



Representing the Interests of America's Industrial Energy Users since 1978

May 20, 2011

VIA E-DOCKET

The Honorable Lisa P. Jackson
Administrator
Room 3000
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Petition for Administrative Stay of (1) the National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 15,554 (Mar. 21, 2011) (Docket No. EPA-HQ-OAR-2006-0790) and (2) the Identification of Non-Hazardous Secondary Materials That Are Solid Waste, 76 Fed. Reg. 15,456 (Mar. 21, 2011) (Docket No. EPA-HQ-RCRA-2008-0329).

Dear Administrator Jackson:

The Council for Industrial Boiler Owners (CIBO) respectfully requests a stay of (1) the National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 15,554 (Mar. 21, 2011) (Docket No. EPA-HQ-OAR-2006-0790) (the Area Source rule) and (2) the Identification of Non-Hazardous Secondary Materials That Are Solid Waste, 76 Fed. Reg. 15,456 (Mar. 21, 2011) (Docket No. EPA-HQ-RCRA-2008-0329) (the NHSM rule) pending reconsideration. CIBO joined the April 27, 2011 Joint Industry Petition to stay the Boiler MACT and CISWI rules,¹ which was granted by EPA May 16, 2011.² Nevertheless, due to the interdependency of all four rules, and the harm imposed by the Area Source and NHSM rules, CIBO urges EPA to stay the Area Source and NHSM rules as well.

CIBO is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and university affiliates with members representing 20 major industrial sectors. CIBO

¹ 76 Fed. Reg. 15,608 (Mar. 21, 2011) (Boiler rule); 76 Fed. Reg. 15,704 (Mar. 21, 2011) (CISWI rule).

² *Industrial, Commercial, and Institutional Boilers and Process Heaters and Commercial and Industrial Solid Waste Incineration Units, Final rules; Delay of effective dates*, --Fed. Reg.--(Web Release May 16, 2011).

members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information within the industry and between industry and government relating to energy and environmental equipment, technology, operations, policies, law and regulations affecting industrial boilers. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost-effective energy and environmental regulations for industrial boilers. CIBO supports regulatory programs that provide industry with enough flexibility to modernize – effectively and without penalty – the nation's aging energy infrastructure, as modernization is the key to cost-effective environmental protection.

SUMMARY OF PETITION

On March 21, 2011, EPA promulgated four interrelated rules – the Boiler MACT, Area Source, CISWI and NHSM rule – that combined impose an unprecedentedly complex and costly set of requirements on boilers and process heaters. EPA recognized in promulgating these final rules that there were old issues that were not addressed and new issues the Agency failed to address, to such an extent that EPA announced in advance of publication of the rules that it would reconsider certain aspects of 3 of the 4 rules Clean Air Act (CAA) §307(d)(7)(B).

In advance of releasing the final rules and announcing a reconsideration, EPA formally expressed concerns that the judicial deadlines would restrict its ability to promulgate coherent, well-developed rules. EPA received over 4,800 comments in response to the proposed rules, many of which raised issues that EPA had not fully considered and that provided substantial additional data. That data now raises questions about some of the Agency's initial conclusions. In the lawsuit unrelated to the merits of the rules, in which EPA had joined with environmental plaintiffs to recommend deadlines for the rules' completion, EPA sought from the D.C. District Court a 16-month extension so that it could more fully analyze and address the technical implications raised by the commenters. EPA cautioned the court that the un-reviewed data in the comments "may materially affect important decisions relating to source categories and coverage for the final emissions standards."³ Unfortunately, the Court denied this request, although an extension would have best served the public interest and given EPA an opportunity to ensure that the final rules were logical outgrowths of the proposals and that the standards were attainable by covered sources.

On March 21, 2011, EPA finalized the rules according to the timeline EPA had negotiated with environmental plaintiffs. However, EPA also issued a Notice of Reconsideration of certain issues of the Boiler MACT, Area Source, and CISWI rules. 76 Fed. Reg. 15,266. In announcing its decision to reconsider parts of the rules under §307(d)(7)(B) of the Clean Air Act, 42 U.S.C. §7607(d)(7)(B), EPA emphasized that it was seeking additional input on difficult technical issues identified during the public comment period, as well as comments on several centrally relevant issues in the final rules which arose after the public comment period had ended. EPA did not notice a reconsideration of the NHSM.

