IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, Plaintiff, v. LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency, Defendant.	Case No. 1:01CV01537 and Consolidated Cases Judge Paul L. Friedman

EPA'S MEMORANDUM IN SUPPORT OF
MOTION TO AMEND ORDER OF MARCH 31, 2006

Defendant, Lisa P. Jackson, Administrator, United States Environmental Protection Agency ("EPA"), moves the Court to further amend Paragraphs 1(i) and 3 of the Order of March 31, 2006 ("2006 Order"), as amended on September 20, 2010, to allow EPA additional time to complete its obligations.[1] Plaintiff Sierra Club opposes this motion.

In these Paragraphs, the Court established a schedule for EPA to complete the duties mandated by section 112(c)(3) and (k)(3) and 112(c)(6) of the Clean Air Act ("CAA"), 42 U.S.C. § 7412(c)(3) and (k)(3), and (c)(6). Paragraph 1(i), which addresses the obligations under section 112(c)(3) and (k)(3), requires EPA to "promulgate emission standards under [CAA] section 112(d) or section 129 assuring that area sources representing ninety percent of the area source emissions of the 30 urban hazardous air pollutants are subject to emissions standards by January 16, 2011." Order (Sept. 20, 2010). Paragraph 3, in relevant part, requires that "[n]o

[1] For the Court's convenience, EPA has attached the 2006 Order and the amendments dated September 10, 2009, April 13, 2010, and September 20, 2010, as Exhibits 1 to 4 hereto. The Court's opinion dated August 2, 2006, *Sierra Club v. Johnson*, 444 F. Supp. 2d 46 (D.D.C. 2006), is attached as Exhibit 5.

later than January 16, 2011, the Agency shall promulgate emission standards assuring that sources accounting for not less than ninety percent of the aggregate emissions of each of the hazardous air pollutants enumerated in Section 112(c)(6) are subject to emission standards under Section 112(d)(2) or (d)(4)." *Id*.

For each of these obligations, the key is reaching the ninety percent threshold. Since 2006, EPA has promulgated final rules establishing emission standards for 48 source categories pursuant to Paragraph 1. Declaration of Panagiotis E. Tsirigotis, Director of the Sector Policies and Programs Division, Office of Air Quality Planning and Standards, Office of Air and Radiation, EPA, ¶ 9 (Dec. 6, 2010) ("Decl."). Exhibit 6. Pursuant to Paragraph 3, EPA has promulgated one rule. *Id*. ¶ 10. As required by Paragraph 3 of the September 20, 2010 Order, EPA expects to issue emission standards for one additional category by December 16, 2010. *Id*.

With regard to Paragraph 3 of the Order, in order to reach the ninety percent threshold, EPA needs to complete additional emission standards for certain hazardous air pollutants emitted by major source boilers and certain area source boilers and commercial and institutional solid waste incineration ("CISWI") units. Decl. ¶¶ 11, 41-42 and n.2. On April 29, 2010, EPA published proposed emission standards for these sources. It received over 4,800 individual comments in response to the proposed standards. Decl. ¶ 34. The comments raise issues that EPA had not fully considered and also provided substantial additional data that raise questions about some of the Agency's initial conclusions. *See id.* Based on its initial review of the significant comments, EPA's preliminary assessment is that the comments may materially affect important decisions relating to source categorizations and coverage for the final emission standards. Decl. ¶ 34-35.

As explained more fully below, EPA believes that the purpose of section 112(c)(6) and the public interest will be best served if the Agency's deadline in Paragraph 3 is extended from January 16, 2011, to April 13, 2012, so that EPA can re-propose the rules for further public comment to ensure that the final rules are logical outgrowths of the proposals. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (EPA cannot promulgate a final rule that materially differs from the proposal unless the changes are a "logical outgrowth" of the proposal.); s*ee* Decl. ¶ 36. EPA anticipates that, if the Court grants the requested modification, it will publish the revised proposals for these three rules no later than June 1, 2011, and promulgate the final emission standards no later than April 13, 2012. Decl. ¶ 37. This is an achievable, but very aggressive schedule for a re-proposal. The requested extension will also provide EPA the opportunity to respond fully to all of the significant comments received from the public on the proposed emission standards. Decl. ¶ 36-37. These steps would significantly bolster the strength of the final rules and would enable the Agency to obtain additional input from the public on three complex, inter-related rules that impact almost 200,000 boilers and 176 CISWI units across the United States. *Id.* ¶¶ 26-27.

