

July 13, 2023

Submitted via regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center; Docket No. EPA-HQ-OGC-2023-0310
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments of the Waste to Energy Association on the Proposed Consent Decree in *East Yard Communities for Environmental Justice v. EPA*, No. 22-cv-0094 (D.D.C.); Docket ID No. EPA-HQ-OGC-2023-0310

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed consent decree (“CD”) filed in the U.S. District Court for the District of Columbia and set forth in the Federal Register¹ to resolve claims brought against the Environmental Protection Agency (“EPA”) in *East Yard Communities for Environmental Justice v. EPA*, No. 22-cv-0094 (D.D.C.).

The Waste to Energy Association (“WTEA”) is a national trade organization representing municipal organizations and partnering companies that own and/or operate 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, safely disposing of over 30 million tons of municipal solid waste, while generating 2,500 MW of renewable electricity using modern combustion technology equipped with state-of-the-art emissions control systems. 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 Large Municipal Waste Combustor (“LMWC”) regulations promulgated under Section 129 of the Clean Air Act. WTEA members and communities they serve will be directly impacted by the regulations that EPA has agreed to promulgate under the terms of the Consent Decree. WTEA sets forth its comments below.

WTEA opposes entry of the consent decree because the terms of the consent decree are inconsistent with the requirements of the Clean Air Act. As detailed below, the timeline proposed needlessly and unlawfully restricts EPA’s options re how to proceed with the rulemaking process, including limiting the ability for EPA to complete a residual risk analysis, EPA’s earlier preference for addressing LMWC MACT. We do not believe that EPA can

¹ 88 Fed. Reg. 38859 (June 14, 2023).



5600 Connecticut Ave., NW
Washington, DC 20015



202-244-2114



www.wte.org

propose, take comment, analyze, and respond to comments, and promulgate a final rule, including the required residual risk analysis, that will be lawful, technically defensible and economically justified within the time frames set forth in the proposed CD. Instead, EPA should respond to WTEA's request to provide documents and data underlying the three options the Agency is considering for the rulemaking, and provide additional time to work with municipalities and WTEA and its members to promulgate a rule that is defensible. WTEA requested but was denied the documents that supported EPA's March 16, 2023 UMRA presentation on the various regulatory options for new LMWC regulations. We understand that the Florida Waste-to-Energy Coalition, a coalition of seven municipal governments that own and/or operate WTE facilities in Florida, has filed a Freedom of Information Act ("FOIA") request for this information. Moreover, WTEA has also filed a 60-day notice of citizen suit letter requesting that EPA comply with its non-discretionary duty to perform the residual risk analysis required by Clean Air Act Sections 129 and 112 for WTE facilities.²

History of WTE Regulation

Clean Air Act Section 129, 42 U.S.C 7429, requires EPA to (1) issue regulations (so-called "MACT standards") for many categories of solid waste incinerators, including WTE facilities; (2) review and revise those standards every 5 years (129(a)(5)); and (3) evaluate whether to issue "residual risk" standards 8 years after the initial MACT standards (129(h)(3) and 112(f)). For new sources, MACT standards must reflect the emission control that is achieved by the best controlled similar unit; while standards for existing facilities may not be less stringent than the average emission limitation achieved prior to setting the floor by the best performing 12 percent of units. Section 129(a)(2); 42 U.S.C. 7429(a)(2). EPA issued its first round of MACT standards to comply with these provisions in 1995. 60 Fed. Reg. 65,387 (Dec. 19, 1995).

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, the EPA noted "[T]he performance of the MACT retrofits has been outstanding." The EPA recognized these improvements in its March 16 2023 UMRA consultation presentation.

EPA then issued updated standards in 2006. 71 Fed. Reg. 27324 (May 10, 2006). Sierra Club sued EPA over both standards and filed an administrative petition for reconsideration of the 2006 standards, arguing in each that the standards were unlawful because they were based on EPA's assessment of the performance of control technologies (for new sources) and on EPA's review of state air permit limits (for existing facilities).

In November 2007, EPA moved to voluntarily remand the rule to address the issues raised by Sierra Club and subsequent case law. One of the cases that EPA cited as a basis for remand was the small MWC MACT court challenge in *Northeast Maryland Waste Disposal Authority v. EPA*.³ In *Northeast Maryland*, the court struck down the small MWC MACT

² See Exhibit 1.

³ *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936 (D.C. Cir. 2004).



standards that were based on state permit limits.⁴ However, the court held that EPA could lawfully issue floors based on state permit limits if EPA could demonstrate “with substantial evidence” that the state permit limits reflect a reasonable estimate of the emission levels achieved by the best-performing 12 percent of existing units.⁵ In light of this decision, EPA moved for a voluntary remand of its own rules, stating that “... [t]he 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*...”⁶ In 2008, the Court granted the remand.⁷ EPA has not, to date, issued revised MACT standards. We believe that EPA should, at this point, conclude the MACT evaluation by demonstrating that the appropriate evidence (data re actual emissions for the years immediately prior to the 1995 standards) shows that the 1995 standards reflected the average of the top 12% of best performing sources for existing sources. If EPA cannot make that showing, it should use that same evidence to re-evaluate the MACT floors. EPA cannot lawfully use evidence post-installation of MACT controls to re-evaluate the MACT floors.

Meanwhile, EPA began a residual risk review in December of 2014 as part of addressing the voluntary remand of the 2006 MACT standards. However, EPA has not made any final determination that would satisfy this Section 129 required mandate. The residual risk review and work on the remand of the 2006 MACT standards was stopped in 2016 after considerable progress had been made. The residual risk provisions of Section 129 and 112 require that 8 years after promulgation of MACT standards, EPA evaluate whether there are any “residual risks” remaining after those standards. CAA sections 129(h)(3) and 112(f)(2). Specifically, EPA is to determine whether new regulations are necessary to provide an ample margin of safety to protect public health or to prevent, taking into consideration costs, energy, safety and other relevant factors, an adverse environmental effect. CAA Section 112(f)(2)(A). And, if EPA concludes that there are no remaining residual risks here under Sections 129(h)(3) and 112(f)(2), EPA should conclude that there is nothing to “review... and revise...” under 129(a)(5).

Sierra Club filed both a mandamus case in the DC Circuit and the deadline case in this Court, arguing that EPA was required to update the MACT standards. While Sierra Club’s suit did not address EPA’s residual risk obligations, 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. In the CD that EPA lodged in this Court, the Agency commits to proposing MACT rules by December 31, 2023, and finalizing those rules by November 30, 2024.

On July 13, WTEA filed a 60-day notice that it may file a deadline suit in this Court, alleging that EPA had a non-discretionary duty to issue residual risk regulations by 2003, and that EPA had not done so.

⁴ *Id.* at 954.

⁵ *Id.*

⁶ EPA’s Reply In Support Of Voluntary Remand, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir. Dec. 6, 2007) at 3.

⁷ Order, *Sierra Club v. EPA*, No. 06-1250 (D.C. Cir. Feb. 15, 2008).



EPA Cannot Issue a Lawful Rule Addressing MACT Standards or Meeting its Residual Risk Obligations in the Time Frame Set Forth in the Consent Decree

Based on its presentations made during the UMRA process, EPA appears to be proposing a second review and revision of MACT standards, first promulgated in 1995 and subsequently revised in 2006, through a process of resetting the MACT floors using “post compliance data from LMWC units” without ever having completed a residual risk review as required by Sections 129 and 112 in order to meet the tight deadlines of the CD. By allowing the CD deadlines to constrain its rulemaking process in this way, EPA is effectively precluded from proposing a lawful rule. Furthermore, by limiting the information provided during the UMRA process, EPA has further constrained its ability to propose an appropriate MACT revision.

