this additional step were needed, § 112(e) is titled "Schedule *for standards* and review" (emphasis added), expressing that Congress was specifying *which standards* EPA must establish.

[1] Substantively similar arguments on the merits raised by Sierra Club in its opposition (ECF #1334650) are addressed herein to avoid repetition of argument. Likewise, some overlapping arguments on imminent harm raised by EPA and Sierra Club are addressed in Movants' reply to Sierra Club.

With respect to EPA's final argument, tacitly acknowledging that § 129 does not contain any reference to sewage sludge incinerators, EPA argues that the word "any" in the § 129(g)(1) definition of solid waste incineration unit unambiguously corrals SSIs.[2] It does not, because SSIs do not fall within the categories of sources qualified by the word "any." Sewage sludge is created from the treatment of domestic sewage in the POTW after several stages of filtering, chemical and physical treatment, and dewatering. These treatment processes change the chemical and physical composition of domestic sewage into solids (i.e., sewage sludge) and wastewater. Thus, the newly created sewage sludge combusted in SSIs is *from* a local government agency, not "*from* commercial or industrial establishments or the general public." CAA § 129(g)(1) (emphasis added). Indeed, EPA has previously stated that SSIs are not covered by § 129 precisely for this reason. See 70 Fed. Reg. 74870, 74880 (Dec. 16, 2005) (SSIs do not combust materials from commercial and industrial establishments or the general public); 65 Fed. Reg. 23460 (Apr. 24, 2000) (same).

[2] EPA is unclear whether its interpretation is based on an (incorrect) reading of the NRDC case (76 Fed. Reg. 15383) or if it is post hoc rationalization in this litigation. Either way, this interpretation is not afforded any Chevron deference. EPA's position is not an expression of the Agency's interpretation of the CAA during the rulemaking, but rather an incorrect reading of this Court's decision in NRDC. EPA's reading of NRDC does not bring to bear any special technical expertise, Agency political accountability or Congressionally delegated policymaking that justify judicial deference under Chevron.

EPA now claims that residences and businesses are the "original source" of sewage sludge, apparently because sewage sludge is created from the treatment of *domestic sewage* that comes from residences and businesses. EPA Opp'n at 7. EPA offers no basis in the CAA for this "original source" theory, nor did EPA give the public any notice and opportunity to comment on this theory during the rulemaking. Moreover, SSIs combust sewage sludge, not domestic sewage, and domestic sewage has long been excluded from the definition of solid waste under the "domestic sewage exclusion" in § 1004(27) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6903(27). See also 40 C.F.R. § 261.4(a)(1). Even if EPA had relied upon this "original source" theory, the material that is *from* commercial or industrial establishments or the general public – domestic sewage – is not a *solid waste*. Thus, even under EPA's theory, SSIs do not meet the definition of solid waste incineration unit.[3]

**B. EPA's MACT Floor Database and Methodology Are Flawed.**

Section 129(a)(2) provides that the MACT floor for existing sources cannot

[3] In a related rule under RCRA, EPA adopted a new definition of solid waste that includes sewage sludge. See 76 Fed. Reg. 15456, 15513 (Mar. 21, 2011) ("NHSM rule"). This rule is a cornerstone of EPA's effort to regulate SSIs under § 129. However, EPA announced on October 14, 2011 that it will be making major revisions to the NHSM rule, including creating various exemptions from the definition of solid waste. See Ex. 1. EPA's about-face creates even greater certainty that the legal foundation for the SSI Rule is flawed.

be less stringent than "the average emission limitation achieved by the best performing 12 percent of units in the category." Unlike § 112(d), § 129(a)(2) does not allow EPA to use fewer than 12% of the units in the category. EPA concedes that it did not set the MACT floor standards using the required number of SSIs. EPA Opp'n at 11-12. As the Agency puts it, the standards are "consistent with what [they] *would have been if* EPA had collected *actual* data from the best performing 12 percent of units." Id. at 12 (emphasis added). EPA's prediction as to what the top 12% of SSIs "would have been" fails to comply with § 129(a)(2). The purpose of the 12% requirement is to prevent such conjecture.

EPA claims that this flaw can be overcome, in essence, by creating data for hypothetical units based on a statistical analysis of the actual data from an inadequate number of SSIs. This approach does not satisfy the plain language of § 129(a)(2) that MACT floors must be based on a minimum number of "units." It also fails to give any meaning to the distinction between §§ 112(d) and 129(a)(2).