Because the standards for certain area source boilers are necessary for EPA to complete its obligations under section 112(c)(3) and (k)(3) and 112(c)(6), the deadline for EPA to complete all the emission standards required under Paragraph 1(i) and 3 should be extended to the same date. To meet its obligations under Paragraph 1 and section 112(c)(3) and (k)(3), EPA must also issue emission standards for sewage sludge incineration units ("SSI"). Decl. ¶¶ 9-11. EPA should be able to complete the SSI rule before April 13, 2012 because the Agency currently does not plan to re-propose the SSI standards. Decl. ¶ 48. The Agency, however, must address the more than 80 individual comments received in response to the SSI proposal before the

comment period closed on November 29, 2010. *Id*. ¶¶ 47-48. In order to fully meet its obligation to respond to these comments, EPA requests that it be allowed until July 15, 2011, to take final action on the SSI standards. *Id*. ¶ 49. This will enable EPA to reduce the risk that a party later seeking judicial review could successfully contend that EPA did not adequately respond to a particular comment. *See North Carolina v. EPA*, 531 F.3d 896, 928 (D.C. 2008). EPA therefore requests that Paragraph 1(i) be amended to require EPA to promulgate standards for one additional area source category by July 15, 2011. EPA requests that Paragraph 1(i) be further amended to require the Agency to promulgate emission standards under CAA section 112(d) or section 129 assuring that area sources representing ninety percent of the area source emissions of the 30 urban hazardous air pollutants are subject to emissions standards by April 13, 2012.

In the alternative, should the Court deny EPA time to re-propose the standards for major source boilers and certain area source boilers and CISWI units, EPA requests that the deadline for completing its obligations under Paragraph 3 be extended until June 15, 2011, to allow the Agency time to fully respond to the 4,800 individual comments received in response to the proposals, and that Paragraph 1(i) be similarly extended. The Agency also seeks to extend the deadline for completing obligations under Paragraph 1(i) to July 15, 2011, so that EPA can fully respond to the comments on the proposed SSI standards.

BACKGROUND

A. Statutory Background

The purpose of section 112 as a whole is to regulate emissions of hazardous air pollutants ("HAP"). To meet this goal, Congress established a complex process for standard-setting set forth in section 112(a)-(k). The statute addresses standards for both major and area sources of

HAP emissions. A "major source" is a stationary source or group of stationary sources that emits 10 tons per year or more of any HAP or 25 tons per year or more of any combination of HAPs. 42 U.S.C. § 7412(a)(1). An area source is a stationary source that emits HAPs, but that does not qualify as a major source. *Id.* § 7412(a)(2).

Section 112 establishes a comprehensive program for regulating source categories that emit HAP. The first step requires the listing of major and area source categories for regulation under section 112, and the next step concerns the promulgation of section 112(d) emission standards for listed source categories. The listing of a source category is a condition precedent to the requirement to promulgate emission standards under section 112(d). Paragraphs 1(i) and 3 of the 2006 Order address the second step of regulation under section 112(d) – the establishment of emission standards for source categories listed pursuant to section 112(c)(3) and (k)(3)(B) and 112(c)(6).

1. Section 112(c)(6)

Section 112(c)(6) requires EPA to take action with respect to seven specific HAPs.[2] 42 U.S.C. § 7412(c)(6). The statute establishes two distinct obligations. First, by November 15, 1995, EPA shall list sufficient source categories to ensure that sources accounting for at least ninety percent of the aggregate emissions of each of these specific pollutants are subject to regulation. The list can include both major and areas sources. Second, by November 15, 2000, EPA shall publish emission standards applicable to these sources pursuant to section 112(d)(2) or (d)(4).

[2] Alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8- tetrachlorodibenzofurans, and 2,3,7,8-tetrachlorodibenzo-p-dioxin. 42 U.S.C. § 7412(c)(6).