EPA first presented information on its plans for updated regulations for new WTE facilities and emission guidelines for existing WTEs in a meeting with the U.S. Conference of Mayors on March 16, 2023.⁸ We are not aware of any municipal owners of LMWCs being present at that meeting, and we know that none of our members were present, despite the fact that the EPA had a list of municipally owned facilities.⁹ EPA did not invite WTEA to that meeting, and also failed to invite many local government stakeholders. The first presentation that included state and local government owners of LMWC facilities did not occur until April 17, 2023. However, based on the presentation provided first in the March 16 meeting, and then subsequent meetings, EPA made it clear that it had already decided the fundamental principles that would guide the rulemaking. EPA stated:

- EPA must reevaluate the numerical emission limits (MACT floors) for new and existing facilities – [WTEA notes that this is not what the CD says. The CD does not call upon EPA to reevaluate numerical emission limits. It says that EPA must “...review and if appropriate revise” the emission standards for LMWCs.].¹⁰
- EPA cannot consider cost in setting the MACT floor.
- MACT floors for nine pollutants were reevaluated using post-compliance data from LWMC units operating in 1990.
- Standards will likely be more stringent and may result in adjustments to existing control technologies as well as installation of additional control technologies.¹¹

EPA also laid out total capital costs, total annual costs and associated emission reductions for three options it was considering (“Three Options”).¹² It is impossible to discern from the presentation slides what each option actually represents.

⁸ See Exhibit 2 – EPA, “Large Municipal Waste Combustors, Standards of Performance for New Stationary Sources and Emissions Guidelines for Existing Source, Federalism and UMRA Consultation,” March 16, 2023.

⁹ *Id.*

¹⁰ Further, the CD says that this review must be in accordance with 42 U.S.C. § 7429. Since residual risk is also a requirement of 42 U.S.C. § 7429, EPA must also consider residual risk in its review, but we have no indication that EPA is planning to do this or has factored residual risk into its timeline. That is why EPA should withdraw the lodged CD, and negotiate new deadlines that include this required analysis with WTEA.

¹¹ *Id.* The slides do not have page numbers, but the language quoted is from a slide entitled “Reevaluation of MACT floors.”

¹² *Id.* Slide entitled “Potential Costs for Facilities Owned/Operated by Municipalities.”



On April 17th, some of the communities that utilize WTE facilities met with EPA to voice many of the concerns set forth here and in comments discussed below. We sincerely appreciate EPA's willingness to meet and engage on the issues, but significant questions remain that materially impact our ability to evaluate the costs and provide meaningful feedback through the UMRA process. WTEA understood based on EPA's presentation during the April 27th meeting and the resulting discussion, that the options are as follows: resetting the MACT floors (Option 1); and two options resulting from a technology review, including one that appears to be limited to going beyond the MACT floor for NO_x (Option 2); and the other that appears to go beyond the MACT floor for the remaining regulated pollutants (Option 3). Despite not providing the underlying standards, the relevant technologies selected or the basis for cost information, the EPA solicited comments on its proposal.

On May 15, 2023, WTEA filed comments on EPA's UMRA presentation.¹³ WTEA argued that EPA had not provided any background information for its Three Options that would allow the regulated entities – WTEA and its member communities and companies – to provide meaningful comments, that EPA's fundamental principles discussed above were wrong, and that there were and are numerous alternatives to EPA's Three Options that the agency must consider. In particular, WTEA stated, among other things, that:

- EPA had not, and has not to date, provided any actual proposed emission standards, data or methodology associated with the Three Options or the background information used to develop the costs and emission reductions used for the Three Options.
- EPA failed to provide supporting documents in stark departure to the approach it has taken with other UMRA filings, including its process leading to the changes made to the MACT standards in 2006.
- After providing such information, EPA should allow time for WTEA and its members to comment.
- To the extent that these options are based on resetting the MACT floors, EPA has not provided information as to how this was done and how such recalculation is consistent with EPA's authority under the Clean Air Act.
- Moreover, EPA has significant flexibility on how to proceed here, and it cannot lawfully reset the MACT floors based on the average of the top 12 % of WTE units reflecting emissions achieved after MACT controls were installed to meet the 1995 and 2006 MACT standards¹⁴. Therefore, to the extent that EPA determines it must now re-analyze emissions performance data, it must use the pre-1995 data to address any revisions to those standards, not "post-compliance" data.

¹³ See Exhibit 3 – Waste to Energy Association Comments on "Reviewing Emission Standards for Clean Air Act Section 129 Pollutants from Large Municipal Waste Combustor Source Category," Federal Nonrulemaking Docket No. EPA-HQ-OAR-2022-0920" (May 15, 2023).

¹⁴ 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. *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).



- EPA should consider potential financial impacts of any regulations on the private sector as well as pass through costs to communities for those facilities that are privately owned, and EPA should also consider the environmental and social costs of alternatives to WTE, such as landfilling.
- EPA should proceed with the residual risk process at the same time as it proceeds with the MACT analysis.

Numerous other individuals and local governments filed comments. In particular, the Local Government Coalition for Renewable Energy et al¹⁵ (“LGCRC”) agreed with WTEA that EPA appeared to have narrowly and unlawfully prejudged its options. They stated that:

- Quoting EPA’s own language, EPA is not required to repeat the Clean Air Act’s MACT floor determination process when conducting its 5-year review.
- EPA has broad discretion with its approach to review and revise these standards.¹⁶
- EPA’s decision to undertake the 5-year review without at the same time considering residual risk is inconsistent with Clean Air Act Section 129 and 112(f).¹⁷

The comments of WTEA and LGCRA demonstrate that EPA has narrowly and unlawfully circumscribed the factors it will consider in the rulemaking that is the subject of the CD lodged with the Court. If EPA were to lawfully consider all the factors that it must indeed consider, including residual risk analysis, it could not possibly propose a rule by December 2023. EPA acknowledged in its April 27th meeting with the WTEA and member communities and companies that it was not completing a residual risk analysis given the anticipated schedule of the CD. In addition, if EPA agrees to share the information that served as the basis for its Three Options with WTEA, as we think it must, WTEA will then work diligently to provide meaningful comments on costs, technology, etc. so that any rule ultimately proposed would be

¹⁵ These comments were filed on behalf of the LGCRC, the United States Conference of Mayors, the National League of Cities and the National Association of Counties. See Exhibit 3.

¹⁶ LGCRC quoted the following language from EPA Federal Register notice 71 Fed. Reg. 27324, 27327-28 (May 10, 2006):

“EPA also believes that interpreting section 129(a)(5) as requiring additional floor determinations could effectively convert existing source standards into new source standards. After 5 years, all sources will be performing at least at the existing source MACT level of performance and some sources will be performing at the new source MACT level of performance. As a result, it is likely that the average performance of the best performing 12 percent of sources will be at or near the new source MACT level of performance. This would result in existing sources being subject to new source MACT requirements on a 5-year cycle regardless of whether those sources have undergone a change which would otherwise require compliance with that standard. EPA sees no indication that section 129(a)(5) was intended to have this inexorable downward ratcheting effect. Rather, we read the provision as requiring EPA to consider developments in pollution control at the sources and to revise the standards based on its evaluation of the costs, non-air quality effects and energy implications of doing so.”

¹⁷ LGCRC quoted the following language from another EPA preamble (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.”



based on sound technological and economic analysis. This again will take far more time than the CD's anticipated proposal deadline of December 2023 will allow.

Accordingly, WTEA opposes entry of the CD. WTEA requests that EPA meet with us to provide the information requested, discuss reasonable deadlines for EPA to re-evaluate the MACT standards, and to lay out a framework for the residual risk analysis.

Sincerely,



Thomas P. Hogan
President
Waste-to-Energy Association
thogan@wte.org



5600 Connecticut Ave., NW
Washington, DC 20015

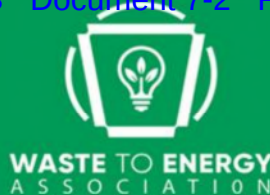


202-244-2114



www.wte.org

EXHIBIT 1



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).



