Submitted via email and certified mail.

July 13, 2023

Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Notice of Citizen Suit to Enforce Deadlines for Clean Air Act Large Municipal Waste Combustor Rule

Dear Administrator Regan:

This letter constitutes notice under Section 304 of the Clean Air Act, 42 U.S.C. § 7604(b)(2) that the Waste to Energy Association ("WTEA") and potentially its individual members intend to file a lawsuit against the Administrator of the U.S. Environmental Protection Agency ("EPA") for EPA's failure to make a formal determination on whether to promulgate residual risk standards for large municipal waste combustors ("large MWCs" or "LMWCs") by the deadline set forth in the Clean Air Act.[1] EPA's failure to conduct its required residual risk review for large MWC standards constitutes a "failure[s] of the Administrator to perform an[] act or duty under [the Clean Air Act] which is not discretionary" as set forth in the Clean Air Act's citizen suit provision.[2] Additionally, EPA's failure to conduct its residual risk analysis within the statutorily-mandated time frame constitutes a violation of the Administrative Procedure Act's requirement that agency actions be completed "within a reasonable time."[3]

The Waste-to-Energy Association is proud of our industry's performance under the MACT standards of the Clean Air Act. Following issuance of the 1995 MACT standards, WTE owners and operators, both public and private, made significant investments in air pollution control equipment. As a result of these investments, emissions were significantly reduced by up to 99% for certain pollutants compared to pre-MACT levels. In a 2007 memo, EPA noted "[T]he performance of the MACT retrofits has been outstanding." EPA recognized these improvements in its 2023 UMRA consultation presentation earlier this year. Our industry continues to innovate to reduce emissions. The WTEA and our members want to partner with EPA, but the deadline in the proposed consent decree in *East Yard Communities for Environmental Justice v. EPA,* No. 22-cv-0094 (D.D.C.) will not allow EPA staff to do the

[1] 42 U.S.C. §§ 7429(h)(3) and 7412(f)(2)(A).
[2] *Id.* at § 7604(a)(2).
[3] 5 U.S.C. § 555(b).

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residual risk that it is required to do, and that EPA nearly completed during the Obama Administration. Because of this fact, we are notifying the Agency of our intent to file a lawsuit to have EPA follow the science and complete the residual risk analysis that it began under the Obama Administration.

I. ORGANIZATIONS PROVIDING NOTICE

The following organization hereby provides notice of its intent to sue:

Waste to Energy Association
5600 Connecticut Avenue, NW
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WTEA is a national trade organization representing municipal organizations and partnering companies with waste-to-energy ("WTE") facilities across the United States. Our members own and operate the vast majority of the modern WTE facilities that operate nationwide. These facilities help to safely dispose of over 30 million tons of municipal solid waste, while generating 2,500 MW renewable energy using modern combustion technology equipped with state-of-the-art emissions control systems. WTE powers 2.3 million homes and recycles 700,000 tons of metal that would otherwise be lost. WTE is the only major source of net-negative greenhouse gas emission electricity and outperforms traditional renewables like wind and solar from a lifecycle perspective when the benefits of avoided landfill methane are considered. WTE is a critical component of our national infrastructure, and WTEA provides this notice of citizen suit in hopes of achieving regulatory certainty for the entire industry.

WTEA (and its predecessors) have actively participated in every major Clean Air Act rulemaking affecting WTE facilities for decades, including both the 1995 and 2006 performance standards discussed below, and WTEA has appreciated the opportunity to work with EPA on both previous iterations of the large MWC rule and the current revision process. However, WTEA is concerned that, in response to the ongoing litigation described below, EPA will promulgate a revised rule that will unlawfully not include a residual risk determination.

II. EPA WAS REQUIRED TO "REVIEW AND … REVISE" ITS LARGE MWC PERFORMANCE STANDARDS BY CONDUCTING RESIDUAL RISK ANALYSIS, AND FAILED TO DO SO

Under Section 129 of the Clean Air Act, EPA is required to establish "performance standards and other requirements" for solid waste incineration units, and the statutory deadlines for promulgating these standards vary depending on the type of incineration unit at issue.[4] In relevant part, the performance standards for new incinerator units must reflect the "maximum degree of reduction in emissions that is deemed achievable" and for existing incinerator units, the standards must be based on the "average emission limitation achieved by the best performing

[4] 42 U.S.C. § 7429(a)(1)(A).

12 percent of the existing sources."[5] These standards are commonly referred to as "Maximum Available Control Technology" ("MACT"), and the resulting requirements are commonly known as "MACT floors." EPA's Section 129 rules for LMWCs have a complex procedural history, as summarized below, that ended with EPA abruptly and unlawfully halting its required residual risk analysis.

