



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

APR - 6 2012

THE ADMINISTRATOR

Mr. Ken Kirk  
Executive Director  
National Association of Clean Water Agencies  
1816 Jefferson Place  
Washington, D.C. 20036-2505

Dear Mr. Kirk:

The purpose of this letter is to respond to the National Association of Clean Water Agencies' (NACWA) May 24, 2011, Petition for Reconsideration and request for a stay of the effective date the U.S. Environmental Protection Agency's final rule entitled Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units (SSI rule), published in the Federal Register on March 21, 2011 (76 FR 15372).<sup>1</sup> In this Petition, NACWA asks the EPA to reconsider the SSI rule to address the following eight issues: (1) Regulation of sewage sludge incineration (SSI) under Clean Air Act (CAA) section 129 instead of CAA section 112; (2) collection of data to determine the maximum achievable control technology (MACT) floors; (3) use of the Clean Water Act (CWA) sludge content program data; (4) establishment of subcategories in addition to fluidized bed incinerators (FBI) and multiple hearth incinerators (MHI); (5) new source standards for MHI; (6) treatment of dioxin/furan emissions data measurements in the MACT floor database; (7) achievability of performance test specifications; and (8) request for stay of effective date of the SSI rule. The EPA has carefully reviewed the points raised in the Petition and is denying the Petition for Reconsideration and the request for a stay of the rule's effective date.

Section 307(d)(7)(B) of the CAA states that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b))."

As to the first procedural criterion for reconsideration, a petitioner must show why the issue could not have been presented during the comment period, either because it was impracticable to raise the issue during that time or because the grounds for the issue arose after the period for public comment (but within 60 days of publication of the final action). In the EPA's view, an objection is of central relevance

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<sup>1</sup> Hereinafter referred to in this letter as "Petition for Reconsideration" or "Petition."



to the outcome of the rule only if it provides substantial support for the argument that the promulgated regulation should be revised. See, e.g., the EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202 of the Clean Air Act, 75 FR at 49556, 49561 (August 13, 2010). See also, 75 FR at 49556, 49560 - 49563 (August 13, 2010) and 76 FR at 4780, 4786 - 4788 (January 26, 2011) for additional discussion of the standard for reconsideration under CAA section 307(d)(7)(B).

### 1. Regulation of SSI Under CAA Section 129 Instead of CAA Section 112

The Petition requests that the EPA reconsider its decision to regulate SSI under section 129 of the CAA, rather than CAA section 112. The Petition alleges that the public lacked the opportunity to comment on the EPA's arguments supporting its interpretation of the CAA and that the issue is of central relevance. The EPA is denying reconsideration of this issue. The EPA disagrees that the proposed SSI rule provided inadequate notice of the EPA's interpretation of the CAA and the Petitioner does not demonstrate that it lacked the opportunity to comment on this issue.

In the proposed SSI rule, the EPA discussed its position that the CAA requires SSI units to be regulated under CAA section 129 rather than CAA section 112. 75 FR at 63263 - 63264. As part of that discussion, the proposal specifically requested comments on Petitioner's position, as articulated in a 2009 letter to the agency, that SSI units must be regulated under section 112 of the CAA. The EPA also included the Petitioner's letter in the docket for the SSI rulemaking. See K. Kirk, NACWA, to USEPA, Letter regarding Regulations on CISWI and RCRA Solid Waste Definitions, September 9, 2009, at EPA-HQ-OAR-2009-0559-0026.

The Petition claims that the EPA failed to provide notice of its position as to why SSI units must be regulated under CAA section 129. Specifically, the Petition alleges that in the final SSI rule, the EPA's rationale for its position that SSI units must be regulated under section 129 was "fundamentally different" from its statements in the proposed rule, because the EPA in the final rule states that section 112(e)(5) of the CAA does not apply to SSI units. Specifically, the Petition claims that the EPA did not explain in the proposal the following: "(1) how its new interpretation squares with the clear directive in section 112(e)(5) for the Administrator to set emission standards under section 112(d), (2) how it implicitly reached the conclusion that SSIs are not covered by the expansive CWA definition of "treatment works" incorporated into CAA section 112(e)(5), (3) how its new interpretation is legally possible in light of the numerous SSIs built and improved using CWA Title II funds, [and] (4) how EPA's new interpretation squares with the examples NACWA provided of previous Agency rulemakings and policy statements." Petition at 7.

The EPA disagrees with petitioner's assertions. The proposed rule provided sufficient explanation regarding the EPA's rationale for regulating SSI units under section 129, and that explanation was more than sufficient for members of the public to comment on the agency's interpretation of the CAA, including each of the issues the Petition raises. Indeed, NACWA commented extensively on the issue of EPA's authority to regulate SSI units under section 129. NACWA comments at 5-15. Therefore, the Petitioner has failed to demonstrate that it was impracticable to raise its objections to the EPA's interpretation during the public comment period for the proposed rule. See Air Transport Ass'n v. FAA, 169 F.3d 1, 6 ("agency's notice must fairly apprise interested persons of the subjects and issues involved in the rulemaking").

The EPA explained in the preamble to the proposed rule that it had not regulated SSI units under the CAA section 112(d) emissions standards issued for public owned treatment works (POTW) in 1999 and that such units should be regulated under section 129. See 75 FR at 63264. While the EPA elaborated on



its position in the final rule, responding to comments from the Petitioner, such additional explanation to support the same interpretation taken in the proposed rule does not warrant re-opening this issue for reconsideration, and does not support Petitioner's argument that it lacked the opportunity to comment on the EPA's interpretation. See *International Fabricare Institute v. EPA*, 972 F.2d 384, 399 (D.C. Cir. 1992) (notice and comment is not intended to result in "interminable back-and-forth") and *Community Nutrition Institute v. Block*, 749 F.2d 50, 58 (D.C. Cir. 1984) (agency is not required to provide additional opportunity to comment on its response to comments).