Under section 112(d)(2), EPA imposes emission standards that require "the maximum degree of reduction in emissions of [HAPs]" that EPA concludes are achievable based on a consideration of factors identified in the statute. These are referred to as "maximum achievable control technology" or "MACT." Setting a MACT standard is a complex, multi-step process. The MACT standards for existing sources must be at least as stringent as the average emissions limitation achieved by the best performing 12 percent of existing sources (for which the Administrator has emissions information) or the best performing 5 sources for source categories with less than 30 sources (CAA section 112(d)(3)(A) and (B)). This level of minimum stringency is called the MACT floor. For new sources, MACT standards must be at least as stringent as the control level achieved in practice by the best controlled similar source (CAA section 112(d)(3)). EPA also must consider more stringent ‘‘beyond-the-floor" control options. When considering beyond-the-floor options, EPA must consider not only the maximum degree of reduction in emissions of HAP, but must take into account costs, energy, and nonair environmental impacts when doing so. *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 857-58 (D.C. Cir. 2001). Section 112(d)(4) authorizes EPA to set a health-based standard for a limited set of hazardous air pollutants for which a health threshold has been established, and that standard must provide for "an ample margin for safety." 42 U.S.C. § 7412(d)(4).

2. Section 112(c)(3) and (k)(3)(B)

Section 112(c)(3) and (k)(3)(B), 42 U.S.C § 7412(c)(3), (k)(3)(B), govern the listing and regulation of area sources. Section 112(k)(3)(B), which requires EPA to publish a strategy to control emissions of HAPs from area sources in urban areas, provides, in pertinent part, that:

> a. EPA shall identify not less than 30 HAPs which, as the result of emissions from area sources, present the greatest threat to public health in the largest number of urban areas; and

> b. EPA shall list area source categories emitting these 30 HAPs and shall assure that the "sources accounting for 90 per centum or more of the aggregate emissions of each of the 30 identified [HAPs]" are regulated.

Section 112(c)(3) similarly provides that EPA shall list sufficient categories to ensure that "area sources representing 90 percent of the area source emissions of the 30 [identified HAPs]" are regulated. In addition, section 112(c)(3) requires that EPA promulgate the emission standards by November 15, 2000. These standards may be set under section 112(d)(2) or (d)(4), as described above, or under section 112(d)(5), which authorizes EPA to establish emission standards for area sources that reflect "generally available control technologies" or management practices.

B. Litigation Background

These consolidated cases were filed in 2001. A number of claims were resolved in a partial consent decree entered in 2003. The decree required EPA to take a number of actions, including, but not limited to, the promulgation of emission standards for specified source categories listed under section 112(c)(3) and (k)(3)(B) and 112(c)(6). Despite continued negotiations, the parties were unable to settle the remaining claims and filed cross-motions for summary judgment. The only issue presented was remedy, that is, how much time should EPA be allowed to complete the required regulations. 2006 Order at 1.

The Court established a schedule in the 2006 Order. In relevant part,[3] the Court required EPA to promulgate emission standards for source categories listed under section 112(c)(3) and (k)(3)(B) by issuing a set number of standards every six months between December 15, 2006, and December 15, 2008, and issuing standards for any remaining categories by June 15, 2009.

[3] The Court also required EPA to issue regulations required by CAA section 183(e), 42 U.S.C. § 7511b(e). 2006 Order ¶ 4. Because EPA has met this obligation, the requirement is not relevant to the instant motion.

Id. ¶ 1(a)-(f). In Paragraph 3, the Court required EPA to complete its obligation under section 112(c)(6) by December 15, 2007.

As explained further below, EPA has completed a substantial amount of work to date pursuant to the Order. Specifically, EPA has completed its obligations with respect to section 183(e), issued emission standards for over 48 different source categories pursuant to Paragraph 1(i) and section 112(c)(3) and (k)(3), and issued standards for one source category under section 112(c)(6). Decl. ¶¶ 9-10. Since 2006, the Court has granted a number of unopposed motions to extend the deadlines in the Order.[4] The most recent extensions were granted on September 10, 2009, April 13, 2010, and September 20, 2010. Exh. 2-4. On September 10, 2009, the Court amended Paragraph 3 to require EPA to complete its section 112(c)(6) obligations by April 30, 2010, unless, no later than April 15, 2010, EPA signed notices of proposed rulemaking for emission standards for (1) gold mining production processes; (2) industrial, commercial and institutional boilers and process heaters; and (3) CISWI units. If the proposed rules were signed on schedule, the deadline for EPA to complete all its obligations under Paragraph 3 would be advanced to December 16, 2010. This same Order also amended Paragraph 1 to require EPA to promulgate standards for fourteen area source categories pursuant to section 112(c)(3) and (k)(3) by December 16, 2009. Order, ¶ 1(f)-(h). Finally, the Court also amended Paragraph 1 to add subparagraph (i), which allowed EPA to promulgate any additional standards necessary to fully discharge its obligations under section 112(c)(3) and (k)(3) by December 16, 2010, if EPA timely promulgated the proposals identified in Paragraph 3.

