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March 25, 2024

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

Submitted via Regulations.gov

Re: Comments on Proposed Rule titled Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors Voluntary Remand Response and 5-Year Review, 89 Fed. Reg. 4243 (January 23, 2023), EPA–HQ–OAR–2017–0183; FRL 5120-02-OAR

Dear Administrator Regan:

We, the undersigned Attorneys General of the States of Indiana, Arkansas, Florida, Idaho, Iowa, Kansas, Louisiana, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Utah, write to you to express concern about your pending Clean Air Act (CAA) regulatory proposal Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors Voluntary Remand Response and 5- Year Review, EPA–HQ–OAR–2017–0183, 89 Fed. Reg. 4243 (Jan. 23, 2024) ("Proposed Rule").

For states with waste-to-energy (WTE) facilities, those facilities play an integral role in our states' economies and our approaches to waste and resource management. Waste generation is a fact of life and finding innovative ways to make use of waste benefits all of us. These facilities serve as an essential part of a necessary "all of the above" energy policy—they help recycle metals while providing good jobs and clean, affordable electricity for local communities. Furthermore, WTE facilities often operate in partnership with local governments. We are concerned, as our states' chief legal officers, with the Proposed Rule's excessively burdensome effects on those facilities.

Background

Under section 129 of the Clean Air Act, added by Congress as part of the 1990 amendments to the Act, the EPA must establish emission standards for each category of solid waste incinerator units. *See* CAA, §129, 42 U.S.C. § 7429. The standards promulgated under this section must "reflect the maximum degree of reduction in emissions of air pollutants listed under section (a)(4)

that the administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new and existing units in each category." *Id*. *See* 42 U.S.C. 7429(a)(2). These standards are also known as the "maximum achievable control technology," or "MACT" standards. *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1119 (D.C. Cir. 2013) (citing *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 939-40 (D.C. Cir. 2004)).

When setting MACT standards, the EPA must also establish minimum emissions stringency requirements—commonly referred to as "floors." 42 U.S.C. §§ 7412(d)(3); 7429(a)(2). The emission floors the EPA must establish for a given source depends on whether it is a new or existing source. For new solid waste incineration units, Congress requires that the floor not be "less stringent than the emissions control that is achieved in practice by the best controlled similar unit." *Id*. For existing units, Congress requires the floor not be "less stringent than the average emissions limitation achieved by the best performing 12% of units in the category." *Id.*

Under the Clean Air Act, MACT standards are considered "technology-based emission standards." *Citizens for Pennsylvania's Future v. Wheeler*, 469 F.Supp.3d 920, 923-24 (2020). In the case of solid waste incineration units, the MACT standards must be reviewed (and if necessary revised) every five years after initial implementation. 42 U.S.C. § 7429(a)(2)(5). Ultimately, MACT standards are "based on the performance of technology, and not on the health and environmental effects of hazardous air pollutants." *Sierra Club v. E.P.A*., 353 F.3d 976, 980 (2004).

In addition to the technology-based emission requirements and standards set forth in the Clean Air Act, Congress also requires the EPA to conduct a "residual risk analysis" every 8 years after it promulgates MACT standards. 42 U.S.C. §§ 7412(f)(2); 7429 (h)(3). Under this statutorily mandated residual risk analysis, the EPA must assess 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." *Id*.

As noted, Congress has imposed on the EPA a non-discretionary, legal duty to conduct the residual risk analysis. If, after conducting the required residual risk analysis, the EPA determines that there are no remaining residual risks after the operation of technology-based emission standards, then there is no reason to change the MACT standards for solid waste combustion units because there would be nothing to "review" or "revise" under 42 U.S.C. § 7429 (a)(5). In other words, if the EPA were to determine that the MACT standards now in effect for large municipal waste combustion units result in no residual risk to public health, then there is no reason to change those standards.[1] By the same token, if this congressionally mandated review does show residual risk, then MACT standards would have to be heightened accordingly. Unfortunately, the EPA has never completed a residual risk analysis for large municipal waste combustors as required by Congress.