In addition, the petitioner misconstrues EPA's position when it asserts that the EPA concluded SSI are not covered by the CWA definition of publicly owned treatment works. The EPA's interpretation, as explained in the proposal and the final rule, is not based on any such conclusion. Rather, it is based on a reasonable interpretation of two provisions in the CAA, so as to give both meaning. CAA section 129(g) defines "solid waste incineration unit" to include "any facility" combusting "any" solid waste. 42 U.S.C. § 7429(g)(1). Since sewage sludge is a solid waste, SSI units are clearly solid waste incineration units under this definition and the EPA must, therefore, issue emissions standards for them under CAA section 129. See *NRDC v. EPA*, 489 F.3d 1250, 1257-58 (D.C. Cir. 2007) and 76 FR 15455 (Mar. 21, 2011)(Non-Hazardous Secondary Materials Final Rule). Given the broad definition of solid waste incineration in section 129, as well as the context of CAA section 112(e)(5), which is a provision found in a subsection of CAA section 112 that governs the timing of emissions regulations, it is reasonable for the EPA to consider both provisions and to conclude that CAA section 129(g)'s all-encompassing definition of solid waste incineration unit requires regulation of SSI under CAA section 129. See 76 FR at 15383. Therefore, Petitioner's contention that the EPA's interpretation is inconsistent with and impermissible in light of the CWA definition of publicly owned treatment works is not relevant, since the interpretation does not depend on whether or not the SSI is within the scope of that definition.

Finally, the Petitioner claims that the EPA failed to provide notice of its position regarding how the agency's interpretation squares with past statements. The EPA disagrees. The Petitioner's comments on the proposed rule referred to several Federal Register notices, which it alleged contained statements inconsistent with the EPA's interpretation, as described in the proposed rule. The EPA responded to those comments in the final rule, explaining that those statements did not support the Petitioner's argument that the EPA must regulate SSI units under CAA section 112. See 76 FR at 15383. The fact that the EPA addressed these past statements in response to comments received on the proposal does not provide a basis for reconsideration. It was clearly not impracticable for the Petitioner to comment on the EPA's past statements, and it did, in fact, do so.

The Petitioner filed a Supplemental Petition for Reconsideration on June 27, 2011, stating that several of its members had received information requests from the New York Department of Environmental Conservation seeking a certification regarding each member's plans regarding compliance with the SSI rule. The Petition claims that these requests demonstrate the imminent impact of the SSI rule on its members. The Supplemental Petition also requests that the EPA stay the SSI rule itself.

The Supplemental Petition does not provide a basis for reconsidering the SSI rule. First, to the extent that the New York information requests have an imminent impact on the Petitioner's members, those requests were not required by the SSI rule. Since nothing in the SSI rule required the information requests to be sent, reconsideration of the rule would have no effect on them. In addition, the information requests do not demonstrate that Petitioners lacked an opportunity to comment on any issue in the rule itself, nor are they of central relevance to the SSI rule, since they do not in any way affect the EPA's establishment of emissions standards for SSI. The requests are simply an effort on the part of a state, without any request from the EPA, to identify existing sources within its jurisdiction that may be subject to the SSI rule once its requirements are applicable.



Therefore, because the Petition does not demonstrate that it was impracticable for the Petitioner to comment, the EPA is denying reconsideration of this issue.

## 2. Collection of Data for the MACT Floor Calculations

The Petition also requests reconsideration of the amount of emissions data the EPA used to calculate the MACT floors. The Petitioner claims that the MACT standards are based on insufficient data because the EPA did not have actual emissions test data from 12 percent of SSI within the source category. The Petitioner claims that the quality and quantity of the data used to set MACT standards are of central relevance to the development of the final rule and, further, argues that CAA Section 129 does not allow the EPA to establish MACT standards without emissions data from 12 percent of units in a category or subcategory. The EPA is denying the Petition for Reconsideration on this issue because the Petitioner has not demonstrated that it was impracticable to comment on this issue. Further, the Petition does not demonstrate that this objection is of central relevance to the outcome of the final rule because it does not provide substantial support that the emissions standards should be revised.

The EPA explained in the preamble to the proposed rule that it issued an information collection request to several SSI which required emissions testing and submission of the test results to the EPA for purposes of the SSI rulemaking.<sup>2</sup> These units were identified as those expected to have the lowest emissions of units in each subcategory, based on the type of unit and the pollution controls installed. See 75 FR at 63270. The EPA received comments on the scope of its information collection request, including comments from the Petitioner which raised the same arguments furthered in the Petition. While Petitioner's comments urged EPA to collect additional emissions test data, the comments did not identify units other than those from which the EPA required emissions testing which the Petitioner believed were the lowest-emitting units. NACWA comments at 24-27. In the final rule, the EPA explained that it had conducted a statistical analysis to verify the minimum number of observations needed to accurately characterize the distribution of the best-performing 12 percent of units in each subcategory. The results showed that the data used by the EPA meets or exceeds the number of observations necessary to provide an accurate representation of that data distributed from the best-performing 12 percent of the source population. See 76 FR at 15387.

Further, the EPA did solicit additional emission information in the preamble to the proposed rule. Some commenters summarized results of their most recent emissions tests, comparing them to the EPA's site-specific estimates of baseline emissions. However, none of the commenters actually provided emission test reports. In the proposed rule, the EPA specifically requested supporting documentation for any data submitted by commenters, and reiterated this request at the public hearing on the proposed rule. See 75 FR at 63262 and EPA-HQ-OAR-2009-0559-0138 (Transcript of October 29, 2010 Public Hearing for Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Units: Sewage Sludge Incineration Units: Proposed Rule at 60 and Public Hearing Desk Copy at 6). The EPA needs such background documentation to determine the conditions under which the testing was conducted, the specific methodology that was used and whether appropriate quality control was applied. Specifically, the EPA needs to ensure that data used to calculate the MACT floor has been collected using appropriate test methods and has been subject to quality assurance procedures. Without such information, the EPA cannot conclude that the emissions data are appropriate to use in calculating MACT floor limits. As explained in the preamble to the final rule, the EPA concluded that, lacking

<sup>2</sup> The Petition alleges that the EPA "circumvent[ed] the Paperwork Reduction Act" with its "fast track" approach to rulemaking. However, the Petition does not acknowledge that the EPA was required to issue the final rule by February 21, 2011, pursuant to an order issued by the Federal District Court for the District of Columbia. Moreover, the EPA's information collection request did not violate the Paperwork Reduction Act.



background documentation, the emission test summaries provided by commenters were not sufficiently reliable to use in the MACT floor calculations. See 76 FR at 15387. Thus, the Petitioner had the opportunity to comment on the EPA's proposed approach to establishing the MACT floor limits and on the data it intended to use in those calculations. The final MACT limits were established using the same approach, with appropriate modifications to address new data and information that EPA could verify as sufficiently reliable to use in the calculations. See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) ("notice requirement should not force an agency endlessly to re-propose a rule because of minor changes") and *Solite Corp. v. EPA*, 952 F.2d 473, 485 (D.C. Cir. 1991) (public had sufficient notice of final rule threshold calculations where methodology did not change significantly from proposed rule). As explained above, the EPA described the scope of its information collection efforts in the preamble to the proposed rule and received comments on the data on which the proposed MACT standards were based, including comments from the Petitioner raising the same issues as in the Petition. The EPA responded to those comments in the final rule. Moreover, the Petition does not provide any information to support its argument that the final rule MACT floor standards should be changed. Rather, the Petition simply reiterates comments submitted on the proposed rule, and provides no supporting information or analysis regarding what the MACT limits should be. Further, the Petition does not explain how the Petitioner believes the EPA should have calculated the MACT limits given the limited emissions test data. For these reasons, the EPA is denying reconsideration of this issue.