³ *Sierra Club v. Lisa P. Jackson, Adm'r, EPA*, No. 01-1537 (D. D.C. filed Dec. 07, 2010) (EPA's Mem. in Supp't of Motion to Amend Order of March 31, 2006 at 2).

The concurrent announcement of a final rule and its reconsideration is to our knowledge unprecedented in the history of EPA rulemaking. It is not unusual for EPA to delay deciding on reconsideration petitions until well into the litigation challenge of the rule. The recent Portland Cement MACT (PC MACT) rulemaking proceedings reflects that practice. On May 11, 2011, EPA released its decision granting reconsideration of certain provisions of the PC MACT rule, just days before the date on which Petitioners must file their opening brief in the case. Here, however, EPA was so certain of the procedural irregularities and lack of confidence in the substance of its rulemaking that it announced reconsideration *sua sponte* upon the signing of the rule.

The final Area Source and NHSM rules will take effect May 20, 2011, triggering compliance obligations and a three-year period for all covered sources to come into compliance with the emission standards and only one year for Area Source units to comply with the tune-up requirement. The emission standards apply to new sources for which construction began after the June 4, 2010 proposal date of the rules. Notwithstanding that EPA itself determined a need for reconsideration of the rules due to the existence of "certain issues of central relevance to these rules [that] arose after the period for public comment or [that] have been impracticable to comment upon,"⁴ EPA did not stay the compliance period or new source applicability dates in conjunction with its notice of reconsideration. The continued running of this compliance period now and while the rules are being reconsidered will require CIBO members to take action and expend resources to comply with rules that EPA has already declared is subject to change. A stay will best advance the public interest by enabling covered sources to allocate resources toward complying with the actual standards, rather than potentially interim standards. Staying the effectiveness of the rules will not diminish the environmental protections that EPA aims to accomplish under either the current or the reconsidered rule.

Considering this and for the reasons stated more fully below, EPA should use its authority under §301(a) and §307(d) of the Clean Air Act, and §705 of the Administrative Procedure Act to stay the Area Source rule and NHSM rule requirements for affected sources to allow the full three-year compliance period to begin only once a final decision on reconsideration is reached.

I. EPA HAS AUTHORITY TO GRANT A STAY OF THE AREA SOURCE AND NHSM RULES.

Pursuant to CAA §307(d)(7)(B), Congress authorized EPA to stay the effectiveness of rules promulgated under the Clean Air Act for up to three months to accommodate the time needed for administrative reconsideration.⁵ In its March 21, 2011 Notice of Reconsideration, EPA specified deficiencies in the Boiler, the Area Source, and CISWI rules. Invoking CAA §307(d)(7)(B), EPA provided several justifications. EPA noted that "reconsideration and additional opportunity for public review and comment should be obtained" for some provisions and for others, "further revisions may be warranted because they involve issues of central relevance that arose after the period for public comment or may have been impracticable to comment on." 76 Fed. Reg. 15,267. EPA also noted that some issues raise "difficult technical issues that we believe may benefit from additional public involvement." *Id.* EPA has acknowledged that its *sua sponte* objections to the rules satisfy the CAA §307(d)(7)(B) standard for reconsideration. CIBO and other parties will petition EPA to reconsider

⁴ 76 Fed. Reg. 15,267.

⁵ 42 U.S.C. §7607(d)(7)(B).

other aspects of these rules as well. Considering this, a stay is clearly warranted for the Area Source and NHSW rules.

Congress granted EPA additional independent authority to grant a stay beyond 3 months. CAA §301(a)(1) authorizes EPA to "prescribe such regulations as are necessary to carry out his functions under the Act." A stay of the rule is necessary for EPA to conduct the reconsideration rulemakings for these 4 interrelated rules, without which the rules will impose compliance obligations that may not be consistent with the final outcomes of the rules, assuming those outcomes are not pre-judged.