5600 Connecticut Ave., NW
Washington, DC 20015



202-244-2114



www.wte.org

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
Suite 200
Washington, DC 20015
202-244-2114

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

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

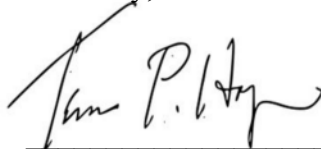
EPA has committed to review and revise the LMWC emissions standards in accordance with Clean Air Act Section 129. However, because a residual risk assessment is a statutorily required component of a Section 129 rulemaking, EPA must conduct that analysis immediately.²¹ Moreover, because EPA has already 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,



Thomas P. Hogan
President
Waste-to-Energy Association

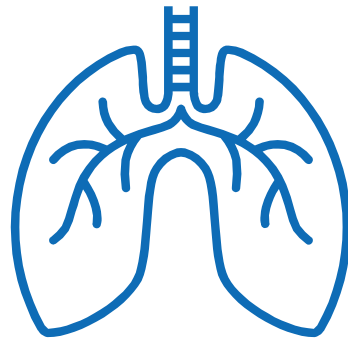
CC: Melissa Hoffer, Principal Deputy General Counsel, Office of the General Counsel, EPA
Joseph Goffman, Principal Deputy Assistant Administrator, OAR, EPA
Peter Tsirigotis, Director, OAQPS, EPA

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).



EXHIBIT 2



Large Municipal Waste Combustors

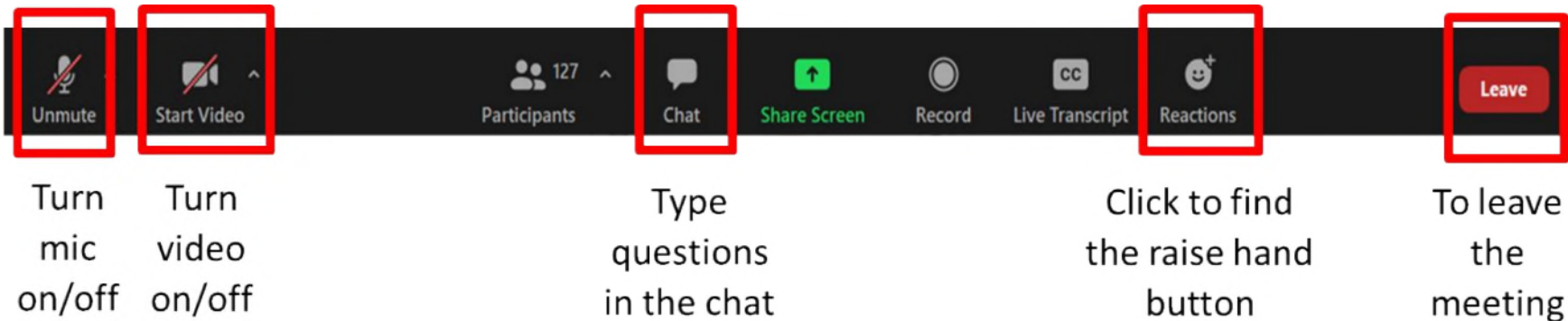
Standards of Performance for
New Stationary Sources and
Emissions Guidelines for
Existing Sources

FEDERALISM AND UMRA
CONSULTATION

MARCH 16, 2023

Meeting Logistics

- To minimize distractions, please **remain muted** and **turn off your camera** during the presentation
- If you have **questions about the information** EPA presents during today's consultation:
 - Raise your hand or type your question in the chat
 - EPA staff will call on you when we are at a stopping point, or at the end of the presentation during the discussion portion of the meeting
 - When you are called, unmute yourself and if you'd like turn on your video



Introduction to Today's Consultation

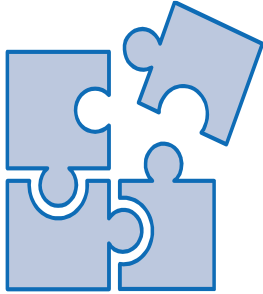
Roll Call

- Office of Congressional and Intergovernmental Relations

Welcome

- Office of Congressional and Intergovernmental Relations
- Office of Air Quality Planning and Standards, Sector Policies and Programs Division

Agenda



Background



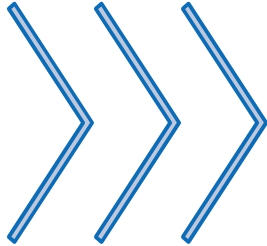
Facility Information



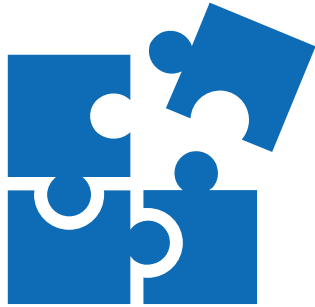
Upcoming Rulemaking



Discussion

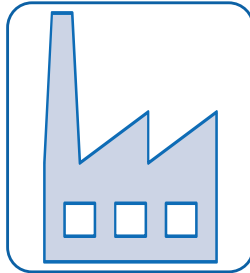


Process



Background

Large Municipal Waste Combustors (LMWCS)



Combust >250
tons/day



Combust municipal
solid waste

- Refuse collected from the **general public** and from **residential, commercial, institutional,** and **industrial** sources consisting of paper, wood, yard wastes, food wastes, plastics, leather, rubber, and other **combustible materials** and **non-combustible materials** such as metal, glass, and rock
- Does **not include** industrial process wastes or medical wastes segregated from other wastes

Clean Air Act Section 129

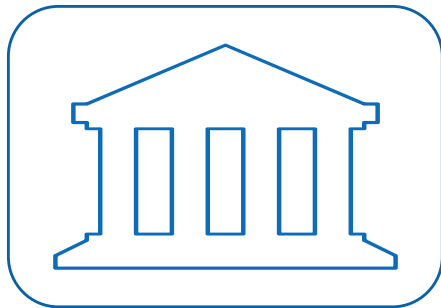
- Clean Air Act section 129 applies to any source burning **nonhazardous solid waste**
- EPA must set **numerical emissions standards** for new and existing sources for the following air pollutants:

Organics Dioxin/Furans	Metals Lead, Cadmium, Mercury	Acid Gases HCl, SO ₂	Particulate Matter	NO_x, CO
----------------------------------	--	---	-------------------------------	---------------------------

- Opacity is regulated as appropriate
- Work practice standards are not allowed
- EPA has discretion to distinguish among classes, types, and sizes within a category
- Title V operating permits are required for all sources/units
- EPA must review and revise standards as needed every 5 years (more frequent than other programs)

New Sources

- EPA's **new source performance standards** (NSPS) must be as stringent as the **best controlled similar unit**
 - This is known as the maximum available control technology (**MACT**) floor
- Standards are effective **6 months** after promulgation



Congress
Clean Air Act



EPA
Sets performance standards for new sources



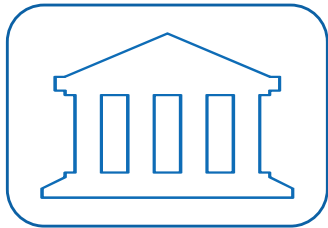
States
Issue state permits



Emissions Reductions

Existing Sources

- Emission guidelines for **existing sources** must be as stringent as the average emission limitation achieved by the **best performing 12 percent of units in the category**
 - This is known as the **MACT floor**
- Existing sources must achieve compliance no later than **5 years** after promulgation of emission guidelines, or **3 years** after the state plans are approved, whichever is earlier



Congress
Clean Air Act
Section



EPA
Sets emission
guidelines



States
Develop state
plans to submit to
EPA



EPA
Reviews and approves
state plans or issues a
federal plan



**Emissions
Reductions**

1995

- EPA adopted NSPS and Emission Guidelines for LMWC units

2000

- NSPS and Emission Guidelines fully implemented, including installation of control technologies

2006

- EPA promulgated the 5-year technology review, minor adjustments to several limits