### 3. Use of Clean Water Act Sludge Content Program Data

The Petition requests that the EPA reconsider its calculation of variability in the final MACT standards. Specifically, the Petition argues that sewage sludge concentration data (*i.e.*, pollutant concentrations in sludge prior to incineration) that was collected pursuant to regulations issued under the CWA should be used to incorporate additional variability into the standards, resulting in less stringent standards than in the EPA's final rule. The Petition then further contends that, because this data was not utilized in determining MACT floors, the standards are set at levels that are unachievable by the best-performing SSI units, even with the use of add-on control technologies. The Petition also requests that the EPA reconsider its approach of setting MACT floor standards on a pollutant-by-pollutant basis and alleges that the EPA failed to address the inverse relationship between nitrogen oxide (NO<sub>x</sub>) and carbon monoxide (CO) when using this approach.

The EPA is denying the Petition for Reconsideration on this issue because the Petition does not demonstrate that it was impracticable to comment on this issue. Moreover, the Petition does not provide substantial support for its argument that the final rule should be revised. In the proposed rule, the EPA requested additional sewage sludge content data from the best performing sources collected during emissions stack tests in order to better evaluate the effect on emissions of differences in metal content of the sewage sludge for the final standards. See 75 FR at 63268. The EPA received comments, including comments from the Petitioner, claiming that emissions from SSI units are affected, not just by control technology, but also by other factors, including the contents of the sludge, and referencing sludge content data collected pursuant to the CWA. In the preamble to the final rule, the EPA explained the basis for its variability analysis, including the fact that the standards were based on emissions information from different regions of the country and different seasons of the year. In addition, the EPA explained that the final standards sufficiently accounted for variability through use of the upper predictive limit (UPL). See 76 FR at 15388 - 15392. Therefore, the Petition does not demonstrate that it was impracticable to comment on this issue, and the Petitioner did, in fact, provide comments raising the same issues raised in the Petition. As noted above, the EPA is not required to provide additional opportunity to comment on the agency's response to comments received. *Community Nutrition Institute v. Block*, 749 F.2d at 58.



Moreover, the Petitioner has not provided substantial support to demonstrate that the MACT standards should be revised based on the CWA. Therefore, this issue is not of central relevance to the outcome of the rule. See *Union Oil v. EPA*, 821 F.2d 768, 683 (D.C. Cir. 1987) (court declined to remand rule because petitioners failed to show substantial likelihood that final rule would have been changed based on internal agency memorandum regarding rule's costs and benefits). While the Petition claims that the concentration of certain pollutants varies considerably in sewage sludge, it fails to demonstrate whether and how the pollutant content in the sludge itself affects emissions. The MACT floor standards must be based on the emissions performance of the best-performing sources, not the pollutant content of the materials combusted. CAA section 129(a)(2). In fact, because SSI units are already well controlled for those pollutants for which sludge content information is collected under the CWA (*i.e.*, cadmium, lead and mercury), the content of these pollutants in the sludge itself has little relationship to the emissions of those pollutants, because the pollutants are removed by the control devices.

As an example, during the EPA's information collection request prior to the rule's proposal, the EPA collected sludge content data that was gathered at the same time as the emissions stack tests. The stack test data were used to calculate the final MACT floors. The EPA reviewed the sludge content data that was collected for lead. The lead concentrations in the sludge itself are within a wide range – from  $1.62\text{E}-5$  to  $3.82\text{E}-1$  (pound lead sludge/dry ton sludge). However, comparing the lead emissions from the incinerator to the lead content of the sludge entering the incinerator shows that the units achieve an average of 97-percent reduction in lead, primarily due to the add-on controls that are used to remove particulate matter from the stack emissions (including sources using only venturi scrubbers, those using venturi scrubbers-impact scrubbers, and those using venturi scrubbers-wet scrubbers-wet electrostatic precipitators). These combinations of controls are generally used by the best-performing SSI. Because of the high reduction in pollutant levels between incoming sludge and emissions due to the add-on controls, the variation in the lead content in the sludge, based on the data collected during the emissions stack testing on the best performing sources, did not affect the emissions performance of those sources. The Petition provides no information to support a contrary conclusion, including any information relating sludge content to emissions from the SSI unit.

The Petition further claims that final MACT floor standards are unachievable by the best-performing units because the EPA did not account for the variability of sludge content and because the EPA established the standards on a pollutant-by-pollutant basis. The EPA disagrees with this assertion, particularly since the agency's analysis shows that most SSI units are currently able to meet the final standards. See 76 FR at 15386. As explained above and in the preambles to both the proposed and final rules, the EPA's variability analysis accounted for the variability in emissions seen among the best-performing sources tested through use of the 99-percent UPL approach, and this variability is reflected in the final limits. Adding additional variability on top of limits that already incorporate appropriate variability would result in standards that are less stringent than the average emissions performance of the best-performing 12 percent of units, and is further not justified, based on the lack of any information showing that sludge content affects emissions.