Furthermore, under §705 of the Administrative Procedural Act (APA), EPA may "postpone the effective date of action taken by it, pending judicial review" when "justice so requires."⁶ The Boiler and CISWI rules are pending judicial review.⁷ With respect to the Area Source and NHSM rules, petitions for review, if not already filed, will be on file with the D.C. Circuit by the time EPA makes its decision on the stay of those rules. For the reasons stated below, justice requires that EPA stay the Area Source and NHSM rules.

In considering whether to grant a stay of its rules, EPA has applied criteria used by courts to judge the appropriateness of a stay of a rule: likelihood of success on the merits, irreparable harm to petitioner if the stay is not granted, harm to other parties interested in the proceeding, and consideration of the public interest. These criteria are considered by courts when deciding whether to stay final action taken by and authorized by other branches of government (action by the executive branch implementing laws adopted by the legislature). The judicial standard for a stay is therefore appropriately restrictive. However, the CAA and APA do not impose this standard on decisions by agencies when determining whether to stay their own rulemakings, but provide broad discretion. The CAA authority is bounded only by an implicit standard of rationality; the APA requires only that the agency concludes that "justice so requires" the stay. In any event, the present circumstances meet both the CAA/APA discretionary and the more restrictive judicial standards for a stay. Justice requires a stay. In addition, CIBO members will be irreparably harmed absent a stay, other interested parties will benefit by the stay and staying the rule is consistent with the public interest. EPA should base its decision whether to grant a stay on the standard Congress provided when deciding whether to stay its own regulatory decisions while undertaking further related regulatory action.

II. JUSTICE REQUIRES EPA STAY THE RULE.

By its concurrent final rule/reconsideration notice, EPA acknowledges that it failed to meet its procedural obligations under CAA §307 in promulgating the rules. The EPA notice plainly states that issues of central relevance arose after the period for public comment. Among the issues EPA identified as central and arising after the period for public comment are elements as fundamental as standards and definitions, for example, the dioxin emission limit and testing requirement for major source boilers, PM standards for oil-fired area source boilers; the definition of "homogenous waste" under the CISWI rule, which is a key term to defining applicability of the rule to sources; and

⁶ 5 U.S.C. §705.

⁷ See *United States Sugar Corp. v. EPA*, D.C. Cir., No. 11-1108 (Apr. 4, 2011); *American Forest & Paper Association, et. al. v. EPA*, D.C. Cir., No. 11-1124 (Apr. 29, 2011); and *American Forest & Paper Association, et. al. v. EPA*, D.C. Cir., No. 11-1125 (Apr. 29, 2011).

requiring sources to meet the criteria of affirmative defense for malfunction events for major and area source units and CISWI units. 76 Fed. Reg. 15,267.

Under CAA §307(7)(B), where it can be demonstrated that the standard for reconsideration is met, the Administrator “shall convene a proceeding for reconsideration of the rule.” The law goes on to require that the Administrator “provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.” Procedural rights include the opportunity to review the agency’s proposal and underlying data and analysis, submit comment on the proposal, an agency decision based on information submitted during the comment period. Implicit in these rights is an administrative process whose outcome is not pre-judged. CAA §307. Once the rule is promulgated and effective, the rule affects the rights and obligations of sources to which it applies. Sources must comply with the rule “[a]fter the effective date of any emissions standard. . . promulgated under this section. . .” CAA §112(i)(3).

Therefore, procedural rights ensure that affected parties have the opportunity to participate in the rulemaking process *prior to* taking on the compliance obligations of the final rule, which permanently alter their legal obligations and liabilities. Here, EPA admittedly failed to meet its CAA obligations, finalized the rules, announced reconsideration, but thus far has failed to provide any remedy for the sources subject to the compliance obligations and liabilities imposed by the rule. If the highly unusual circumstances of these rulemakings do not meet the CAA deferential standard and the APA standard of “as justice so requires,” what circumstances would?

EPA’s failure to protect the procedural rights of sources relate to foundational elements of the rule. For example, for small power production and cogeneration qualifying facilities that burn homogenous waste that are now expressly exempt from CISWI §129 standards (pursuant to CAA §129(g)(1)), EPA failed to protect their procedural rights in defining “homogenous waste” in the final rule. The result is dramatic, because those sources are now not certain whether they remain under the statutory exemption of §129. If indeed the outcome of EPA’s reconsideration proceeding is not pre-judged, and there is a possibility that the definition of homogenous waste will be amended to provide certainty that sources will remain exempt from §129, then consistent with its protection of procedural rights, EPA should ensure that the improperly promulgated rules will not be effective and require those sources to comply with §129 in advance of a truly final decision on its applicability to those sources.