Rule History

Typical LMWC
Control
Technology
Configurations

Fabric filters

Electrostatic precipitators

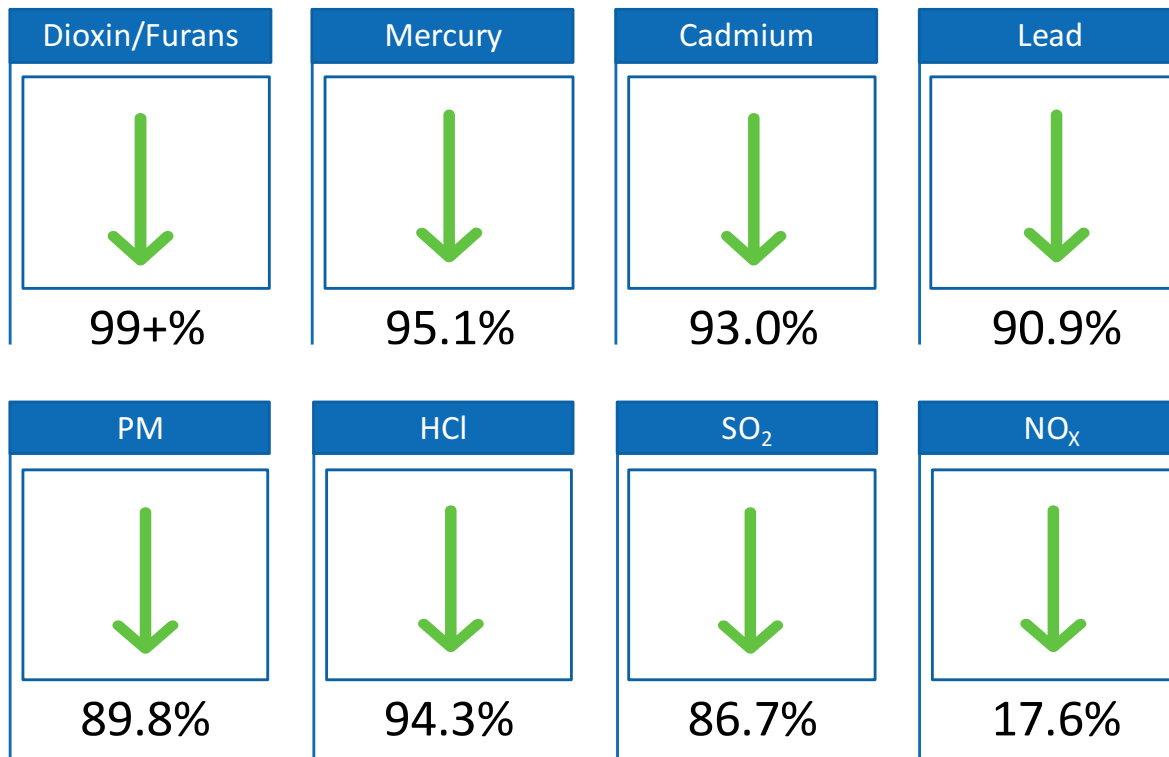
Spray dryers

Activated carbon injection

Selective non-catalytic reduction

LMWC Emission Reductions

Percent Reduction from
1990 to 2000





Facility and Proximity Information

Geographic Distribution of LMWC Facilities

- EPA's current facility list includes 152 units located at 57 facilities, operating in 18 states
 - Facility counts by state: Florida (10), New York (7), Pennsylvania (6), Massachusetts (5), Connecticut (4), New Jersey (4), Minnesota (3), Virginia (3), California (2), Maine (2), Maryland (2)
 - One facility in each of the following states: Alabama, Hawaii, Indiana, Michigan, New Hampshire, Oklahoma, Oregon, Washington, Wisconsin



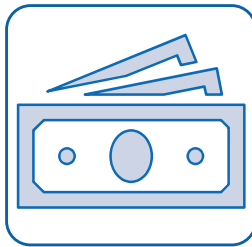
Additional LMWC Facility Information



Most facilities are located in urban areas with significant population exposure and environmental justice concerns



22 facilities are owned by state or municipal governments



EPA does not expect a significant economic impact on a substantial number of small entities for this action

Preliminary List of State or Municipal- Owned Facilities

State	Facility
Alabama	Covanta Huntsville, Inc.
California	Long Beach City, SERRF Project
Connecticut	Wheelabrator Lisbon, Inc. (WM)
Florida	Miami-Dade County Department of Solid Waste Management
	Renewable Energy Facility #1
	Pasco County
	Hillsborough City Resource Recovery Facility
	McKay Bay Refuse-to-Energy Facility
	Pinellas County Utilities Administration
	Lee County Department of Solid Waste Management
	Palm Beach Renewable Energy Facility #2
Hawaii	H-POWER
Maryland	Montgomery County Resource Recovery Facility
Maine	Ecomaine – Portland
Michigan	Kent County Waste to Energy Facility
Minnesota	Covanta Hennepin Energy Resource Co., LLC
New Jersey	Union County Resource Recovery Facility
New York	Onondaga County Resource Recovery Facility
Pennsylvania	HBG Resource Recovery FAC/HBG
	York County Resource Recovery Center
	Lancaster County Resource Recovery Facility
Washington	Waste To Energy



Upcoming Rulemaking

Elements of Rulemaking



Reevaluation
of MACT floors

Technology
Review



Other Issues

Reevaluation of MACT Floors

- EPA must **reevaluate** the numerical emission limits (MACT floors) for new and existing facilities
- EPA **cannot consider cost** in setting the MACT floor
- MACT floors for nine pollutants were reevaluated using post-compliance data from LMWC units operating in 1990
- Standards will likely be more stringent and may result in adjustments to existing control technologies as well as installation of additional control technologies:

Particulate Matter

- Fabric filter retrofit or upgraded filters (bags)

Mercury and Dioxin/Furans

- Activated carbon injection retrofit or increased carbon injection

Acid Gases

- Increased lime injection (no new equipment)

NO_x

- Add selective non-catalytic reduction (SNCR), retrofit with Advanced SNCR, or other low NO_x technology

CO

- Good combustion practices (no new equipment)

Technology Review

- Per statutory requirements, EPA must complete a 5-year review to identify any **advances in processes, practices, and technologies** that facilities could implement to achieve greater emission reduction
- EPA **may consider cost** in evaluating new technologies
- Could require greater or different use of existing control technologies as well as installation of additional control technologies:

Particulate Matter

- Fabric filter retrofit, upgraded fabric filter, or upgraded filters (bags)

Mercury and Dioxin/Furans

- Activated carbon injection retrofit, increased carbon injection, or both

Acid Gases

- Increased lime injection or circulating fluidized bed scrubber retrofit

NO_x

- Add ASNCR, retrofit with ASCNR, or other low NO_x technology

CO

- Good combustion practices (no new equipment)

Potential Costs

- Costs will depend on the current control technologies installed at the facility
- Costs may not be uniform across all LMWC units
- Costs will also depend on whether EPA decides to increase the stringency of the regulation beyond what is required based on the MACT floor reevaluation

Pollutant Grouping	Option 1			Option 2			Option 3		
	Total Capital Cost (\$)	Total Annual Cost (\$/yr)	Associated Emission Reductions ^a	Total Capital Cost (\$)	Total Annual Cost (\$/yr)	Associated Emission Reductions ^a	Total Capital Cost (\$)	Total Annual Cost (\$/yr)	Associated Emission Reductions ^a
Particulates (PM, Cd, Pb)	\$8,825,609	\$1,666,341	19.4	\$8,825,609	\$1,666,341	19.4	\$66,223,918	\$8,462,428	46.7
Mercury	\$0	\$1,400,458	19.3	\$0	\$1,400,458	19.3	\$13,364,522	\$6,454,185	115.7
Dioxins/Furans	\$0	\$11,765,702	38.1	\$0	\$11,765,702	38.1	\$21,698,028	\$31,335,027	124.6
Acid Gases (HCl, SO ₂)	\$0	\$4,568,736	945	\$0	\$4,568,736	945	\$415,038,613	\$143,181,810	1,852
Nitrogen Oxides	\$31,239,276	\$6,651,461	1,505	\$144,708,681	\$33,056,532	6,086	\$144,708,681	\$33,056,532	6,086
Carbon Monoxide	-	-	-	-	-	-	-	-	-
Overall	\$40,064,885	\$26,052,699	2,470	\$153,534,289	\$52,457,770	7,050	\$661,033,761	\$222,489,982	7,984

^a Associated emission reductions in tpy for all pollutants, except mercury (lb/yr) and dioxins/furans (g/yr).