The Petition claims that certain facilities will not be able to achieve the final emissions limits without making combustion adjustments or adding air pollution control devices to control certain pollutants. However, the Petition does not present emissions data or other information to support this claim, including any specific information on "at least two utilities that believe their units cannot achieve" the final rule mercury standard. Petition at 15. Moreover, the Petitioner had the opportunity to comment on the achievability of the proposed MACT limits and, in fact, did so. The EPA solicited public comments on the emissions baseline calculations and emission reduction analysis supporting it. The Petitioner and other commenters, in fact, commented on the EPA's baseline estimation and estimated emission



reduction, providing the EPA with substantial new information during the public comment period, which the EPA used to adjust the baseline and emissions reductions estimation in the final rule. See NACWA comments at 19 and Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units Summary of Public Comments and Responses at 8-1 (EPA-HQ-OAR-2009-0559-0171). Specifically, the EPA, in the final rule, revised the emissions inventory (204 units), the default parameters assigned to units and unit capacity and feed assumptions in order to provide a more accurate representation of the baseline calculation and the amount of emission reductions each unit would need to achieve to comply with the limits, in order to determine how many units would need to install controls to comply. See 76 FR at 15392 and EPA-HQ-OAR-2009-0559-0155-0155.10 (Revised Cost and Emission Reduction of the MACT Floor Level of Control and Supporting Tables). In the final rule, the EPA estimated that most SSI units (155 of 204 units) are currently meeting the emissions limits. See 76 FR at 15386. Therefore, the Petition does not demonstrate that the Petitioner lacked the opportunity to comment on the achievability of the emissions limits, or that the final emissions limits do not represent the emissions level achieved by the best-performing sources. See *Sierra Club v. EPA*, 479 F.3d 875, 882 (D.C. Cir. 2007).

The Petition also includes statements criticizing the EPA's pollutant-by-pollutant approach to establishing the MACT floor standards. However, the Petition does not demonstrate that it was impracticable to comment on this issue. The EPA explained in the preamble to the proposed rule that the proposed standards were based on the pollutant-by-pollutant approach and our interpretation of the CAA that is the basis for this approach. See 75 FR at 63273. See *Air Transport Ass'n v. FAA*, 169 F.3d at 6. The EPA received several comments on the pollutant-by-pollutant approach, as noted in the final rule preamble (see 76 FR at 15384), including comments from Petitioner opposing the EPA's approach. NACWA comments at 29. The EPA responded to these comments in the preamble to the final SSI rule, explaining how the basis for using this approach is consistent with both the intent of section 129 of the CAA and previous court rulings on this matter. Petitioner's comments included its claims regarding the impact of the inverse relationship between CO and NO<sub>x</sub>, and the EPA's response addressed that specific issue as well. See 76 FR at 15386. As noted above, the EPA is not required to provide additional opportunity to comment on the agency's response to comments received. *Community Nutrition Institute v. Block*, 749 F.2d at 58. Therefore, to the extent the Petition requests that the EPA reconsider its establishment of MACT floor standards on a pollutant-specific basis, the Petition does not demonstrate that it was impracticable to comment on that issue, as the Petitioner did, in fact, submit comments on the proposed rule, raising the same issues in the Petition. The EPA, therefore, denies the request for reconsideration of this issue.

#### 4. Subcategories Other than FBI and MHI Units

The Petition requests the EPA reconsider its establishment of subcategories in the final rule and add a third subcategory for a stoker/grate type design that the Petitioner claims are being used at a limited number of POTW. The Petitioner states that they were unaware of this type of unit until after the public comment period closed. The Petition also claims that the regulatory status of the few existing sources of this type and potential new stoker-design sources is uncertain, because they do not appear to fit within either subcategory in the SSI rule. The EPA is denying the Petition for Reconsideration.

First, the Petition does not provide support for its argument that the final rule should be revised to add a third subcategory of units. Based on the information currently available to the EPA, there is no stoker-design system currently employed in practice in the United States, although such units are currently being marketed. See EPA-HQ-OAR-2009-0559-0180 (Other Unit Designs as Related to New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units). The Petition



does not identify any sources at which such units are being used. Therefore, based on the lack of information regarding any currently-operating units of the type the Petition raises and the cursory information in the Petition regarding the design of such units, the Petition does not demonstrate that a separate subcategory would be appropriate or that there is any information that the EPA could use to establish emissions standards for these units as a separate subcategory.

Additionally, the EPA solicited public comment in the preamble to the proposed rule on the subcategorization it proposed for new and existing sources, specifically including a request for whether other types of SSI units existed. See 75 FR at 63268. Therefore, the Petitioner clearly had the opportunity to comment on any other units that did not fit within the proposed subcategories. For these reasons, the EPA is denying the Petition for Reconsideration on this issue.

##### 5. New Source Standards for MHI

The Petition requests that the EPA reconsider the emission limits for new MHI units. The Petition alleges that the limits were not available for public comment, and that the new source performance standards (NSPS) will be difficult to achieve with control technologies demonstrated for use on MHI. The EPA is denying the Petition for Reconsideration on this issue because the Petition does not demonstrate that it was impracticable to comment on this issue.

While the EPA did not propose to establish separate NSPS for MHI units, the proposed SSI rule preamble did solicit public comment on emissions limits for new MHI units that were calculated based on the best-performing MHI unit. See 75 FR at 63272 (Table 3). The Petitioner submitted comments supporting NSPS limits for a MHI subcategory. NACWA comments at 30-31. In the final rule, the EPA established emission limits for new MHI units as a separate subcategory, based on the best-controlled MHI unit. Therefore, Petitioners clearly had an opportunity to comment on NSPS for a separate MHI subcategory and did so. Moreover, the limits for MHI units in the final rule were calculated using the same methodology as the limits in Table 3 of the proposed rule, with some minor modifications (*e.g.*, modified variability assumptions). The fact that the EPA made adjustments to the limits on which it sought comment does not warrant an additional opportunity for comment. See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 547 and *Solite Corp. v. EPA*, 952 F.2d at 485.

The Petition further claims that the standards for new MHI are not achievable for some units, because those units cannot meet the limits in the final rule without using add-on controls which have not been demonstrated for use on MHI units. However, the Petition does not demonstrate that it was impracticable to comment on this issue. See *NRDC v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988) and *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 547 (agency may make changes to proposed rule without triggering new round of comments, where change are logical outgrowth of proposal and comments). As noted above, the EPA did solicit comment on NSPS for MHI units based on the best-performing unit, and established such standards in the final rule. The final standards were calculated using the same methodology as the standards on which the EPA solicited comment, with appropriate adjustments. Therefore, Petitioners could have provided comments regarding the achievability of the limits on which the EPA solicited comment. In fact, the EPA did receive comments regarding the feasibility of add-on controls for SSI, including activated carbon injection, and responded to those comments in the preamble to the final rule, as well as the comment response document. See 76 FR at 15393 and Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units Summary of Public Comments and Responses at 11-23 to 11-31 (EPA-HQ-OAR-2009-0559-0171). Further, the Petition does not provide support for its argument that the rule should be revised. The Petition simply alleges that the final emissions limits “may



not be achievable” using proven technology, but provides no specific data or other information to support this claim. Therefore, the EPA is denying the Petition for Reconsideration on this issue.