[4] Because the motions to extend the deadlines were unopposed, EPA did not provide an explanation of the reasons that the additional time was necessary. The difficulties encountered in the administrative process that required the Agency to seek additional time are set forth in the following section of this brief.

On April 13, 2010, the Court amended Paragraph 3 to provide that EPA could still secure the benefit of the December 16, 2010, deadline if the proposed standards for industrial, commercial and institutional boilers and process heaters, and CISWI units were signed by April 29, 2010. Finally, on September 20, 2010, the Court extended the final deadlines under Paragraphs 1(i) and 3 from December 16, 2010 to January 16, 2011.

C. Administrative Background

To date, EPA has issued final emission standards for 48 area source categories pursuant to Paragraph 1(i) of the Order and CAA section 112(c)(3) and (k)(3). Decl. ¶¶ 9. EPA will complete its remaining obligations under Paragraph 1(i) by establishing emission standards for certain emissions from area source boilers and for SSI units. *Id*. Under Paragraph 3 and section 112(c)(6), EPA has issued emission standards for one source category and will take final action on emission standards for a second category by December 16, 2010. Decl. ¶ 10. To meet its obligations under Paragraph 3 and section 112(c)(6), EPA must establish emission standards for certain emissions from major source boilers, area source boilers, and CISWI units. Decl. ¶ 11.

1. The Major Source Boilers, Area Source Boilers, and CISWI Rules

The development of the proposed emission standards took much longer than EPA had anticipated during the 2006 proceedings before this Court in large part because the D.C. Circuit issued three decisions in 2007 that required EPA to substantially modify its methodology for developing MACT emission standards. *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007); *Natural Resources Def. Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007) ("*NRDC I*"); *Natural Resources Def. Council v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007) ("*NRDC II*").[5] EPA explains

[5] The extensions granted by the Court in ruling on the unopposed motions for extensions of time provided most of the time necessary for EPA to complete the unexpected additional work necessary to comply with the D.C. Circuit's instructions during the rulemakings required by the Order. This background information is important, however, so that the Court can understand

the consequences of these decisions for future MACT rulemakings at greater length in the preamble to the proposed rule for emission standards for major source industrial, institutional, and commercial boilers and process heaters. 75 Fed. Reg. 32,006, 32,008-10 (June 4, 2010). *See also* Decl. ¶¶ 13-15.

In *NRDC I*, the D.C. Circuit vacated the MACT standards that EPA had promulgated for major source industrial, institutional, and commercial boilers and process heaters, which is one of the source categories needed to fulfill the Agency's section 112(c)(6) obligation. Decl. ¶ 14. Because the 2006 Order was issued before *NRDC I*, this Court, in formulating its remedy, had not considered the time and effort that would be required for EPA to redo the emission standards vacated by the D.C. Circuit. Furthermore, *NRDC I* also vacated a rule that EPA had promulgated to define the types of CISWI units that would be subject to emission standards under CAA section 129(a)(1)(D) ("CISWI Definitions Rule"). All solid waste incineration units, including CISWI units, are regulated under section CAA section 129.[6]

Under the CISWI Definitions Rule, only those units that combusted commercial or industrial solid waste and were either not designed to, or did not operate to, recover thermal energy from combustion would be subject to standards under section 129(a)(1)(D). The D.C. Circuit, however, rejected EPA's effort to exclude units that combust solid waste from the scope of section 129. The Court held that section 129(g)(1) unambiguously applies to "solid waste incineration units" and specifically to "solid waste incineration units combusting commercial or industrial waste." In vacating the CISWI Definitions Rule, the Court held that section 129(g)(1)

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why the proposals were not published until 2010, several years after the final rules under section 112(c)(6) should have been completed under the 2006 Order.

[6] The standards for setting MACT for sources regulated under sections 112 and 129 are the same and thus the Court's decisions in *Sierra Club* and *NRDC II* are also relevant to the Agency's section 129 standards.

"defines '[t]he term 'solid waste incineration unit' plainly and broadly to include 'a distinct operating unit of *any* facility which combusts *any* solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels).'" *NRDC I*, 489 F.3d at 1257. CAA section 129(g)(6), in turn, defines "solid waste" to have the meaning provided by the EPA Administrator under the Resource Conservation and Recovery Act ("RCRA").