Another dramatic outcome that EPA should address fully before sources must comply is the possibility that existing major and area source boilers now subject to §112 standards could become subject to §129 standards immediately upon the effectiveness of the NHSM rule. A CISWI unit is defined as a unit that “combusts. . . any solid waste.” 76 Fed. Reg. 15,762. Both the CISWI and NHSM rules take effect on May 20, 2011. In the ordinary course, a boiler operator would make the decision to burn a solid waste with knowledge that the unit would subsequently be classified as a CISWI unit and there would be some planned-for transition period into that source category. However, sources are legitimately concerned that under a plain reading of the rules, major and area source boilers that combust a material being newly classified as “solid waste” as of May 20, 2011 could be considered CISWI units as of that date. Further, even with EPA’s May 16, 2011 stay of the effective date of the CISWI Rule, it remains unclear whether units making the boiler MACT to CISWI unit transition would immediately be subject to the CISWI standards promulgated in 2000, subsequently implemented by the states or other regulatory authorities, and currently in effect prior to SIP revisions which will include the revised CISWI requirements.

In addition to these and other foundational elements of the rules such as the dioxin/furan emission limits for major source boilers already identified by EPA, are many that have been and will be identified by affected sources in petitions for reconsideration. EPA will review these petitions and carefully discern which issues are appropriate for reconsideration. In the meantime, however, the rules continue to apply to new sources and existing sources that have no choice but to plan for compliance with flawed rules while EPA first decides which issues should be reconsidered and then undertakes that process. Covered sources are not in a state of suspension while EPA rewrites portions of the rules, but must adapt to new compliance obligations or risk rule violation.

III. CIBO MEMBERS WILL BE IRREPARABLY HARMED ABSENT A STAY DUE TO UNCERTAINTY AND THE INTERDEPENDENCY OF THE BOILER MACT, AREA SOURCE, CISWI AND NHSM RULES.

A. Changed Contained Gas Definition Upends Current Source Category Applicability.

CIBO members will be irreparably harmed pending EPA's resolution of the definition of "contained gas." In the final CISWI rule, and without any indication of this significant change in agency interpretation during the rulemaking process, EPA removed a key definition from existing CISWI regulations that defines how EPA views "solid waste" with respect to contained gases. In addition, in its Response to Comments (RTC) on the NHSM Rule, EPA suggests that gases in pipelines are solid wastes under RCRA unless specifically exempted. This contradicts EPA's longstanding position that gases in pipelines are not "contained" gases that are solid waste under RCRA.

This change in interpretation effectively redefines boilers, process heaters, and other combustion devices (e.g., thermal oxidizers, vapor incinerators, and other devices) that combust process vent streams and other gases as CISWI units (as opposed to Boiler MACT units) if the gas that is combusted does not meet the legitimacy and generator control criteria. This interpretation was not in the proposed rules and EPA provided no notice of this change during the rulemaking process. Industries planning to start up new sources would have to expend significant, unplanned effort and capital to meet CISWI requirements because of an unprecedented interpretation of the definition of solid waste. Affected industries must have certainty that this interpretation of the regulation will not change before having to make additional steps to comply with requirements of a different CAA provision.

On May 13, 2011, EPA released a letter addressing this issue and apparently indicating that it did not intend to alter its longstanding definition of contained gas and the treatment of uncontained gas streams under RCRA. This interpretive letter apparently signals EPA's intended resolution of this issue, and CIBO appreciates EPA's swift response to this concern. However, EPA must still address the issue in a revised final rule, to ensure consistent regulatory treatment of contained gas and remove any possible doubt about EPA's interpretation. More importantly, this issue could be raised in judicial challenges to the rules, and EPA's interpretation should be made formal final agency action for that purpose.