Potential Costs for Facilities Owned/Operated by Municipalities

Table provides *preliminary* cost estimates for potential options EPA may propose in this rulemaking, but options and costs also may change as EPA continues the pre-proposal rulemaking process

Other Issues in Current Standards

- Requirements for startup, shutdown, and malfunction periods
- Potential technical corrections and clarifications from implementation
- Clarify Title V permitting requirement for air curtain incinerators burning wood wastes, yard wastes, and clean lumber



Discussion

Questions

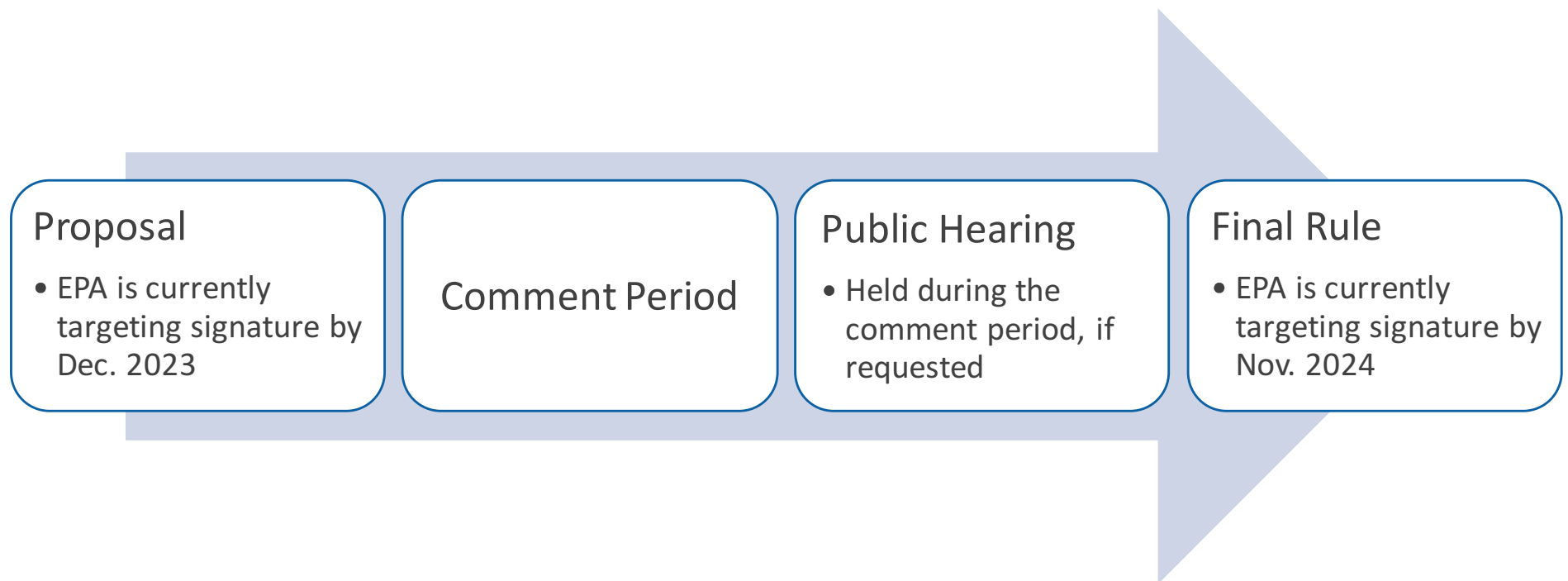
- Do you have any additional information or concerns you would like to share with EPA?
- EPA specifically would appreciate any information and data that state and local governments could provide in the following areas:
 - Is EPA’s list of state and municipal-owned facilities accurate?
 - Have there been any facility closures or are any planned in the next 3-5 years?
 - Have there been any significant upgrades in control technologies at facilities?
 - What size communities do LMWC units collect waste from?
 - How would state or local governments handle municipal solid waste if it was not combusted in a LMWC unit (i.e., what alternatives exist)?



Process

Next Steps

- After the meeting, please **forward the briefing information and materials** to your members and invite them to **develop and submit comments** to the Agency
 - Please submit comments by May 15, 2023, at regulations.gov to Docket ID No. EPA-HQ-OAR-2022-0920:
<https://www.regulations.gov/docket/EPA-HQ-OAR-2022-0920/document>
- EPA is also seeking input from **other key stakeholders and entities** through pre-proposal outreach



Rulemaking Process

For More Information on LMWCs



[EPA's LMWC Web Page](#)



[42 U.S. Code § 7429 - Solid waste combustion](#)

Contacts

For
questions
related to
the
rulemaking

Charlene Spells
Sector Policies and Programs Division
Office of Air Quality Planning and Standards

spells.charlene@epa.gov
(919) 541-5255

For
questions
related to
EO 13132 -
Federalism

Andrew Hanson
Office of Congressional and
Intergovernmental Relations

hanson.andrew@epa.gov
(202) 564-3664

EXHIBIT 3



May 15, 2023

SUBMISSION VIA ELECTRONIC MAIL

a-and-r-Docket@epa.gov

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

***Re: Federal Nonrulemaking Docket ID No. EPA-HO-OAR-2022-0920 – Reviewing
Emission Standards for Clean Air Act Section 129 Pollutants from Large Municipal
Waste Combustor Source Category***

Dear Administrator Regan:

Thank you for the opportunity to comment on the Environmental Protection Agency’s review of emissions standards for Clean Air Section 129 pollutants from the large municipal waste combustor source category.

The Waste-to-Energy Association (“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, safely disposing of over 30 million tons of municipal solid waste, while generating 2,500 MW renewable electricity using modern combustion technology equipped with state-of-the-art emission control systems. WTE is an important component of our country’s infrastructure, powering 2.3 million homes and employing approximately 6,000 American workers who strive every day to be a high-performing essential service provider to communities and the planet. WTE saves 255 acres of land a year from landfilling and recycles 700,000 tons of metals that would otherwise be lost. Fifty-seven (57) of the WTE facilities in the United States fall under the Large Municipal Waste Combustor source category (“LWMC”) covered by the EPA’s review.

The role played by WTE is more important now than ever, given the challenges posed by climate change and the need for quick and decisive action. Processing municipal solid waste (MSW) at WTE facilities reduces lifecycle greenhouse gas (GHG) emissions conservatively by one ton of



5600 Connecticut Ave., NW
Washington, DC 20015



202-244-2114



www.wte.org

GHG emissions for every ton of waste processed.¹ This occurs by displacing fossil fuels, avoiding methane produced by decomposing trash at landfills, and recovering metals for recycling.

As a result, the nation's WTE facilities annually reduce GHG emissions by over 30 million tons of CO₂ equivalents. When the benefits of avoided landfill methane are considered, WTE is the only major source of net-negative GHG emissions energy, outperforming traditional renewables like wind and solar when viewed from a lifecycle perspective.

WTE's ability to mitigate methane is especially pertinent. WTE facilities, and other forms of organics diversion from landfills, prevent all generation of landfill methane, the third largest anthropogenic source of methane, a potent GHG over 80 times stronger than carbon dioxide over 20 years. The United Nations Environment Programme (UNEP) concluded in its recent Global Methane Assessment that mitigating methane emissions is the "strongest lever" we have for avoiding the most severe impacts of climate change. In 2021, the Biden Administration and the European Union announced the Global Methane Pledge for a collective effort to reduce global methane emissions at least 30% from 2020 levels by 2030, which could eliminate over 0.2° C warming by 2050.

Landfills are the third largest source of anthropogenic methane in the U.S., and recent data reveals that their emissions to be greater than previously thought. Moreover, new research has shown landfills to be a greater source of methane than previously understood. Direct measurement of landfill methane plumes via aircraft have found actual measured emissions from landfills to be twice the amount reported in GHG inventories.²⁻⁷

WTE facilities provide these climate benefits while also being protective of human health and the environment. As noted in the EPA's March 16, 2023 presentation as part of its consultation under the Unfunded Mandates Reform Act ("UMRA"), LMWCs already achieved significant emissions reductions over the period 1990 to 2000 as a result of Maximum Achievable Control

¹ Lifecycle calculation for the net benefit of 1 ton of CO₂e / ton of MSW processed uses the 100-year methane GWP of 28. Policymakers and scientists are increasingly moving toward a 20-year methane GWP of over 80, which is more reflective of the time period over which climate action is needed.