The D.C. Circuit concluded that, because EPA had used an invalid definition of "solid waste incineration unit," EPA's determination as to which boilers and process heaters would be regulated as boilers, rather than CISWI units, was also invalid. The D.C. Circuit further concluded that, once EPA properly defined "solid waste incineration unit,"the Boilers MACT standards will need to be revised as well because the universe of sources subject to its standards will change. *Id.* at 1261.

In order to redo the major source boilers rule and to proceed with the standards for certain emissions from area source boilers and the CISWI units, EPA is working on a rule called the Non-Hazardous Solid Waste Rule, *see* Decl. 24, to define "solid waste" under RCRA. With this rule, the Agency can establish the universe of industrial, institutional, and commercial boilers and process heaters that will be regulated as boilers under section 112 and the universe that will be regulated as CISWI units under section 129.

NRDC II and *Sierra Club* did not vacate standards that would have counted towards EPA's obligations under the 2006 Order. However, the principles laid down in these decisions, as well as *NRDC I*, required EPA to substantially modify its methodology for setting emission standards pursuant to section 112(c)(3) and (k)(3) and 112(c)(6). *See* 75 Fed. Reg. at 32,009-10 (discussing effect of decisions on all MACT rulemakings).

As a result of these decisions, EPA determined that it needed to gather substantial additional information from many facilities regarding the major industrial, commercial and institutional boilers and process heaters and CISWI units in order to proceed to set MACT standards.[7] To do so, the Agency had to comply with the requirements of the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501-21. The main requirements of the PRA are that the agency seeking to collect information must publish notice of the proposed collection in the Federal Register and allow 60 days for the public to submit comments on the proposal. *Id*. § 3506(c)(2)(A). After the comments are received and reviewed, the agency must submit its proposed information collection request ("ICR") to the Director of the Office of Management and Budget ("OMB") for review. *Id*. § 3507(c)(3). After submission, the agency must publish a second Federal Register notice to inform the public that the submission has been made and that comments may be submitted to OMB. *Id*. § 3507(a)(1)(D). OMB must allow at least 30 days for public comment, *id*. § 3507(b), but must approve or disapprove the ICR within 60 days of the later of publication in the Federal Register or receipt of the ICR from the Agency. *Id*. § 3507(c)(2).

Thus, under the PRA, collecting information is a time-consuming process by design. After drafting the ICR, EPA published the first Federal Register notice on December 7, 2007, and after considering the comments received and revising the draft, EPA published the second Federal Register notice on May 14, 2008. OMB approved the first phase of the ICR, which required submission of existing information for major industrial, commercial and institutional boilers and process heaters and CISWI units, on August 8, 2008. By the end of that month, EPA

[7] EPA did not seek additional information regarding area source boilers. The Agency did not proceed separately with that rulemaking because, given its close connection to the major source boiler and CISWI rulemakings, EPA concluded that the three rules should be kept on the same track so that the public would be able to consider both in formulating their comments.

had sent the ICR out to over 3,000 facilities. The facilities were given 60 days to respond, but this deadline was later extended for facilities located in areas hit by hurricanes. The responses were all completed by mid-December 2008. After EPA and OMB reviewed these responses, OMB issued its approval of Phase 2 of the ICR, which required 200 facilities to conduct specific emissions testing, on May 21, 2009. On June 1, 2009, EPA sent out the testing surveys. Although the responses were originally due on October 31, 2009, EPA did not receive all the data until February 2010, because a number of facilities encountered difficulties in getting contractors to complete the tests and produce the analytical results.

After reviewing the information, the Agency completed the proposed rules for the major source boilers, area source boilers, and CISWI (as well as the Non-Hazardous Solid Waste Rule). The four proposals were signed on April 29, 2010. Although the notices were promptly sent to the Office of the Federal Register, the notices were not published until June 4, 2010. The citations are:

> "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters," 75 Fed. Reg. 32,006-73 (June 4, 2010) ("major source boilers rule");
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> "National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers," 75 Fed. Reg. 31,896-935 (June 4, 2010) ("area source boilers rule");
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> "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units," 75 Fed. Reg. 31,938-32,004 (June 4, 2010) ("CISWI rule"); and
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> "Identification of Non-Hazardous Secondary Materials That Are Solid Waste," 75 Fed. Reg. 31,844 (June 4, 2010) ("Non-Hazardous Solid Waste Rule").