B. Sources May Be Redefined Into Standards That May Change During Reconsideration.

When effective, the NHSM rule will define the boundaries for many categories of units subject to standards found in the Boiler, Area Source, and CISWI rules. It is not clear whether or how the underlying standards will change post-reconsideration. As pointed out in the Joint Industry Petition to Stay the Boiler and CISWI rules, certain major sources will become CISWI units depending on the final definition of solid waste. While many of these are boilers and indirect-fired process heaters that otherwise would be subject to the Boiler rule, others are currently subject to existing MACT standards such as direct-fired process heaters subject to the PCWP MACT, and have made investments to and are complying with those MACTs. Certain area sources could also be forced into the CISWI category based on the final definition of solid waste. These units should not be forced to make capital expenditure decisions based on a solid waste definition that will not be truly final until after reconsideration. It is unreasonable for EPA to put the owners of all industrial, commercial and institutional boilers nationwide in a situation of compelled decision-making in the face of such extreme uncertainty.

Most companies have limited supplies of capital available for each budget cycle. Capital investment decisions are made in different ways by different entities. Generally, however, industrial decision-making comes down to individual facility and product economics, and whether continuing operation can support such investment or whether other alternatives (including shutdown) are in order. With each emission standard EPA promulgates, businesses need to decide, in accordance with their resource allocation schedule, whether to install emissions controls, whether to shutdown units for which controls will be too expensive, or whether to replace units determined to be unable to meet the emissions limits with new combustion units and emissions control devices. These decisions require significant lead-time (especially if new units must be procured) and will result in higher capital costs than installing control technology. Companies will be forced to expend significant investments to design and secure the equipment, permits, and infrastructure necessary to meet the final rule. For example, companies switching to natural gas may need to secure permits for a pipeline corridor to transmit natural gas to the facility through a newly constructed pipeline, may need to secure transportation on interstate pipelines. For those interstate natural gas pipelines that lack sufficient capacity, the process whereby capacity may be offered or constructed is regulated by FERC to protect residential and other critical consumers and is indifferent to the deadlines established by the CAA. This takes significant capital, and also significant time to secure permits and construct the new pipeline. If the standards or key elements of the final rules are adjusted on reconsideration, these excess costs/expenditures may well have been rendered unnecessary, and may not even result in compliance. At that point, because of the unnecessary capital expenditures already made, companies will have even fewer resources to apply toward compliance.

C. EPA's CISWI And NHSM Rules And "Other Gas 1" Fuel Category.

In the preamble to the NHSM rule, EPA discusses burning of manure and digester gas and concluded that "if manure is processed into biofuels (for example, by anaerobic digesters), such biofuels would be considered a legitimate non-waste fuel that has been processed from a non-hazardous secondary material provided "the biofuel" meets the legitimacy criteria". 76 Fed. Reg. 15,479. EPA's response to comment 3a-B2-1 states that "Biofuels that are produced from non-hazardous secondary materials can have contaminants that are somewhat higher than the traditional fuel that otherwise would be

burned and still qualify as being comparable, and would not be considered a solid waste.” How does one determine when the contaminants are too high that the biofuel no longer meets the legitimacy criteria?

The use of biofuels produced from other organic materials such as wastewater is not specifically addressed in EPA’s responses in the rule, therefore it is surmised that these type fuels might also need to meet the legitimacy criteria.

In the NHSM rule, EPA clarifies that it is defining the term “contaminant,” as constituents that will result in emissions of the air pollutants identified in CAA §112(b) and the nine pollutants listed under CAA §129(a)(4) when such non-hazardous secondary materials are burned as a fuel or used as ingredients, including those constituents that could generate products of incomplete combustion. 76 Fed. Reg. 15,524. The air pollutant SO₂ is one of the nine pollutants listed in CAA §129(a)(4). Therefore, H₂S as a contaminant in the non-hazardous secondary materials being burned presumably would need to be considered in the legitimacy criteria. This requirement is extremely restrictive since the rule could be interpreted to require that the H₂S level of biogas would need to be compared to the H₂S level in the traditional fuel, natural gas. Many owners of existing units fueled by biogas will face adding expensive equipment necessary to clean the biofuels to natural gas levels which is economically infeasible and will force many owners to cease firing the units with the renewable biofuel.