#### 6. Dioxin/Furan Emissions Data Measurements in the MACT Floor Database

The Petition asks the EPA to reconsider the dioxin/furan emission limits and to replace them with work practice standards. The Petition refers to the EPA’s then-proposed emission standards for electric utility steam generating units (Utility MACT) as new information warranting reconsideration of the SSI limits, arguing that similar concerns regarding limits of detection and sulfur-to-chlorine ratios exist within the data for SSI units.

The EPA is denying the Petition for Reconsideration on this issue because the Petition does not provide support for its argument that the final rule should be revised, and therefore does not demonstrate that the issue is of central relevance to the outcome of the final rule. The EPA proposed numeric emissions limits for dioxin/ furans, as required by section 129(a)(4). In the final rule, the EPA responded to comments requesting that the agency adopt work practice standards for periods of startup, shutdown and malfunction. The EPA responded to those comments and explained that, in contrast to section 112 of the CAA, section 129 of the CAA does not authorize the agency to establish work practice standards in lieu of numeric emissions limits for the nine pollutants specified in CAA section 129(a)(4). See Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units Summary of Public Comments and Responses at 15-8 (EPA-HQ-OAR-2009-0559-0171). The EPA previously explained the same interpretation in other section 129 rules. See 74 FR at 51368, 51396 (Oct. 6, 2009). The same interpretation would preclude the EPA from establishing work practice standards in lieu of numeric emissions limits for dioxin/furans in the SSI rule. However, the Petition does not explain how the outcome of the final rule could be different, given this limitation on the EPA’s authority under CAA section 129, nor does it address the fact that the Utility MACT was issued pursuant to CAA section 112, not CAA section 129.

Further, the Petition does not demonstrate that it was impracticable to comment on this issue. Specifically, the Petition raises issues regarding the dioxin/furan data used to establish the SSI floor standards which it could have raised during the public comment period on the proposed rule, but did not. The EPA proposed numeric emissions limits for dioxin/furan, and explained in the preamble to the proposed rule the agency’s approach for addressing non-detect data when calculating the proposed dioxin/furan emission limits. See 75 FR at 63273. Petitioners commented on the proposed standards, but did not recommend a work practice standard in lieu of emissions limits. As noted above, the Petitioner’s comments did request that the EPA establish work practice standards for periods of startup, shutdown and malfunction. As the Petitioner’s comments recommended work practice standards in certain circumstances, they could have similarly recommended such standards for dioxin/furan limits, given their concerns about the non-detect data, expressed for the first time in their Petition as a basis for recommending work practice standards. For these reasons, the EPA is denying the Petition for Reconsideration on this issue.

#### 7. Performance Test Specification Achievability

The Petition requests that the EPA reconsider the requirement that SSI must be operated at 85 percent of their maximum permitted capacity during compliance test runs. The Petition states that the EPA proposed operational requirements for SSI units but did not adopt them in the final rule. Instead, the final rule contains a requirement to conduct compliance tests at 85-percent of maximum capacity. The Petition claims that this requirement is not achievable for POTW that do not generate quantities of



biosolids on a continuous basis and do not have sufficient storage capacity to maintain a large enough quantity of biosolids to maintain the 85-percent operating rate for the duration of the emissions test.

The EPA is denying the Petition for Reconsideration on this issue because the Petition does not demonstrate that it was impracticable to comment on this issue. The EPA proposed to require SSI units to maintain sludge feed rate and sludge moisture content within specified ranges during compliance testing. The Petitioner and other commenters opposed these requirements, and provided the EPA with sufficient information that demonstrated that the proposed operational ranges were unachievable and would have resulted in units having to conduct testing at maximum capacity, which could result in an erratic state of control of the unit. See Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units Summary of Public Comments and Responses at 12-4 to 12-5 (EPA-HQ-OAR-2009-0559-0171). The specific feed rate and moisture content requirements in the proposed rule were intended to ensure good combustion during testing. However, after consideration of comments received, the EPA did not adopt those operating parameter monitoring requirements. Instead, the EPA required units to monitor temperature in the combustion chamber and maintain requirements to report sludge feed rate and moisture during performance tests, to ensure good combustion during testing. See 76 FR at 15396 and Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units Summary of Public Comments and Responses at 12-4 to 12-5 (EPA-HQ-OAR-2009-0559-0171). Further, after consideration of information received during the comment period, the EPA included in the final rule a requirement that performance tests be conducted at 85 percent of the permitted maximum capacity in order to ensure good combustion and stable unit control.

#### 8. Request for Stay of Effective Date of the SSI Rule

The Petition requests that the EPA stay the effectiveness of the SSI rule. Because the EPA is denying reconsideration of the final rule, the Agency does not believe that it is appropriate to stay the effective date. The EPA also notes that on November 28, 2011, the U.S. Court of Appeals for the District of Columbia denied Petitioner's motion for a stay of the rule.

I thank you for raising these issues and appreciate your comments and interest in this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa P. Jackson", is written over a horizontal line.

Lisa P. Jackson  
Administrator





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

APR - 6 2012

Mr. James Pew  
Attorney  
Sierra Club  
1625 Massachusetts Avenue, NW, Suite 702  
Washington, D.C. 20036

THE ADMINISTRATOR

Dear Mr. Pew:

The purpose of this letter is to respond to the Sierra Club's May 20, 2011, Petition for Reconsideration concerning the U.S. Environmental Protection Agency's final rule entitled Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units (SSI rule), published in the Federal Register on March 21, 2011 (76 FR 15372).<sup>1</sup> In this Petition, Sierra Club asks the EPA to reconsider the following issues in the SSI rule: (1) Beyond-the-floor standards for new multiple hearth incinerators (MHI); (2) maximum achievable control technology (MACT) floor methodology for new MHI; (3) beyond-the-floor analysis for existing MHI; (4) MACT floor methodology for mercury (Hg), nitrogen oxides (NO<sub>x</sub>) and particulate matter (PM) for existing fluidized bed incinerators (FBI); and (5) alternative testing option for existing units. The EPA has carefully reviewed the points raised in the Petition and is denying the Petition for Reconsideration.