[1] In a previous rulemaking, the EPA noted that it "does not interpret such technology review requirements to require another analysis of MACT floors for existing and new units," and that "where we determine that existing standards are adequate to protect public health with an ample margin of safety . . . it is unlikely that the EPA would revise MACT standards merely to reflect advances in air pollution technology." 72 Fed. Reg. 5510 (Feb. 6, 2007).

The EPA was supposed to issue its initial MACT standards for large municipal waste combustors by November 15, 1991. 42 U.S.C. § 7429(a)(1)(B). However, on December 19, 1995, the EPA issued these standards—over four years later.[2] In a 2001 lawsuit brought by the Sierra Club, the EPA eventually entered a consent decree requiring it to issue new MACT standards for large municipal waste combustors by April 28, 2006. *See* Revised Partial Consent Decree, *Sierra Club v. Whitman*, No. 1:01-cv-01537-PLF (D.D.C.) (May 22, 2003). The EPA issued updated MACT standards on May 10, 2006, and Sierra Club again filed suit, challenging the EPA's determination of MACT emission floors for large municipal waste combustors. *Sierra Club v. EPA* No. 06-1250 (D.C. Cir.). During this litigation, the court granted the EPA's request for voluntary remand for continued rulemaking (*Id.*, Order, Feb 15, 2008). This remanded rulemaking process has continued up to the agency's publication of its Proposed Rule.

Unfortunately, the EPA promulgated this Proposed Rule in compliance with the arbitrary deadlines imposed by the consent decree the EPA entered into during a new round of litigation brought by Sierra Club and its allies—a consent decree into which EPA very willingly entered. (Consent Decree, *East Yard Communities for Environmental Justice, et al.*, No. 1:22-cv-0094 (D.D.C., May 23, 2023)). Under the decree, the EPA must propose new MACT rules for large municipal solid waste incinerators by December 31, 2023, and finalize those rules by November 30, 2024. Again, the EPA issued this Proposed Rule without completing the residual risk analysis as required by Congress. In essence, the EPA now proposes these new MACT standards without regard to whether the existing standards are adequately protective of public health and the environment. Moreover, by failing to complete the congressionally mandated residual risk review, any new MACT standards imposed by the EPA will not be informed by such review, and therefore, expose the federal government and taxpayers to a significant amount of litigation.

Discussion

In the almost 30 years since the EPA began regulating this sector under the Congressional statute, emissions from these facilities have fallen significantly. This includes a reduction of emissions of over 99% for dioxins and furans, mercury, and lead; 98% for cadmium; 97% for hydrochloric acid; 96% for particulate matter; 89% for sulfur dioxide; and 43% for nitrogen oxides.[3] This Proposed Rule fails to fully address the performance gains in the reduction of pollutants as well as steps governments and private companies have taken to curb pollution. Further, the Proposed Rule attempts to recreate the performance of the industry from 1990 through 1995 in order to recalculate the MACT floors based off of the 2000 through 2008 data set, but does so incompletely and fails to recognize improvements made by the industry in direct response to implementing MACT. In fact, the Proposed Rule seems to punish these improvements by failing to recognize their impact in recalculating the 1990-1995 baseline, resulting in a "MACT on MACT" analysis, which has been ruled unlawful by the courts. Instead of setting a new MACT

[2] 60 Fed. Reg. at 65387 (Dec. 19, 1995).

[3] Baseline 1990 & 2005 industry-wide emissions: U.S. EPA August 2007 Memo, "The performance of the MACT retrofits has been outstanding."; 2020 industry-wide emissions: U.S. EPA (2020) National Emissions Inventory (NEI). 2020 Dioxin emissions were estimated using the average dioxin TEQ concentration per WTE facility as calculated in an assessment of 57 US WTE facilities in 2012. (Source: Dwyer & Themelis (2015) Inventory of U.S. 2012 dioxin emissions to atmosphere, Waste Management, 46, 242 – 246) MSW trend data: U.S. EPA (2018) Advancing Sustainable Materials Management: 2018 Fact Sheet, Table 2.

floor in compliance with the requirements of the CAA, the EPA actually pulls the floor out from underneath these regulated WTE sites.