Because of intense public interest in the proposed rules, EPA held three public hearings on the proposed emission standards and allowed the public until August 23, 2010, to comment on these complicated and interconnected rules. EPA received over 4,800 individual comments

on the proposed emission (discounting mass mailings). Some of these comments exceed 300 pages. As evidenced by the number of comments, which include a substantial amount of additional new data, the major source boilers, area source boilers, and CISWI rules will have far-reaching effects. Estimates of the monetized value of the public health benefits for all three rules combined range from $18 billion and $44 billion. The economic impacts of implementation of these standards will also be significant and vary by rule. For example, the nation-wide capital cost for the proposed major source boilers rule was estimated to be $9.5 billion in the year 2013, with a total national annual cost of $2.9 billion in the year 2013. The major source and area source boilers rules are expected to apply at almost 200,000 boilers at over 90,000 facilities. On balance, given the broad impact these rules will have, EPA believes that the overall public interest is best served by allowing EPA to re-propose the rules so that the Agency will be able to issue emission standards that are based upon a thorough consideration of all available data and reduce potential litigation risks.

2. The SSI Rule

The proposed SSI standards were published in the Federal Register on October 14, 2010. "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units," 75 Fed. Reg. 63,260-344 (Oct. 14, 2010) ("SSI rule"). EPA's signature of the proposal had been delayed by several factors. In October 2009, EPA sent an information collection survey to a small number of facilities. That survey asked for existing information and required facilities to test for certain pollutants.[8] The survey required sources to submit existing information by December 19, 2009, and the test data by February 17, 2010. The Agency provided extensions for many facilities for the submission of test data. See

[8] The number of facilities was too small to trigger the PRA requirements.

Decl. In large part, the extensions were needed so that the sewage sludge incinerator units, which are owned almost exclusively by municipalities, could secure the necessary funding and resources to complete the testing. The Agency received all of the information and test data by March 31, 2010, but there were some shortcomings that took several weeks to resolve. Finally, while developing the proposed standards, EPA recognized that it was missing some necessary cost information. A few additional weeks were required to gather this information and complete the cost assessment for the proposed standards.

The Administrator signed the proposed SSI emission standards on September 30, 2010. EPA received a request for a public hearing, and that hearing was held on October 29, 2010. The comment period closed on November 29, 2010, thirty days after the public hearing as required by CAA section 307(d)(5). EPA received over 80 comments on the proposed rule. Based on its review to date of the comments, EPA does not currently intend to re-propose the rule. The Agency cannot, however, currently respond in full to all of the significant comments submitted on the proposed rule by January 14, 2011. An extension until July 15, 2011, would allow EPA to fully consider the information presented in the significant comments and prepare an appropriate response.

STANDARD OF REVIEW

In its 2006 decision, this Court held that, when EPA fails to meet a statutory deadline for an action mandated by Congress, the appropriate remedy is for the Court to exercise its "equity powers" to establish a schedule for EPA to complete its obligations. *Sierra Club*, 444 F. Supp. 2d at 49-50. The Court's authority to modify the 2006 Order is not open to question. *Natural Resources Def. Council, Inc. v. Train*, 510 F.2d 692, 713 n.106 (D.C. Cir. 1974) (quoting *System Fed'n No. 91, Ry. Employees v. Wright*, 364 U.S. 642, 647 (1961) ("There is also no dispute but

that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances . . . have changed, or new ones have since arisen.") and *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.")).

In determining whether EPA has established that a modification is appropriate, the Court should rely on the same principles as it did in issuing the Order. In 2006, the Court recognized that "the sound discretion of an equity court does not embrace enforcement through contempt of a party's duty to comply with an order that calls him to do an impossibility." 444 F. Supp. 2d at 52 (internal quotations omitted). The Court explained that it would not "order a remedy that would . . . completely neutralize the mandatory nature of the statutory directive." *Id*. (internal quotations omitted). The Court also declined to impose a schedule that did not "afford any reasonable possibility of compliance." *Id*. at 58. The Court ultimately applied these principles to "order a regulatory schedule that is slightly more relaxed than that proposed by plaintiff, but significantly more expedited than that sought by the defendant." *Id*. at 59.