² Peischl et al. (2013) Quantifying sources of methane using light alkanes in the Los Angeles basin, California, *Journal of Geophysical Research: Atmospheres*, **118**: 4974-4990. <https://doi.org/10.1002/jgrd.50413>

³ Wecht et al. (2014) Spatially resolving methane emissions in California: constraints from the CalNex aircraft campaign and from present (GOSAT, TES) and future (TROPOMI, geostationary) satellite observations, *Atmos. Chem. Phys.* **14**, 8173-8184. <https://www.atmos-chem-phys.net/14/8173/2014/acp-14-8173-2014.pdf>

⁴ Cambaliza et al. (2015) Quantification and source apportionment of the methane emission flux from the city of Indianapolis, *Elementa: Science of the Anthropocene*, **3**:37. <https://www.elementascience.org/articles/10.12952/journal.elementa.000037/>

⁵ Cambaliza et al. (2017) Field measurements and modeling to resolve m² to km² CH₄ emissions for a complex urban source: An Indiana landfill study, *Elem Sci Anth*, **5**: 36, <https://doi.org/10.1525/elementa.145>

⁶ Ren et al. (2018) Methane Emissions From the Baltimore-Washington Area Based on Airborne Observations: Comparison to Emissions Inventories, *Journal of Geophysical Research: Atmospheres*, **123**, 8869–8882. <https://agupubs.onlinelibrary.wiley.com/doi/pdf/10.1029/2018JD028851>

⁷ Jeong, S., et al. (2017), Estimating methane emissions from biological and fossil-fuel sources in the San Francisco Bay Area, *Geophys. Res. Lett.*, **44**, 486–495 <https://agupubs.onlinelibrary.wiley.com/doi/full/10.1002/2016GL071794>



Technology (“MACT”) standards first promulgated in 1995 under the Clean Air Act amendments of 1990. The resultant emissions performance has led numerous experts to conclude that WTE facilities operated under the modern standard pose minimal health risks. A comprehensive 2017 review of available literature on air quality health risk assessments and health surveillance programs surrounding Energy-from-waste (EfW) facilities was done for Portland, Oregon. The review “determined that there was ***not a predictive or actual increase in health issues***, including for those in vulnerable or sensitive “at-risk” populations such as children or the elderly.”⁸ A recent academic review concluded that human health is not adversely impacted by waste to energy.⁹ Furthermore, a recent environmental epidemiology study found “no statistically significant associations between annual age-adjusted emergency room or hospital discharge rates for asthma in relation to annual average PM_{2.5}, NO₂ or SO₂ air concentrations due to emissions from the WTE facility” located in the City of Baltimore during the 3-year time period assessed by the study.¹⁰

As integral members of the communities in which our association members operate, these facts are important to them and their neighbors. Whether owned by local governments or private companies, WTE facilities directly serve the needs of the community. Therefore, they believe it imperative to not only be strong community members but to also address issues around environmental justice. Our members are fully committed to building and maintaining partnerships with their communities and have open communication.

Some of our individual members will provide the EPA with additional detail under separate cover; however, some recent highlights of their work in communities include:

- Support of New Jersey’s groundbreaking Environmental Justice Law.
- Educating future STEM leaders about the importance of sustainable waste management and climate change through tours, sponsored school recycling programs, and supported environmental clubs, like the Green Bees in Newark, New Jersey.
- Hiring locally by participating in local recruiting efforts and vocational programs.
- Serving our veteran communities by providing responsible flag retirement services in communities across the county.
- Providing drug take-back services designed to help communities provide safe and secure options for removing unused pharmaceuticals from homes.

The continued operation of LMWCs and other WTE facilities is critical to meet the needs of communities. Without WTE, communities would be forced to find other alternatives to manage their waste. Unfortunately, the only other option to manage waste remaining after recycling is

⁸ Ollson Environmental Health Management (2017) *Metro Health Impact Assessment Evaluation of Landfills and Waste to Energy Options for Managing Municipal Solid Waste*. https://www.oregonmetro.gov/sites/default/files/2017/07/06/Metro_WTE_Landfill_HIA_Final_with_appendices_20170706.pdf

⁹ Castaldi, Marco J. (2021) *Scientific Truth About Waste-to-Energy*. https://gwcouncil.org/wp-content/uploads/2021/11/Marco-Castaldi_Scientific-Truth-About-Waste-to-Energy.pdf

¹⁰ Foster, S., B. Hoffman (2019) *Evaluation of Asthma Emergency Room and Hospital Discharge Rates in Relation to Ambient Air Concentrations Associated with the Wheelabrator Waste-to-Energy Facility*



5600 Connecticut Ave., NW
Washington, DC 20015



202-244-2114



www.wte.org

landfilling, the least preferable option under the EPA's waste management hierarchy, as well as the hierarchies of many states. Not only would this exacerbate GHG emissions, it would increasingly mean long-haul transport of wastes to other communities, which may have their own set of environmental justice implications.

The closure of LMWC facilities would not increase recycling and, in fact, increased costs stemming from more stringent MACT floors or additional standards that municipalities would incur would compete with the same resources that currently fund other municipal programs, including recycling programs. While our members continue to evaluate alternative technologies and advance toward "zero waste," the persistent reality is that significant amounts of post-recycled waste remain that need to be managed. Given the criticality of maintaining the LMWC capacity to address the solid waste management needs in the most sustainable way currently possible, we offer the following comments for consideration by the EPA.

We request that the EPA share additional background and information beyond what the EPA provided in its UMRA presentation to allow for constructive comments from municipal owners.

The EPA first presented information on its review of "LMWC Standards of Performance for New Stationary Sources and Emissions Guidelines for Existing Sources" ("New LMWC Guidelines") to the U.S. Conference of Mayors on March 16, 2023. We requested, most recently at an in-person meeting on April 27 between the EPA, WTEA and its members, the background information used to develop the costs and emission reductions used for the three options presented as part of that UMRA briefing presentation. Without such background, we are unable, consistent with the requirements of UMRA, to meaningfully comment on costs, the technology review, or available technologies considered by the EPA.

While the EPA has asked the LMWC facilities to comment on the information presented in the UMRA briefing, their comments cannot be constructive and are, at this time, speculative without the benefit of reviewing such background information. Background information would include: the emissions database and calculations used to reset the MACT floor (Option 1), the technologies considered in the technology review (Option 2) and the basis for going beyond the MACT floor (Option 3).

The estimated total capital costs for the three options for just the 21 municipally owned facilities range from \$40 million (Option 1) to \$661 million (Option 3). When one considers the entire universe of 57 publicly and privately owned LMWC facilities, total capital costs range from \$104 million to \$1.7 billion. Given these significant costs, revised MACT standards will have major impacts on the economics of LMWC facilities vital to municipal integrated solid waste management programs and to those municipalities and communities who rely on privately owned LMWCs to manage their solid waste. Obtaining the background information on how these costs were derived and/or calculated is crucial to understanding if these costs accurately reflect all municipal and owner costs of implementing the various options and subsequent impacts on municipal/community budgets and ultimately on taxpayers.



5600 Connecticut Ave., NW
Washington, DC 20015



202-244-2114



www.wte.org

Without an opportunity to review, at this time, the database used to set the reevaluated MACT floors, we cannot provide meaningful comments on achievability of the floors and on the data screening analysis and statistics employed to derive the floors. In our experience, we have found this collaboration critical in ensuring effective rulemaking processes. During the development of the 2005 LMWC MACT floor revisions, we (together with the EPA) found discrepancies and errors in the EPA's emissions database, including the treatment of outliers and errors in statistics and calculations. For instance, an artificial data set was used to derive the proposed SO₂ limit where continuous emissions monitoring system ("CEMS") data was used to set the concentration limit and an entirely different data set derived from stack test results was used to set the alternative removal limit. Finding these errors through collaboration between the EPA and the regulated community was instrumental in the development of an accurate and defensible set of regulations. Additional "eyes" on the data can and did identify issues well in advance of the floors being formerly proposed.