In the Boiler rule, EPA has determined that to the extent that process gases are comparable to natural gas and refinery gas, combustion of those gases in boilers and process heaters should be subject to the same standards as combustion of natural gas and refinery gas (Other Gas 1 rather than Gas 2). (76 Fed. Reg. 15,639). EPA then defined the concentration levels for “Other Gas 1” fuel as 4 parts per million (ppm) H₂S and 40 micrograms per cubic meter (ug/m³) of mercury notwithstanding the fact that refinery gas is known to contain concentrations of H₂S up to 160 ppm.⁸

Literature indicates that the typical range of anaerobic digester gas is 200 to 3000 ppm of H₂S. An EPA Best Available Control Technology (BACT) determination identified that digester gas meeting a concentration of 200 ppm is BACT. The EPA Boiler MACT database indicates the average biogas sulfur level to be 2100 ppm. Therefore a very large number of fuels from anaerobic digesters will not meet the legitimacy criteria in the NHSM rule or Other Gas1 category under the Boiler rule.

The result of the NHSM rule and the Other Gas1 category under the Boiler rule is to discourage the development of biogas technology and other clean carbon-neutral fuels as viable renewable fuels which is counter to the Agency’s policy to encourage the use of renewable fuels.

The CO limit established for the Gas 2 (other) subcategory whether new (3 ppmvd) or existing (9 ppmvd) is much too low, as are the CO limits under CISWI (36 ppmvd @ 7% O₂, or 36 ppmvd @ 3% O₂ for liquid/gas ERUs). A facility had an indirect-fired process heater combusting biogas and was tested under the EPA’s §114 Request for additional information where the CO was tested at about 90 ppm. It will be uneconomical to control the CO emissions to the above CO emission limits. The facility will have to either flare the biogas or discontinue the use of that renewable fuel. The EPA

⁸ CIBO addresses the H₂S limit in its Petition for Reconsideration and does not take a position in this Stay Request on the appropriateness of the limit.

should be encouraging the use of biogas and other renewable fuels without placing in doubt the regulatory viability of the continued use of these fuels. The net effect of these rules will strongly discourage the use of renewable fuels such as biogas, landfill gas, and other resources where the clear policy direction from Congress in RCRA, EPA's own programs such as the Landfill Methane Outreach Program, and policy commitment of this Administration is to encourage the use of renewable fuels.

D. Some CIBO Members Will Be Subject To The 2000 CISWI Rules If The Solid Waste Definition Becomes Effective.

Certain CIBO members burn process emissions waste gas and other materials without energy recovery and, although unclear, it appears that upon the effective date of the NHSM rule they may be subject to regulation under the CISWI 2000 standard requirements prior to state or other delegated authority implementation of the revised CISWI rules. Considering this dilemma, unless EPA stays the effective date of the NHSM rule, without allowing for time for reconsideration before it takes effect, and for some allowance for the inherent delay in state regulatory changes, many sources will be forced to comply with different standards than those to which they are presently subject or to which they will eventually be subject.⁹ This would be the case even though the standards and definitions could change through the reconsideration process. EPA undertook coordinated drafting for all four of the rules referenced in this document. The record does not reflect that EPA anticipated units newly subject to CISWI would be subject to the 2000 CISWI rule.

E. The Uncertainty Surrounding the Rules Could Result in Covered Sources Making Contractual Obligations With Unintended Consequences.

CIBO members must plan expenditures, contracts, and business relationships in advance. Many CIBO members must make relatively long-term contracts for the supply of fuel materials to be burned in their boilers. With the uncertainty surrounding the four rules, some members may unknowingly contract for, depending on the outcome of reconsideration and litigation petitions, what could eventually be considered any of 3 fuel material classifications –(1) non-hazardous secondary materials that are solid wastes, (2) non-hazardous secondary materials that are fuels, or (3) "traditional fuels." Some members could wind up subject to CISWI rules when they thought they were contracting for traditional fuels simply because aspects of the rules changed during the interim period. The compliance preparation and implementation activities, such as engineering costs, testing and equipment capital costs, will vary widely depending on which of those fuel material classifications a company ends up with, since the fuel material classification largely determines which air emission regulation –a MACT or CISWI- will have to be met. This is far too much uncertainty with significant potential for stranded and lost cost implications for companies to reasonably bear. This kind of situation can cause irreparable harm to the contracting entities which could be prevented with a coordinated stay of all four rules.