ARGUMENT

In the four and a half years since the 2006 Order, EPA has made substantial progress towards completing its obligations under that Order, as amended, and has completed its obligations under the Partial Consent Decree. The Agency is now working on the last actions necessary to discharge its obligations and bring this matter to a close, but has encountered unanticipated complexities that could create a risk that these rules will not survive judicial review unless the current deadline of January 16, 2011, is extended. On August 31, 2010, when EPA submitted its unopposed motion seeking a one-month extension to the existing deadline of December 16, 2010, in Paragraphs 1(i) and 3, the Agency had not yet reviewed the 4,800 individual comments received on the proposed boilers and CISWI rules and thus had not recognized the complexity of the issues raised in the many submissions. Importantly, certain submissions identified data that called into question the accuracy of data previously relied upon by the Agency in its proposal. The Agency has now completed its initial review of the comments and is in the process of reevaluating the substance of some aspects of its proposals, as well as the procedural steps necessary for completing the rulemakings under CAA section 307(d), which sets the requirements for promulgating the rules at issue here. EPA respectfully requests that the Court, consistent with *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d at 713, consider the current posture of these rulemakings and grant EPA the relief it seeks.

I. ALLOWING TIME FOR RE-PROPOSAL COULD AVOID DELAY IN THE ACTUAL IMPLEMENTATION OF THE SECTION 112(c)(6) EMISSION STANDARDS

Congress' purpose in setting deadlines for the promulgation of emission standards was to timely achieve the improvements in air quality that would result from the implementation of the standards. The three rules establishing standards for certain emissions from major source boilers

and area source boilers, and CISWI units, along with the Non-Hazardous Solid Waste Rule, are complicated and interconnecting rulemakings. The three air rules are expected to cover almost 200,000 boilers and 176 CISWI units. As demonstrated by the 4,800 comments received, there is a strong public interest in the outcome of these rulemakings. The interests of public policy require that EPA proceed with due care in these circumstances.

In this case, EPA's preliminary assessment is that the comments may materially affect important decisions relating to source categorizations and coverage for the final emission standards. If EPA re-proposes the rules, the interested parties will have the opportunity to identify and propose corrections to any weaknesses in the revisions that EPA is contemplating. This process is particularly valuable in complex and far-reaching rulemakings such as these standards. In light of the anticipated public health benefits and the significant costs associated with the implementation of the standards at the many facilities that will be regulated, it is important that EPA be able to formulate the final standards based on careful consideration of all relevant data and upon full consideration of comments on the anticipated changes to the proposed standards.

Furthermore, under the CAA, where the Agency makes changes between the proposed and final rules, the public must be given the opportunity to comment on the changes unless the changes are a logical outgrowth of the proposal. The D.C. Circuit has explained that "a rule is deemed a logical outgrowth if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004). Those dissatisfied with the final rules will likely allege that the changes from the proposed standards are too significant to be deemed logical outgrowths.

If EPA is allowed time to re-propose the standards, the Agency will be able to avoid any potential claims that the Agency made changes to the proposed rules that exceed the scope allowed under the logical outgrowth rule without providing an opportunity for public comment. A successful petition could undo the standards and so delay realization of the intended air quality improvements pending further administrative action. Thus, while the requested extension would add fifteen and a half months to the rulemaking process, maintaining the current deadline could result in a far longer delay.

As explained by Mr. Tsirigotis, this extension is necessary for EPA to re-propose the rules and complete the rulemakings.[9] In reaching this conclusion, Mr. Tsirigotis considered the reality that these are complex and interconnected rules. The Non-Hazardous Solid Waste Rule, defining "solid waste," will be significant in distinguishing which industrial, commercial, or institutional units are regulated as boilers and which are subject to the standards adopted for CISWI units. If such units combust secondary materials that are "solid waste," as that term is ultimately defined when EPA promulgates the Non-Hazardous Solid Waste Rule, the unit will be subject to the CISWI standards. If not, the unit may be subject to the emission standards established for major source boilers or area source boilers, as appropriate. *See* 75 Fed. Reg. at 32,008-09. Until the boundaries of the different standards are defined, many of the regulated entities, as well as members of the public, will have an equal interest in the three air emission rulemaking, as well as the Non-Hazardous Solid Waste Rule. Therefore, it is necessary that these rules be kept on the same schedule.

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[9] In 2006, the Court criticized EPA for relying on a declaration that presented a "template" schedule, based on the Agency's experience in the past and not what was in fact needed to complete the actual rules at issue. 644 F. Supp. 2d at 55-56. In contrast, Mr. Tsirigotis Declaration is based on an analysis of the development of particular rules and the issues that have been raised by the public. Accordingly, this Declaration has the specificity that the Court found lacking in EPA's prior submission.