EPA's reliance on Sierra Club v. EPA, 167 F.3d 658 (D.C. Cir. 1999), as support for its approach is unfounded because, in the rulemaking underlying that case, EPA supplemented its MACT floor database using real-world regulatory permit data to create a database containing information for the requisite number of actual units. Id. at 661. Sierra Club endorsed the use of regulatory permit data for units when EPA did not have test data for the requisite number of units. That

decision in no way opens the door for EPA to *create* data using a statistical method that cannot (and EPA does not claim otherwise) reasonably estimate emission levels of SSIs other than the few SSIs (in some cases as few as four SSIs testing once each) represented in the database.

Although additional data were available during the rulemaking, EPA did not use regulatory permit data for SSIs, data from the Part 503 program for some of the same pollutants, or even SSI stack test data submitted by commenters. EPA simply fails to respond to arguments that EPA's explanation for not using these data was contrary to the record and arbitrary. See Mot. at 12-14. Instead, EPA offers a new response, now asserting that the Part 503 data are "inadequate" and the stack test data "incomplete" (EPA Opp'n at 15 n.10), without explaining how they are inadequate or incomplete. EPA's failure to use available data is a violation of the database requirements established by § 129, and of the fundamental requirement for rational agency decisionmaking. See Mot. at 13-14.

## II. IMMINENT HARM

EPA argues that the examples of imminent harm in the declarations by four local agencies are insufficient, relying heavily on Wis. Gas Co. v. FERC, 758 F.2d 669 (D.C. Cir. 1985). This case in inapposite because the Court there denied a stay based solely on "unsubstantiated and speculative allegations of recoverable economic injury." Id. at 674. In this case, however, there is evidence that the

unachievable emission standards – which fail to account adequately for variability within and among SSIs and for which there are no demonstrated pollution control technologies – will require municipalities to abandon incineration. See LeBlanc Decl. ¶¶ 5-6 (no SSIs can meet standards); Lyons Decl. ¶ 6 (same). The immediate effects are the unrecoverable loss of millions in local government funds, and major increases in air pollution, truck traffic, landfill burdens and other impacts affecting these communities. See NEORSD Decl. ¶¶ 12-13; LeBlanc Decl. ¶ 8 (loss of SSIs "will potentially result in greater landfilling burdens and increased costs" and increase pollution from trucking and landfills). For example, as a "direct result of the SSI Rule" Albany County, NY predicts that they will not seek to perform a beneficial energy recovery project that had started before the rule was promulgated. See Lyons Decl. ¶ 7. Similar projects and upgrades are jeopardized at other POTWs. See NEORSD Decl. ¶¶ 7-10, 12, 15; Ball Decl. ¶ 8. The adverse environmental impacts of abandoning incineration are in no way speculative or uncertain – they are certain because no POTW would be able to convert to land application instead of landfilling. Such environmental impacts are by their nature irreparable. See Amoco Prod. Co. v. Gambell, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.")

This Court's precedent does not require that issuance of a stay wait until municipalities have already suffered the major irreparable harm a stay is intended to prevent. The declarations clearly evidence that municipalities are being forced to spend millions or to shut down their SSIs. One agency already anticipates shutdown of several of its SSIs. Particularly where, as here, there is a very high probability of success on the merits, the required showing of injury is significantly less. See Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985) (stay appropriate with a high probability of success and "some injury").

Movants have established imminent harm sufficient to warrant a stay.

## III. PUBLIC INTEREST AND HARM TO OTHERS

EPA does not dispute that SSIs are already regulated by comprehensive risk-based regulations. See 40 C.F.R. Part 503, Subpart E; Part 61, Subparts E and C. EPA established these regulations to be protective of human health and the environment for all pollution associated with SSIs. EPA points to estimates of health benefits based on hypothetical exposures, but it *does not* claim the SSI Rule is needed to protect public health because other regulations provide this protection.

## CONCLUSION

For the reasons set forth in the Motion for Stay and the replies in support thereof, Movants respectfully request that the Court issue a stay of the SSI Rule.

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Respectfully submitted,

/s/ Jeffrey A. Knight .

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## CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October 2011 copies of the foregoing Reply to EPA's Opposition to Motion for Stay was served electronically through the Court's CM/ECF system on all registered counsel.

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