Section 307(d)(7)(B) of the Clean Air Act (CAA) states that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b))."

As to the first procedural criterion for reconsideration, a petitioner must show why the issue could not have been presented during the comment period, either because it was impracticable to raise the issue during that time or because the grounds for the issue arose after the period for public comment (but within 60 days of publication of the final action). In the EPA's view, an objection is of central relevance to the outcome of the rule only if it provides substantial support for the argument that the promulgated regulation should be revised. See, e.g., the EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202 of the Clean Air Act, 75 FR at 49556, 49561 (August 13, 2010). See also, 75 FR at 49556, 49560 - 49563 (August 13, 2010) and 76 FR at 4780, 4786 - 4788 (January 26, 2011) for additional discussion of the standard for reconsideration under CAA section 307(d)(7)(B).

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<sup>1</sup> Hereinafter referred to in this letter as "Petition for Reconsideration" or "Petition."



### 1. Beyond-the-Floor Standards for New MHI

The Petition requests that the EPA reconsider its decision not to establish beyond-the-floor standards for new source MHI. The Petition first argues that the Petitioner was never given the opportunity to comment on new source MHI emission limits based on the MHI data because the EPA proposed new source performance standards (NSPS) MHI limits based on the emissions performance of FBI. The Petition further recommends beyond-the-floor standards for MHI units, such as basing new MHI beyond-the-floor standard on FBI units.

The EPA is denying the Petition for Reconsideration on this issue. The Petitioner has not demonstrated that it was impracticable to comment on this issue. First, while the EPA did not propose to establish separate NSPS for MHI units, the proposed SSI rule preamble did solicit public comment on emissions limits for new MHI units that were calculated based on the best-performing MHI unit. See 75 FR at 63272 (Table 3). Therefore, it was clearly practicable for the Petitioner to comment on NSPS emissions limits for MHI units based on the best-performing such unit, and members of the public should have anticipated that the EPA might establish such limits in the final rule. See *Air Transport Ass'n. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (when evaluating whether agency has provided adequate public notice, “question is typically whether the agency’s final rule so departs from its proposed rule as to constitute more surprise than notice”). Moreover, the limits for MHI units in the final rule were calculated using the same methodology as the limits in Table 3 of the proposed rule, with some minor modifications made after consideration of public comments received (e.g., modified variability assumptions). The fact that the EPA made adjustments to the limits on which it sought comment does not warrant an additional opportunity for comment. See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (“notice requirement should not force an agency endlessly to repropose a rule because of minor changes”) and *Solite Corp. v. EPA*, 952 F.2d 473, 485 (D.C. Cir. 1991) (public had sufficient notice of final rule threshold calculations where methodology did not change significantly from proposed rule).

The Petition also claims that “[i]n the final rule and its supporting documents, EPA said nothing about going beyond-the-floor in the NSPS for multiple hearth or fluidized bed units.” However, the EPA did solicit public comment in the proposed rule on beyond-the-floor standards for new SSI units, explaining that we did not think beyond-the-floor standards were warranted for such sources and were, therefore, not proposing them. See 75 FR at 63277. The EPA also explained its analysis of beyond-the-floor options for new sources in a memorandum that was in the docket for the proposed rule. See Revised Estimation of Impacts for New Units Constructed Within Five Years After Promulgation of the SSI NSPS (EPA-HQ-OAR-2009-0559-0005). Therefore, the Petitioner had ample opportunity to comment on the EPA’s proposed approach and recommend a different one. See *NRDC v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988) and *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 547 (agency may make changes to proposed rule without triggering new round of comments, where change is a logical outgrowth of proposal and comments). As such, the Petition does not demonstrate that it was impracticable to comment on the EPA’s proposed approach of not establishing beyond-the-floor standards for new sources and the rationale for that approach.

The Petitioner claims that it would have recommended that the EPA adopt a beyond-the-floor standard that required replacing a new MHI unit with a new FBI unit. The Petitioner points to the EPA’s analysis and reference materials in the new source memorandum for the proposed rule, where the EPA concluded that no beyond-the-floor standards were warranted for new sources. As explained above, the EPA disagrees that the Petitioner lacked the opportunity to comment including the opportunity to recommend



a specific approach for such standards. The fact that the EPA solicited comment on potential NSPS for MHI units based on the best-performing MHI unit, combined with the EPA's decision not to propose beyond-the-floor standards for new units and its explanation for that decision, provided sufficient opportunity for the Petitioner to comment, recommending its preferred approach to beyond-the-floor standards for new sources. See 75 FR at 63272. See *Air Transport Ass'n. v. Civil Aeronautics Board*, 732 F.2d 219, 224, (D.C. Cir. 1984) (notice should describe "subjects and issues involved") and *Air Transport Ass'n v. FAA*, 169 F.3d at 6 ("agency's notice must fairly apprise interested persons of the subjects and issues involved in the rulemaking"). The Petition further does not provide substantial support for its argument that the rule should be revised, and therefore does not demonstrate that the issue is of central relevance to the outcome of the final rule. The Petition provides no analysis regarding cost or other factors to support its argument that any beyond-the-floor standards are warranted. For these reasons, the EPA is denying the Petition for Reconsideration on this issue.

## 2. MACT Floor Methodology for New MHI

The Petition requests that the EPA reconsider the final NSPS emission limits for MHI. The Petition argues that the methodology the EPA used in setting these limits (*i.e.*, upper predictive limit (UPL) analysis) is arbitrary and capricious because it resulted in new source limits for hydrogen chloride (HCl) and sulfur dioxide (SO<sub>2</sub>) that are less stringent than existing source limits for MHI. The Petition further requests reconsideration of the EPA's decision to establish the NSPS for MHI units at the same level as the emission guidelines (EG) for MHI units. The EPA is denying the Petition for Reconsideration on this issue because the Petition does not demonstrate that it was impracticable to comment on the issue and because the Petition does not provide support for its argument that the final rule should be revised.

The EPA incorporated variability in the final MACT floor calculation for this source category using the 99 percent UPL. The UPL is an appropriate statistical tool to use in determining variability in the SSI data used to establish the MACT floors. The predictive aspect of the UPL calculation is important to assure that the a future test condition will fall below a MACT floor emission limit calculated using a UPL. Two revisions were made to the final rule's UPL methodology for new MH units. First, the EPA selected log-normal results when it was not clear that the data were normally distributed. Second, the EPA revised CO limits on an analysis of the span of the test. See 76 FR at 15388. Table 8 in the final preamble shows the NSPS limits. See 76 FR 15388.