The EPA has failed to complete the residual risk analysis as required by Congress—a failure which does not appear to concern Sierra Club and its cohorts. Perhaps the environmental litigants are more interested in harassing the waste-to-energy business and pursuing their own agenda than protecting public health. Consider, for example, that in its 2021 mandamus action before the Court of Appeals for the D.C. Circuit to require new MACT standards for large municipal solid waste incinerators, the plaintiffs alleged that emissions from such facilities were harming local communities. *See* Petition for Writ of Mandamus, *In re East Yard Communities for Environmental Justice*, No. 21-1271 (D.C. Cir. Dec. 21, 2021). But if that is the case, then why not insist that the EPA complete its residual risk analysis, which focuses on the actual risks to public health remaining after the installation of the MACT technologies? As noted earlier, MACT standards are technology-based performance standards; they are not based on the actual risk from listed hazardous air pollutants (HAP's) to public health.

One would think that the actual, real risk from harmful pollutants would be at the very heart of any petition grounded in "environmental justice." Instead, environmental activists seem panicked that the industry, along with the EPA's prior regulatory efforts, have indeed worked as intended, and that the Congressionally required residual risk analysis would reveal that the current MACT standards do *not* result in a residual risk to public health. Such a finding would trouble the Sierra Club and its allies because it would undermine their litigation and fundraising efforts. For these and other reasons explained below, the undersigned Attorneys General urge the EPA to reconsider the Proposed Rule.

I. The EPA's Proposed Rule is Arbitrary and Capricious.

The Administrative Procedure Act requires federal agency decision making to be "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); *See also DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020); 5 U.S.C.A. § 706. Agency actions are arbitrary and capricious when they "entirely fail[] to consider an important aspect of the problem or offer[] an explanation for its decision that runs counter to the evidence before it." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383-84 (2020) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Proposed Rule would not survive this review for several reasons. First, the EPA builds its proposal around faulty data, running counter to the role of the EPA in addressing these changes. Second, the EPA has not conducted the statutorily required residual risk analysis on its MACT standards. Lastly, the EPA ignores major progress in the WTE industry, disregarding evidence of further compliance with emission standards and the reduction of emissions by WTE facilities.

A. The EPA builds its Proposed Rule around an incomplete picture by using estimations and calculations to back calculate performance of WTEs in the 1990s without fully considering subsequent improvements.

The EPA ignores the improvement of emissions performance by WTEs made since 1990-1995. The EPA was right to try to assess performance in 1990-1995 to avoid an unlawful application of MACT on top of MACT, but its assessment was incomplete. First, most WTEs across the industry have lowered their emissions of pollutants by up to 99% compared to pre-MACT levels.[4] This prodigious improvement in emissions performance has taken place against the backdrop of a more than 10% increase in the tons of municipal solid waste processed at our nation's WTE facilities.[5] In other words, the industry has already been integrating emission control technology through investment and economic expansion without a mandate by the EPA. Emissions have continued to trend downward as improvements in control technologies and operational practices have advanced. This accomplishment should be lauded, not punished. In fact, the EPA itself in a 2007 memorandum stated, "the performance of the MACT retrofits [for WTEs] has been outstanding."[6]

However, many aspects of the EPA's Proposed Rule and the process by which EPA issued it verge on being punitive in nature. First, the EPA avoids its obligations under the Unfunded Mandates Reform Act (UMRA) by not providing the impacts of their Proposed Rule "on State, local, and tribal governments, and the private sector." *See* 2 U.S.C.A. § 1531. Instead, the EPA provided only nationwide cost projections to municipal and local governments who would shoulder the financial burden of the Proposed Rule, without any explanation of the methodology used to propose the new Rule. Next, the EPA provides no way for individual WTE facilities and their government partners to determine how the EPA arrived at its estimate or what implications the Proposed Rule would have on their current protocols. Further, the EPA uses data collected in the early 2000s to "guess" the emissions data from the early to mid-1990s for its Proposed Rule.[7] This does not consider the improvements in WTE facility operations or non-capital changes to facilities. Also, the EPA failed to ask WTE facilities for any data from the 1990s to propose any revised emissions standards.