A. The 1995 MACT Standards and 2006 MACT Standards

The Clean Air Act required EPA to promulgate its first set of MACT standards for LMWCs by November 15, 1991.[6] EPA promulgated those standards on December 19, 1995.[7] Five years later, the Sierra Club and other parties sued to compel EPA to conduct its five-year "review and … revis[ion]" of the standards.[8] EPA entered into a consent decree which required, in relevant part, EPA to promulgate revised LMWC standards on or before April 28, 2006.[9]

EPA published its first revision of the MACT standards for LMWCs on May 10, 2006, and Sierra Club challenged the standards once more.[10] In response to subsequent decisions from the United States Court of Appeals for the D.C. Circuit ("DC Circuit") and the Sierra Club challenge, EPA moved for voluntary remand of its LMWC rules.[11] In its motion for voluntary remand and subsequent pleadings, EPA maintained that the methodology that it used to calculate its MACT standards was lawful, but that intervening D.C. Circuit case law, which remanded a related rulemaking due to procedural deficiencies, made it apparent that the LMWC rulemaking contained the same procedural deficiencies and that EPA should initiate a new rulemaking.[12]

Courts have looked with disfavor on the ratcheting down of MACT standards through subsequent required rulemakings, because MACT standards are supposed to be promulgated one time.[13] In fact, the Clean Air Act does not allow EPA to reset the floors through a "MACT on MACT" process (that is, setting any revised MACT floors on the basis of emissions from facilities that have installed controls to achieve the original MACT standards).

One of the cases EPA cited as basis for its remand is the small MWC MACT court challenge in *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936 (D.C. Cir. 2004). In this case, the court struck down small MWC MACT standards that were based on state

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[5] 42 U.S.C. § 7429(a)(2).
[6] *Id.* at § 7429(a)(1)(B).
[7] 60 Fed. Reg. 65387 (Dec. 19, 1995).
[8] 42 U.S.C. § 7429(a)(5).
[9] Case No. 1:01-CV-01537, Revised Partial Consent Decree at 4 (May 14, 2003).
[10] 71 Fed. Reg. 27324 (May 10, 2006); *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir.).
[11] EPA's Mot. For Voluntary Remand, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir. Nov. 9, 2007). EPA's Reply In Support Of Voluntary Remand, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir. Dec. 6, 2007).
[12] EPA's Reply In Support Of Voluntary Remand, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir. Dec. 6, 2007) at 3; *see also Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936 (D.C. Cir. 2004). WTEA believes that the original MACT floors promulgated in 1995 were lawful, and that EPA will demonstrate as such with its revised rulemaking.
[13] *National Association for Surface Finishing v. EPA*, 795 F.3d 1, 8 (D.C. Cir. 2015) (holding that EPA is not required to calculate a new MACT floor when it revises existing standards through its technology review process); *Ass'n of Battery Recyclers Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) ("reiterating that EPA has "no obligation" to calculate MACT standards when it does its technology review).

permit limits. However, the court held that EPA could determine floors based on state permit limits if EPA can adequately explain that the state permit limits reflect a reasonable estimate of the emission levels achieved by the best-performing 12 percent of existing units. At the end of the motion EPA in part states "…. *The most practical and efficient process is for this Court to remand the case and allow EPA to revisit the 1995 rule in light of the principles set forth by the Court in Northeast Maryland Waste Disposal Authority…*"

The D.C. Circuit granted EPA's motion for voluntary remand of the LMWC MACT rules on February 15, 2008.[14] To date, regulated facilities remain subject to the 2006 standards, and WTE owners and operators, both public and private, have made significant investments in air pollution control equipment, significantly reducing emissions. We have also been awaiting EPA's residual risk analysis, which was due in 2003.

B. The 2014 Residual Risk Review and Subsequent Proceedings

EPA has a nondiscretionary duty to conduct a residual risk analysis eight years after promulgating MACT standards. Specifically, the Clean Air Act provides that the Administrator "shall, within 8 years after promulgation of standards for each category or subcategory of sources… promulgate standards … if promulgation of such standards is required in order to provide an ample margin of safety to protect public health…"[15] Further, Emission Guidelines for existing units must include several specifically-identified items, including each of the elements required by subsection (h)(3) (residual risk).[16]

In 2014, EPA began a residual risk review as the first part of the process of reconsidering the 1995 and 2006 MACT floors under the 2007 voluntary remand, and to meet its statutory obligation to review and revise the MACT standards every five years. In doing so, EPA had determined that a residual risk review was the appropriate mechanism to review and revise the MACT standards previously promulgated for LMWCs. Although the rulemaking was ultimately not concluded, EPA made considerable progress which could serve as the basis for the continuation of that work today. EPA's approach was entirely appropriate and in line with its statutory requirements, especially for an industry where MACT floors had been set, subsequently revised, and met for over decades through considerable capital investment by both private companies and public entities alike. Both EPA and WTEA and its member companies and municipalities expended considerable effort in moving the residual risk analysis forward before work was stopped abruptly in 2016. However, the residual risk review and 2007 remand were ultimately not concluded.