As explained above, the EPA solicited public comment in the preamble to the proposed rule on the NSPS for MHI units calculated based on the best-performing MHI unit. Those limits were calculated using the 99-percent UPL analysis. See 75 FR at 63272 and EPA-HQ-OAR-2009-0559-0006 (MACT Floor Analysis for the Sewage Sludge Incinerator Source Category). Therefore, the Petitioner had the opportunity to comment on the 99-percent UPL approach and, in fact, did so in its comments on the proposed standards for existing sources. Sierra Club comments at 5. While the EPA did refine its analysis in the final rule after consideration of comments received, such as modifying certain assumptions in the statistical analysis, those refinements do not support a conclusion that it was impracticable to raise any objection during the comment period. See *Community Nutrition Institute v. Block*, 749 F.2d 50, 58 (D.C. Cir. 1984) (supplementary studies considered after proposal did not require additional opportunity for public comment, nor is agency required to provide additional opportunity to comment on its response to comments).

Moreover, the Petition does not describe the methodology that it believes the EPA should have used considering the limited available emissions information to support its assertion that the final rule should



be revised. The Petition claims that the EPA's establishment of NSPS limits for HCl and SO<sub>2</sub> at the same level as the EG for those pollutants is arbitrary and capricious. This is not the case. While section 129(a)(2) allows existing source MACT floor limits to be less stringent than new source limits, the EPA interprets this provision as precluding the new source limits from being less stringent than the existing source limits. Thus it set the new source limit to be no less stringent than the EG limit. In addition, the Petition again does not provide any description or analysis of an alternative methodology for setting the NSPS in a manner that accounts for variability. See *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 863 (D.C. Cir. 2001) (EPA can account for variability by setting floors at level that reasonably estimates performance of best performers under worst reasonably foreseeable circumstances). Therefore, the Petition does not provide support for its argument that the final rule should be revised and thus does not demonstrate that the issue is of central relevance to the outcome of the final rule. For these reasons, the EPA is denying the Petition for Reconsideration on this issue.

### 3. Beyond The Floor Analysis for Existing MHI

The petition requests that the EPA reconsider its decision not to establish beyond-the-floor standards for existing MHI. The Petitioner argues that it did not have the opportunity to comment on this issue because the EPA had proposed to adopt a beyond-the-floor standard for Hg for such units, but did not adopt that proposed standard in the final rule. In addition, the Petitioner contends that the EPA failed to link its beyond-the-floor analysis to the factors the statute requires the EPA to consider. The EPA is denying the Petition for Reconsideration on this issue because the Petitioner has not demonstrated that it lacked the opportunity to comment on this issue and because the Petition does not provide substantial support for its argument that the final rule should be revised.

The Petition includes several criticisms of the EPA's beyond-the-floor analysis for existing MHI. First, the Petition argues that the EPA must set beyond-the-floor standards if standards that would result in greater emissions reductions than the MACT floor are achievable, regardless of whether such standards are cost effective. Second, the Petition claims that the record does not support the EPA's conclusion that carbon injection in conjunction with a fabric filter and afterburner are not achievable based on cost. The Petitioner contends that the EPA's cost-effectiveness analysis for the third combination of controls it evaluated for existing MHI units should have included the emissions reductions attributable to afterburners, as well as those attributable to the other controls evaluated in that combination because the EPA has stated that an afterburner or regenerative thermal oxidizer is integral to using carbon injection technology for SSI. Finally, the Petition claims that the EPA did not analyze the emission reductions of all pollutants in its beyond-the-floor analysis. Lastly, the Petition argues that the EPA did not consider wet electrostatic precipitators (WESP) as a beyond-the-floor control for Hg.

The Petition does not demonstrate that the Petitioner lacked the opportunity to comment on these issues relating to the beyond-the-floor analysis. The EPA proposed beyond-the-floor Hg limits for existing MHI units, explaining its rationale for that proposal in the preamble to the proposed rule and requesting comment on it. See 75 FR at 63277. The Petitioner submitted comments on the EPA's beyond-the-floor analysis supporting the EPA's proposed beyond-the-floor standards for Hg for existing MHI units. Sierra Club comments at 7. Further, the arguments in the Petition regarding the EPA's consideration of cost and achievability were raised in its comments on the proposed rule to support its recommendation that the EPA establish beyond the floor standards for pollutants other than Hg. Sierra Club comments at 7-9. In fact, some of the statements in the petition are taken directly from those comments. See Petition at 10-11 and Sierra Club comments at 8. Therefore, the Petitioner clearly had the opportunity to comment on the EPA's beyond-the-floor analysis and did so. The fact that the EPA proposed beyond-



the-floor standards for some units, but did not finalize those standards, does not mean that the Petitioner or any other member of the public lacked the opportunity to comment.

Moreover, the EPA disagrees with the Petitioner's interpretation of the CAA's MACT requirement. CAA section 129 (a)(2) requires that the EPA establish standards reflecting the maximum degree of reduction in emissions of the CAA section 129(a)(4) air pollutants, "taking into consideration the cost of achieving such emission reduction," as well as other specified factors. CAA section 129(a)(2) further specifies that the MACT level shall not be less stringent than the average of the best performing 12 percent of sources in the category or subcategory (for existing sources) or the emissions performance of the best performing similar source (for new sources), *i.e.*, the MACT floor. Thus, the EPA is to evaluate cost and the other specified factors in determining whether to establish a MACT standard that is more stringent than the floor levels. CAA section 129(a)(2) does not require the EPA to establish a beyond-the-floor standard regardless of cost, but rather, to evaluate whether additional reductions are achievable, and then to consider cost and other factors in deciding whether to require additional reductions.