Upon making additional background information available, the EPA should provide additional time for municipal owners of LMWCs to respond as part of the UMRA process.

The EPA's first presentation on its review of New LMWC Guidelines was made on March 16 to the U.S. Conference of Mayors, as noted above, but we are not aware of any municipal owners of LMWCs as being present at that meeting, and we know that none of our members were present. The first presentation that included state and local government owners of LMWC facilities was not until April 17, 2023. The EPA's requested response deadline, as noted in the EPA's presentation of May 15, 2023 provides only 28 days from the first notification to state and local governments that are impacted by the potential changes, far less than the 60 days specified by UMRA. Note that the EPA's deadline requested in the presentation is inconsistent that the June 6, 2023 deadline noted in the docket.¹¹

When assessing potential financial impacts, the EPA should consider the impact of pass-through costs to communities for those facilities that are privately owned and should also consider the environmental and social costs of alternatives (i.e., landfilling).

While 21 LMWCs are owned by local governments that will have a direct exposure to costs associated with compliance with revised MACT standards, the actual financial impact to local governments will reach beyond those directly-owned facilities. An additional 36 LMWCs are owned by private companies but predominately serve local governments in managing MSW. Costs of privately owned facilities to comply with any new MACT standards will largely be passed along to municipal governments in the form of higher tip fees.

Additionally, to provide a more complete picture of the costs of more stringent MACT limits, the EPA should assess the costs, including social costs of increased GHG and methane emissions, of alternatives to LMWCs, including landfills. The U.S. Interagency Working Group on Social Cost of Greenhouse Gases has developed social costs of GHG emissions that are specifically designed to be used to assess potential regulatory impacts. To the extent that new LMWC MACT limits result in greater landfilling, there would be an increased social cost, as a result of the increased

¹¹ U.S. EPA (2022) Memorandum: Posting EPA-HQ-OAR-2022-0920 to Regulations.gov for Public Access. <https://www.regulations.gov/document/EPA-HQ-OAR-2022-0920-0001>



GHG emissions.

Given the potential financial impact of some of the options under consideration by the EPA, the EPA needs to assess the potential financial impact on the private sector to meet the requirements of UMRA.

Part of the purpose of UMRA is to require that Federal agencies “prepare and consider estimates of the budgetary impact of regulations containing Federal mandates upon . . . the private sector.”¹² Consistent with this purpose, the statute requires that, where costs to the private sector exceed \$100,000,000 in any one year, an agency shall prepare a written statement, including a “quantitative and qualitative assessment of the anticipated costs and benefits of the Federal mandate” as well as other economic estimates, a summary of comments submitted and a summary of the agency’s evaluation of those comments and concerns.¹³ An agency is further instructed to consider a reasonable number of regulatory alternatives and to “select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.”¹⁴

Large MWC facilities have had significant improvements in environmental performance since the existing MACT floors were established.

LMWCs have had significant improvements in environmental performance since the existing MACT floors were established. These significant improvements have *resulted from a variety of factors, including voluntary operational changes to reduce emissions and both voluntary and regulatory-driven capital improvements to facility air pollution control systems, including:*

- Replacement of electrostatic precipitators (“ESPs”) with fabric filters at LMWCs in West Palm Beach FL, Millbury MA, Camden NJ, Newark NJ, Rochester MA, and, most recently, Baltimore MD.
- Upgrades to existing selective non-catalytic reduction (“SNCR”) controls for nitrogen oxides (“NOx”) to meet Ozone Transport Region NOx reasonably available control technology (“RACT”) limits of 150 ppm relative to the current MACT standard of 205 ppm as part of State Implementation Plans for the Ozone National Ambient Air Quality Standard (“NAAQS”) in Connecticut, Maryland, Massachusetts, New Hampshire, and New Jersey.
- Installation of proprietary Low NOx (LNTM) Technology to existing SNCR NOx control systems to achieve NOx RACT limits of 110 ppm in Connecticut, Maryland, Massachusetts, and Virginia.
- Pending upgrades to SNCR systems at several facilities to meet Pennsylvania DEP RACT III limit of 110 ppm for compliance with the 2015 ozone NAAQS.

¹² 2 U.S.C. §1501(7)(B).

¹³ *Id.*, §1532(a). With regard to the cost-threshold, EPA has projected total annual costs to range from \$26 million to \$222 million under the “potential options” that EPA has identified and that total capital costs could range from \$40 million to \$661 million. Consultation slide 22.

¹⁴ *Id.*, §1535(a). In the event this option is not selected, an affected agency must publish an explanation as to why it was not adopted. *Id.*, §1535(c).



- Pending upgrades to the SNCR systems at the Stanislaus County WTE facility to comply with new particulate matter (“PM”) limits.

Furthermore, several LMWCs will also be subject to new NO_x limits as a result of the March 15 Good Neighbor Plan, designed to reduce the transport of NO_x and ozone from upwind states to downwind states. The new limits for WTE facilities are 105 ppm over a 24-hr average and 110 ppm over a 30-day rolling average.

To the extent that EPA has presented information regarding how it determined potential options for the rulemaking, this information is incomplete. Specifically, the EPA has indicated that options under consideration are based on resetting MACT floors, but the EPA has not provided information regarding how this was done and how such recalculation is consistent with the Agency’s authority under the Clean Air Act (“CAA”).

We understand that the EPA does not have a pre-1995 MACT database of emission levels and thus the agency may be using data for emission levels achieved after the 1995 MACT floors became effective in 2000, following air pollution control retrofits with fabric filters, acid gas controls (spray dryer absorbers), activated carbon systems and SNCR NO_x controls. If this is accurate, the use of post-1995 MACT data results in new MACT floors that are significantly more stringent than floors derived from actual emission levels prior to the 1995 MACT implementation.

Further, the EPA, in 2005, undertook the first MACT review and lowered the MACT floors for particulate, cadmium, lead, and mercury that were finalized in 2006. While EPA indicated during the meeting on April 27th that the emissions database includes emissions data through 2008, this oral statement only serves to introduce another layer of uncertainty as to the assumptions and data that may have been utilized to reevaluate the floors. This is especially pertinent to mercury where some states adopted limits of 28 µg/dscm, well below the 2006 revised MACT standard of 50 µg/dscm.

Without being able to review the EPA’s database or understand its methodology and rationale for what data was utilized, we cannot adequately comment on the floors, their achievability, and the resulting costs of achieving the resulting emissions levels. We can also not comment on the consistency of EPA’s approach that may superimpose an added layer of stringency to emissions levels already achieved through previously set MACT floors with regard to CAA Sections 129/111d. Furthermore, we cannot comment on the EPA’s approach to the lack of pre-1995 emissions data that would have been the basis of the industry’s initial MACT floors and to the agency’s application of reasonable discretion to make appropriate adjustments for the lack of pre-1995 MACT emissions data.

The EPA is not required to adopt the approach it has indicated it may take, in its UMRA presentation, to reevaluate the MACT floors.

The EPA has significant flexibility with how to proceed with reevaluating MACT floors. The EPA has, in the past, signaled its intent to use this flexibility. We urge the EPA to carefully



consider our comments and previous related activity, including their residual risk review process that began in 2014, in adopting their approach to resetting the MACT floors.

The EPA should clarify its decision to not complete the Residual Risk Analysis the agency began in 2014 and how the results from completion of the RR could impact its approach to reevaluating the MACT floors.

In 2014, the EPA commenced a residual risk review (“RR”) as part of the process of reconsidering the 1995 MACT floors under the 2007 voluntary remand. Considerable effort was spent by the EPA and the MWC industry working through the RR with substantial progress made before work ceased with a change in administration. It is not clear, however, whether this process had any impact on the options that EPA outlined in its presentation. Again, the lack of backup and detail for EPA’s proposed options greatly hinders – if not totally prevents – the Agency from receiving meaningful comments and input in accordance with the objectives of UMRA. We request that the Agency adopt a different posture towards its approach to UMRA compliance and increase the transparency of the various assumptions and CAA interpretations that underly its proposed options.