C. Current Litigation and Status of the Residual Risk Analysis

To date, EPA has not completed its residual risk analysis. In 2021, environmental groups sued EPA in both the U.S. Court of Appeals for the D.C. Circuit and the U.S. District Court for the District of Columbia seeking to force EPA to issue revised MACT standards. *See* Petition for Writ of Mandamus, *In re East Yard Communities for Environmental Justice,* No. 21-1271

[14] Order, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir. Feb. 15, 2008).
[15] 42 U.S.C. §§ 7429(h)(3); 7412(f)(2)(A).
[16] 42 U.S.C §§ 7429(b)(1)

(D.C. Cir. Dec. 21, 2021); *see also* Complaint, *In re East Yard Communities for Environmental Justice*, No. 1:22-cv-0094 (D.D.C. Jan. 13, 2022). EPA and Plaintiffs in the District Court case have lodged with the court a Consent Decree that would require EPA to propose and finalize new MACT rules for large MWCs by December 31, 2023, and November 30, 2024, respectively. These cases do not address EPA's failure to perform its residual risk analysis within the statutory time frames mandated by the Clean Air Act. Accordingly, WTEA will file comments requesting that EPA withdraw the CD because EPA cannot possibly meet the proposed deadlines therein if, as required by the Clean Air Act and this notice, it must also promulgate residual risk standards simultaneously. One of the main reasons cited by the Plaintiffs in the mandamus petition for requiring EPA to revise the MACT standards was that emissions from LMWC facilities were harming their communities and that the Court could redress these harms by requiring EPA to revise the outdated standards. Completing the residual risk review would directly address the communities' concerns, since that review, by definition, looks at whether there are risks to health after installation of the MACT required technologies.

As discussed below, WTEA requests that EPA conduct the residual risk analysis in conjunction with its revisions to the MACT standard and establish deadlines that do not de facto foreclose completion of the residual risk analysis.

III. EPA MUST ANALYZE RESIDUAL RISK WHEN PROMULGATING THE REVISED LARGE MWC PERFORMANCE STANDARDS

EPA should have completed its residual risk review in 2003, eight years after the 1995 standards were promulgated.[17] EPA should complete the residual risk analysis now, in conjunction with its revised MACT analysis. This would be consistent with prior EPA rulemakings in which EPA has revised or supplemented its MACT floor analysis in response to a court order, while simultaneously conducting its required risk and/or technology reviews. For example, in a rulemaking to revise its mercury and air toxics ("MATS") standards for coal and oil-fired electric utility steam generating units in response to a court remand, EPA conducted the necessary revisions to the underlying MACT standard based on the court's instructions while simultaneously publishing its residual risk and technology review determinations.[18] EPA has also taken similar steps when revising standards for other solid waste incinerators. In a proposed rule revising performance standards for Hospital, Medical, and Infectious Waste Incinerators ("HMIWI") in response to a court remand, EPA conducted its technology review of the applicable standards at the same time as its MACT review.[19] EPA should similarly do so here. Indeed, if EPA concludes that there are no remaining residual risks here under Sections

[17] *See Citizens for Pennsylvania's Future v. Wheeler*, 469 F. Supp. 3d 920 (N.D. Cal. 2020) (holding that a residual risk review is triggered by initial technology-based standards, not subsequent revisions to those standards).
[18] National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units – Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31286 (May 22, 2020).
[19] Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Hospital/Medical/Infectious Waste Incinerators, 72 Fed. Reg. 5510 (Feb. 6, 2007).

129(h)(3) and 112(f)(2), EPA should conclude that there is nothing to "review… and revise…" under 129(a)(5).[20]

EPA has committed to review and revise the LMWC emissions standards in accordance with Clean Air Act Section 129. However, because a residual risk assessment is a statutorily required component of a Section 129 rulemaking, EPA must conduct that analysis immediately.[21] Moreover, because EPA has already been through two rounds of MACT floor rulemakings, we believe that EPA should now complete its residual risk analysis first (*i.e.,* before any MACT analysis), irrespective of the order in which the deadline cases have been filed.

IV. EPA HAS VIOLATED THE CLEAN AIR ACT

In sum, WTEA hereby provides notice of its intent to commence suit for one distinct violation of the Clean Air Act – EPA's failure to perform its nondiscretionary duty to review, and if necessary to revise, its Section 129 rule for large MWCs based on residual risk analysis within 8 years of promulgation. WTEA also intends to file suit for one violation of the Administrative Procedure Act for failure to act on the residual risk analysis within a reasonable time period.

WTEA is willing to discuss effective remedies for the violation identified above that may avoid the need for further litigation. If you wish to pursue such a discussion, please promptly contact me so that negotiations may timely commence.

Sincerely,

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Thomas P. Hogan
President
Waste-to-Energy Association

CC: Melissa Hoffer, Principal Deputy General Counsel, Office of the General Counsel, EPA
Joseph Goffman, Principal Deputy Assistant Administrator, OAR, EPA
Peter Tsirigotis, Director, OAQPS, EPA

[20] *See* (72 Fed. Reg. 5510, 5532-33 (Feb. 6, 2007)): "The statute provides the Agency with broad discretion to revise MACT standards as we deem necessary, and to account for a wide range of relevant factors, including risk. … Moreover, as a general matter, EPA has stated that where we determine that existing standards are adequate to protect public health with an ample margin of safety and prevent adverse effects, it is unlikely that EPA would revise MACT standards merely to reflect advances in air pollution control technology."

[21] 42 U.S.C. § 7429(h)(3).