The EPA conducted such an analysis as part of the SSI rule and calculated not only cost effectiveness, but also total cost, in its beyond-the-floor analysis, as well as the other factors specified in section 129(a)(2), contrary to the Petitioner's assertion. EPA received comments on its proposed analysis and revised the analysis in the final rule as appropriate after consideration of the comments. This analysis is provided in the record at EPA-HQ-OAR-2009-0559-0161, and includes estimates of costs and emissions reductions associated with WESP technology, which the EPA concluded was not appropriate as a beyond-the-floor technology based on cost (Revised Analysis of Beyond the Maximum Achievable Control Technology (MACT) Floor Controls for Existing SSI Units). The EPA also disagrees with the Petition's claim that the agency did not evaluate the emission reductions of all CAA section 129 pollutants and disagrees that the third combination of controls evaluated should have included emissions reductions attributed to those controls. The EPA did, in fact do so, as explained in the record for the final rule the emissions reductions of all CAA 129 pollutants and that the third combination of controls would not be cost effective with the additional emissions reductions included. See Revised Analysis of Beyond the Maximum Achievable Control Technology (MACT) Floor Controls for Existing SSI Units. Finally, while the Petition requests that the EPA adopt beyond-the-floor standards for existing MHI, it does not contain any information or analysis to demonstrate that such standards are warranted based on consideration of costs and other factors enumerated in CAA section 129(a)(2). For these reasons, the EPA is denying the petition for reconsideration on this issue.

#### 4. Floor-Setting Methodology for Hg, NO<sub>x</sub> and PM for Existing FBI

The Petition requests that the EPA reconsider its use of the weighted UPL in determining the MACT floors for existing FBI. The Petition asserts that the MACT floor for these units calculated using this approach does not reflect the average of the best-performing 12 percent of units in the subcategory. The EPA is denying the Petition for Reconsideration of this issue.

The Petition does not demonstrate that the Petitioner lacked the opportunity to comment on this issue. As explained above, the preamble to the proposed SSI rule describes the EPA's rationale for using the 99-percent UPL to develop the MACT floor emission limits. See 75 FR at 63271. Therefore, petitioners had an opportunity to comment on the use of this approach and did, in fact, comment. Sierra Club comments at 4-7. As explained in the preamble to the final rule, the EPA did refine this approach by using a weighted UPL for existing FBI in order to account for the biasing of emissions data from one facility, after consideration of comments received on this issue. See 76 FR at 15389. However, an



agency may refine its proposed approach without providing an additional opportunity for public comment. See *Community Nutrition Institute v. Block*, 749 F.2d at 58 and *International Fabricare Institute v. EPA*, 972 F.2d 384, 399 (D.C. Cir. 1992) (notice and comment is not intended to result in “interminable back-and-forth”). Further, the Petition does not provide support for its argument that the final rule should be revised and therefore does not demonstrate that the issue is of central relevance to the outcome of the final rule. The Petition simply asserts that the weighted UPL approach “diminish[es] the weight given to the majority of [the] sampling data,” but does not include any analysis explaining why this is the case or refuting EPA’s rationale in the final rule for using this approach in light of the data available for existing FBI units. For these reasons, the EPA is denying the Petition for Reconsideration on this issue.

##### 5. Alternative Testing Option for Existing Units

The Petition requests that the EPA reconsider the alternative testing option for existing SSI units adopted in the final rule. The Petitioner argues that it did not have the opportunity to comment on the alternative testing provision for dioxin/furan testing and on the requirement that emissions meet the 75-percent threshold for 2 consecutive years rather than 3 before the alternative testing option can be used. The Petition also claims that the testing provision is inconsistent with the requirements of CAA section 129 and that the EPA did not provide a rationale for the 75-percent threshold for reduced testing. Finally, the Petition argues that the EPA did not respond to comments on accounting for short-term variability in emissions and resultant local and national impacts of the reduced testing alternative.

EPA is denying the Petition for Reconsideration on this issue. The Petition does not demonstrate that it was impracticable to comment on the issue. The EPA proposed reduced testing for all the CAA section 129 pollutants except dioxin/furans, provided sources show emissions are less than 75 percent of the applicable emission limit. See 75 FR at 63278. Therefore, the Petitioner had the opportunity to comment on the reduced testing provision and, in fact, did so. Petitioner’s comments raise the same objections raised in its Petition regarding the requirements of section 129 of the CAA. Sierra Club comments at 9. In the final rule, the EPA responded to Petitioner’s comments, as well as to others received on this issue. See 76 FR at 15396.

The EPA also disagrees that the testing requirements in the final rule fail to account for short-term variability in emissions. The final rule requires performance testing at maximum normal operating conditions. In addition, the final rule requires SSI units to submit a monitoring plan for any continuous monitoring system or bag leak detection system and ash handling system used to comply with the rule. See 76 FR at 15377. When a unit burns variable feed, as many incinerators do, the performance test plan must discuss the feed variability, the streams that will be fed for the test, the operating conditions for the unit during the test and why these streams and conditions represent a worst case scenario for the pollutants being tested. See 40 CFR 60.4880. Testing under these conditions provides reasonable assurance that all operations that occur under normal conditions will be in compliance with the emissions limits, including short term variations. Additionally, during the testing, the facility sets limits for various control device parameters that must be monitored continually. These limits are based on how the control device is operating during the test, ensuring that the same performance achieved during the test is achieved during normal operations. See 40 CFR 60.4850 and 60.4855.

Moreover, the reduced testing frequency is only available to facilities that are below a certain percentage of the emission limit. The EPA established the threshold at a level more stringent than the emissions limit (i.e., 75 percent of the emissions limit) to provide assurance that the facility will be meeting limits even with less frequent testing. If the facility ever finds that it is above the threshold during a test, it is not eligible to return to the reduced testing frequency until consecutive tests show that it is below that



percentage again. These safeguards are designed to provide a reasonable assurance of compliance during normal operations.

The approach to the reduced testing requirement in the final rule was essentially the same as in the proposed rule, with minor adjustments, including the number of years for which emissions must be below the threshold. In addition, after consideration of comments received, EPA established the reduced testing requirement in the final rule for dioxin/ furans as well as to the other pollutants for which EPA established numeric emissions limits. Because stack test results showed extremely low levels of dioxin/furans, the EPA concluded that providing the opportunity for reduced testing, assuming certain conditions are met, was appropriate as a means to reduce the testing burden for units that demonstrated good performance. See 76 FR at 15396-97. These revisions to the proposed rule do not support a conclusion that it was impracticable to comment on the reduced testing provision. See *Air Transport Ass'n. v. Civil Aeronautics Board* 732 F.2d at 224 (final rule where license fees were higher or lower than proposed rule was logical outgrowth of proposal). In particular, nothing in the Petition raises different arguments with respect to reduced testing for dioxin/furans compared to the arguments made in Petitioner's comments opposing the reduced testing provision in general.

I thank you for raising these issues and appreciate your comments and interest in this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lisa P. Jackson', with a large, stylized flourish extending to the right.

Lisa P. Jackson  
Administrator