We believe that as part of the process required under UMRA and the process of reevaluating the MACT floors, the EPA should complete the RR concurrently. Based on oral statements made during the April 27th meeting, the same emission database that the EPA is using to revise the floors was used in the RR review. Completion of the RR as part of the UMRA process and floor reevaluation could provide the EPA useful additional background for evaluating the options and the additional costs to state and local governments as well as support the floor reevaluation, especially given the lack of pre-1995 MACT emissions data.

Thank you for your consideration of the foregoing comments and the various submissions of LMWCs, communities, and other stakeholders, and we look forward to continuing our collaborative efforts with the EPA as the Agency moves forward with its reevaluation of MACT floors.

Sincerely,

Thomas P. Hogan
President
Waste-To-Energy Association

Chris Averyt
Director Solid Waste Management
City of Spokane Waste to Energy Facility

Michael Van Brunt
Senior Director, Sustainability
Covanta Holding Corporation



5600 Connecticut Ave., NW
Washington, DC 20015



202-244-2114



www.wte.org

Kevin H. Roche
Chief Executive Officer/General Manager
ecomaine

Timothy Steinbeck
President
GRE HERC Services, LLC

David McNary
Assistant Director
Hennepin County Department of Environmental Services

Jason Gorrie
President
JMG Engineering, Inc.

Darwin J. Baas
Director
Kent County Department of Public Works

Robert Zorbaugh
Chief Executive Office
Lancaster County Solid Waste Management Authority

Douglass Whitehead
Director
Lee County Solid Waste Department

Michael J. Fernandez
Director
Miami-Dade County Department of Solid Waste Management

Kevin Spillane
Executive Director
Onondaga County Resource Recovery Agency

Dan Pellowitz
Executive Director
Solid Waste Authority of Palm Beach County

Paul S. Sacco
Director
Department of Solid Waste - Pinellas County Government

R. Stephen Lynch
President
RS Lynch & Company, Inc.



5600 Connecticut Ave., NW
Washington, DC 20015



202-244-2114



www.wte.org

Louis Vetrone
Deputy Commissioner
Westchester County Department of Environmental Facilities

Timothy Porter
Director Air Quality Programs
WIN-Waste Innovations Holdings Inc.

David Vollero
Executive Director
York County Solid Waste Authority



5600 Connecticut Ave., NW
Washington, DC 20015



202-244-2114



www.wte.org

Appendix A**List of Municipally-Owned LMWCs**

<u>State</u>	<u>Facility</u>	<u>Owner</u>	<u>Approximate People Served</u>
AL	Huntsville Waste-to-Energy Facility	Solid Waste Authority of Huntsville	277,000
CT	Southeast Resource Recovery Facility (SERRF)	Southeast Resource Recovery Facility	500,000
CT	Wheelabrator Lisbon	Eastern CT Resource Recovery Authority	225,000
FL	Pinellas County Resource Recovery Facility	Pinellas County	1,000,000
FL	Pasco County Solid Waste Resource Recovery Facility	Pasco County	440,000
FL	Palm Beach Renewable Energy Facility 2	Palm Beach County	1,270,000
FL	Palm Beach Renewable Energy Facility 1	Palm Beach County	1,270,000
FL	Miami-Dade County Resource Recovery Facility	Miami-Dade County	2,532,000
FL	McKay Bay Refuse-to-Energy Facility	City of Tampa	337,000
FL	Lee County Resource Recovery Facility	Lee County	627,000
FL	Hillsborough County Resource Recovery Facility	Hillsborough County	1,234,000
HI	Honolulu Resource Recovery Venture - HPOWER	City & County of Honolulu, HI	908,000
MD	Montgomery County Resource Recovery Facility	Northeast Maryland Waste Disposal Authority	972,000
ME	ecomaine	ecomaine	250,000
MI	Kent County Waste to Energy Facility	Kent County	605,000
MN	Hennepin Energy Resource Center (HERC)	Hennepin County	1,156,000
NJ	Union County Resource Recovery Facility	Union County Utilities Authority	500,000
PA	York County Resource Recovery Center	York County Solid Waste Authority	450,000
PA	Susquehanna Resource Management Complex	Lancaster County Solid Waste Mgmt. Authority	100,000
PA	Lancaster County Resource Recovery Facility	Lancaster County Solid Waste Mgmt. Authority	420,000
WA	Spokane Waste to Energy Facility	City of Spokane	426,000

5600 Connecticut Ave., NW
Washington, DC 20015

202-244-2114

www.wte.org

Appendix B**List of Privately Owned MWCs Serving Municipal Customers**

<u>State</u>	<u>Facility</u>	<u>Owner</u>	<u>Approximate People Served</u>
CA	Stanislaus County Resource Recovery Facility	Covanta Stanislaus, Inc.	521,000
CT	Bristol Resource Recovery Facility	Covanta Bristol, Inc.	373,000
CT	Southeastern Connecticut Resource Recovery Facility	Covanta Company Southeastern CT	248,000
CT	Wheelabrator Bridgeport	Wheelabrator Bridgeport, L.P.	816,000
FL	Lake County Resource Recovery Facility	Covanta Lake, Inc.	288,000
FL	Wheelabrator South Broward Inc.	Wheelabrator South Broward Inc.	850,000
IN	Indianapolis Resource Recovery Facility	Covanta Indianapolis, Inc.	908,000
MA	Haverhill Resource Recovery Facility	Covanta Haverhill, Inc.	475,000
MA	SEMASS Resource Recovery Facility	Covanta SEMASS, L.P.	1,000,000
MA	Wheelabrator Millbury	Wheelabrator Millbury Inc.	750,000
MA	Wheelabrator North Andover	Wheelabrator North Andover Inc.	426,000
MA	Wheelabrator Saugus	Wheelabrator Saugus Inc.	850,000
MD	Wheelabrator Baltimore	Wheelabrator Baltimore, L.P.	1,427,000
ME	Penobscot Energy Recovery Company	PERC holdings LLC	400,000
MN	Great River Energy - Elk River Station	Great River Energy	850,000
MN	Xcel Energy - Red Wing Steam Plant	Xcel Energy	128,000
MN	Xcel Energy - Wilmarth Plant	Xcel Energy	
NH	Wheelabrator Concord	Wheelabrator Concord L.P.	169,000
NJ	Covanta Camden Energy Recovery Center	Covanta Camden GP, LLC	506,000
NJ	Essex County Resource Recovery Facility	Covanta Essex Company	1,200,000
NJ	Wheelabrator Gloucester Company	Wheelabrator Gloucester Company L.P.	263,000
NY	Baylon Resource Recovery Center	Covanta Babylon, Inc.	430,000
NY	Covanta Hempstead	Covanta Hempstead Co.	1,000,000
NY	Huntington Resource Recovery Facility	Covanta Huntington, Inc.	345,000
NY	Niagara Falls Resource Recovery Facility	Covanta Niagara Company	900,000
NY	Onondaga Resource Recovery Facility	Covanta Onondaga, L.P.	470,000
NY	Wheelabrator Hudson Falls	Wheelabrator Hudson Falls LLC	346,000
NY	Wheelabrator Westchester	Wheelabrator Westchester, L.P.	855,000
OK	Covanta Tulsa Renewable Energy Facility	Covanta Tulsa Renewable Energy LLC	388,000
OR	Marion County Solid Waste-to-Energy Facility	Covanta Marion, Inc.	315,000
PA	Covanta Plymouth Renewable Energy	Covanta Plymouth Renewable Energy, LLC	422,000



<u>State</u>	<u>Facility</u>	<u>Owner</u>	<u>Approximate People Served</u>
PA	Delaware Valley Resource Recovery Facility	Covanta Delaware Valley, L.P.	1,000,000
PA	Wheelabrator Falls	Wheelabrator Falls Inc.	550,000
VA	Alexandria/Arlington Resource Recovery Facility	Covanta Arlington/Alexandria Inc.	300,000
VA	I-95 Energy/Resource Recovery Facility (Fairfax)	Covanta Fairfax, Inc.	1,652,000
VA	Wheelabrator Portsmouth	Wheelabrator Portsmouth Inc.	1,128,000



5600 Connecticut Ave., NW
Washington, DC 20015



202-244-2114



www.wte.org