⁹ For example, the final emissions from combustion-based control devices used to meet the PCWP MACT process emissions standards.

IV. A STAY IS IN THE INTERESTS OF OTHER PARTIES AND THE PUBLIC

Other parties interested in the outcome of these rulemakings will benefit from a rational process for first completing the reconsideration of these rules and then making the rules effective. As EPA has already noticed that it will reconsider certain provisions of the rules and potentially others that are the subject of petitions, a stay will ensure that compliance timeframes across the sources covered by the rules are coordinated in time and can be monitored in an orderly fashion, including early rule requirements and the 3- or 4-year emissions standard compliance requirement, and single facility compliance deadlines for major sources and co-located area sources. An orderly, comprehensive reconsideration process should also permit EPA to focus on completing the rulemaking process before focusing resources on compliance-related issues, which will inevitably arise across every affected sector, and will require EPA to respond to sector- and source-specific questions, develop interpretive guidance, and interpret aspects of its final rules that do not arise until the practical implementation of new emission limits and regulatory requirements. An orderly allocation of EPA resources will increase the ability of interested parties to stay informed about interpretive developments and increase EPA accountability in how the final rules are implemented.

The public will also be served by a stay. The public has an interest in adherence by agencies to CAA, APA or other applicable laws governing their administrative processes, especially regarding the public's procedural right to participate in rulemaking and other agency decision-making. Where an agency, as EPA did here, announces at the same time as a final rule, that the agency failed to protect basic right of the public to participate, on very fundamental aspects of the rulemaking, the public has an interest in an appropriate remedy and avoidance of deprivation of their rights in the future. Under these highly unusual circumstances, an appropriate remedy is to stay the rule until EPA conducts a reconsideration process that includes full participation by the public. Given its commitment to environmental protection, EPA unquestionably will be committed to conducting a procedurally sound, efficient reconsideration process. The increased environmental protections from the revised rule will be delayed only a short time over the longer term as sources come into compliance over the course of 3-4 years. Some sources will undoubtedly comply in advance of that timeframe, and some will shut down, as EPA has predicted, both of which would yield earlier emissions reductions.

It is also in the public's interest that facilities coming into compliance with the rule wisely allocate resources, and not be forced to divert scarce resources to compliance planning, procurement contracting and other commitments, until they have certainty regarding their compliance obligations. These rules are national in scope of coverage as well as in economic impact. EPA estimates there to be 13,000 affected sources, and that sources will spend \$5.1 billion in capital and \$1.8 billion in annual costs to comply with the Boiler MACT rule alone.¹⁰ EPA estimates there are almost 183,000 existing affected Area Source boilers that will be required to spend \$435 million in annualized costs to comply with the Area Source Rule.¹¹ EPA estimates there are 100 existing CISWI sources that would be required to spend \$706 million in capital and \$280 million per year in annual costs to comply with

¹⁰ CIBO has carefully reviewed EPA's cost analysis and inventory data of sources and controls required for compliance, and estimates the capital costs of the Boiler rule to be at least \$10 billion, at least two times greater than what EPA estimates.

¹¹ 76 Fed. Reg. 15,579 (Mar. 21, 2011).

the CISWI rule.¹² “Sources” are workplaces across the nation’s cities and towns and rural areas. Capital used for regulatory compliance is capital not allocated to product development and growth of publicly traded companies. When EPA writes regulations that directly mandate capital outlays of this magnitude, it is certainly in the public’s interest that the regulatory process be transparent with full public participation *before* facilities nationwide must begin to allocate those resources.

CONCLUSION

For all the foregoing reasons, CIBO respectfully requests EPA stay, in addition to the Boiler MACT and CISWI rules, the Area Source and the NHSM rules.

Sincerely yours,

/s/ Robert D. Bessette

Robert D. Bessette
President

¹² U.S. EPA, Regulatory Impact Analysis: Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, at 2-2, February 2011.