Mr. Tsirigotis estimates that EPA would need about five months to develop the re-proposals, including the necessary supporting documentation, such as revised calculations regarding the standards, the health benefits, and the costs associated with the standards. EPA also expects that a public hearing on the proposed changes will be requested, and, of course, would have to allow time for the submission of public comments. Before taking final action, EPA would have to respond to all significant comments on the re-proposal, as well as completing its responses to the significant comments already received that are not mooted by the re-proposal. Mr. Tsirigotis estimates that this process can be completed in ten and a half months.

EPA recognizes that section 307(d)(5)(B), which establishes a process for judicial reconsideration of regulations after promulgation, could provide a path for remedying some of the issues that are causing EPA to conclude that re-proposal is advisable. This process, however, is time-consuming and prolongs uncertainty as to what the final standards will be even as regulated entities are planning the actions necessary to come into compliance. While reconsideration can be an effective means of resolving issues, EPA does not believe it is the appropriate path to pursue here. In this case, EPA has identified the need for additional public input prior to issuing the final rules, the rules affect almost 200,000 boilers and 176 CISWI units across the United States, and are complex and inter-related. Under these circumstances, EPA believes it is appropriate to seek to avoid any risk of procedural error and provide the public another opportunity to comment on the new information and data received in response to the proposals. A re-proposal would result

in standards that are more defensible and will yield environmental benefits earlier, because the final standards will more likely withstand substantive review. For this reason, the Court should grant EPA the requested extension until April 13, 2012.

II. IF THE COURT DECLINES TO ALLOW EPA TIME TO RE-PROPOSE THE SECTION 112(c)(6) EMISSION STANDARDS, THE COURT SHOULD ALLOW EPA SIX MONTHS TO COMPLETE THE PROCESS OF RESPONDING TO THE PUBLIC COMMENTS

CAA section 307(d)(6)(B) requires that EPA must respond to the significant public comments before promulgating the final rules. 42 U.S.C. § 7607(d)(6)(B) ("The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period."). Because of the unanticipated number and complexity of the comments received, EPA is concerned that it may not be able to adequately complete this duty by January 16, 2011. Mr. Tsirigotis has concluded that the Agency will require until June 15, 2011, to fully complete this important task. Decl. ¶ 49. This conclusion is not an approximation based on the Agency's experience in other rules, but is grounded in Mr. Tsirigotis's knowledge regarding the actual number and complexity of the comments that must be addressed here.

Allowing the Agency the additional time will reduce the risk that a petition for review would be granted on the ground that EPA failed to adequately respond to comments, as happened in *North Carolina v. EPA*, 531 F.3d at 928. *See also Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1051 (D.C. 2001) ("While we generally uphold the EPA's authority to make emission projections and set emission limitations accordingly, we do so only where the EPA adequately responded to comments and explained the basis for its decisions."). Thus, although this shorter extension would not address the likelihood that opponents of the rule will allege that EPA failed to allow for sufficient public comment, it would enhance the defensibility of the final emission standards. Accordingly, EPA requests that, if the Court declines to allow the Agency time to re-propose the rules at issue, the Court instead extend the deadline to June 15, 2011, so that EPA can prepare the responses required under the Clean Air Act.

III. WITH RESPECT TO THE SECTION 112(c)(3) AND (k)(3) STANDARDS, THE COURT SHOULD SET TWO NEW DEADLINES

EPA must establish standards for certain emissions from area source boilers to meet its obligations under Paragraph 1 of the Order of September 20, 2010. Because standards for certain area source boilers are needed under both Paragraph 1(i) and Paragraph 3, EPA requests that the Court establish the same final deadline for both Paragraphs. Because EPA currently does not expect to re-propose the SSI standards, this rulemaking can be completed more expeditiously. EPA has serious concerns, however, as to whether it can fully respond to the over 80 significant comments received unless the January 16, 2011, deadline is extended. The comment period closed on November 29, 2010, only forty-five days before the deadline. The Agency requests that it be allowed until July 15, 2011, to promulgate the final SSI rule so that the Agency can ensure that it has fully responded to all significant comments, as required by section 307(d), thereby improving the defensibility of the rule.

CONCLUSION

For these reasons, the Court should amend Paragraph 1(i) to require EPA to promulgate standards for one additional area source category by July 15, 2011. The final deadlines in Paragraphs 1 and 3 of the Order of September 20, 2010, should be amended to allow EPA to complete its obligations by April 13, 2012.

Respectfully submitted,

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