Here, the EPA engages in arbitrary and capricious practices by not considering already changing industry standards regarding emissions performance and failing to consider any relevant up-to-date data. Instead, the EPA relies on data collected between the late 2000s to calculate the data from 1990-1995, thereby "failing to consider an important aspect of the problem."[8] *See Little Sisters of the Poor*, 140 S. Ct. at 2383-84. Also, the EPA neglected to ask WTE facilities for data from the 1990s. Rather, it chose independently to use data from the early to mid-2000s to recreate data from the 1990s. This completely ignores data that has already been collected and shows how the EPA is failing to consider a very important aspect of these proposed regulations. The EPA would rather estimate emissions data in their favor to further their radical climate agenda instead of using actual, up-to-date data. Further, the EPA fails to examine the difference in waste streams, the improvements in the operations of these WTE facilities, and improvements in non-capital changes to WTE facilities.

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[4] 60 Fed. Reg. at 65387
[5] *Id.*
[6] *See* Memorandum on Emissions from Large and Small MWC Units at MACT, U.S. Environmental Protection Agency (Aug. 10, 2007), https://www.regulations.gov/document/EPA-HQ-OAR-2005-0117-0164.
[7] *Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors Voluntary Remand Response and 5-Year Review*, 89 Fed. Reg. at 4249.
[8] *Id.* at 4249.

Lastly, the EPA forgets to provide any notice to those who would shoulder the $309 million dollar capital investment compliance cost with the Proposed Rule.[9] By not providing an avenue for stakeholders and local governments to provide necessary input before the EPA issued its Proposed Rule, the EPA limited input which would provide valuable insight to its Proposed Rule. This does not "reasonably explain" why the EPA set such stringent standards or why they did not ask for more relevant input. *See Prometheus Radio Project* at 1158. The Proposed Rule would require significant capital and operational expenses, even though the facilities are already highly regulated. This would leave landfills, which are not as regulated as WTEs, as the only alternative for waste management, and could lead to other negative environmental impacts. When these additional costs are needlessly added, it could have a significant market impact on the environmentally preferred technology. The EPA seemingly attempts to solve a problem by issuing this Proposed Rule without knowing whether a problem actually exists. Therefore, by building its Proposed Rule around an incomplete picture through the use of estimations and calculations to back calculate performance of WTEs in the 1990s without fully considering subsequent improvements, the EPA is acting in an arbitrary and capricious manner.

B. The EPA fails to conduct any statutorily required residual risk analysis on its MACT Standards.

By not completing the residual risk analysis required by statute, the EPA is acting in an arbitrary and capricious manner towards WTEs. Again, the EPA was required to statutorily perform a "review" of the MACT standards, and to "revise" as necessary. *See* 42 U.S.C. § 7412(d)(6). However, courts have stated that while there is a requirement to review, there is no requirement to "start from scratch." *See Nat. Res. Def. Council v. E.P.A.*, 529 F.3d 1077, 1084 (D.C. Cir. 2008). The Agency continues to insinuate that the WTE sector poses an undue risk to the very communities they serve without any actual data or analysis to support its assertions.[10] Instead of setting a new MACT floor in compliance with the requirements of the Clean Air Act, the EPA would rather pull the floor out from underneath these necessary facilities.

Next, by continuing to resist its long-overdue residual-risk obligation, the EPA denies Congress its opportunity to assess the actual protectiveness of WTEs. The EPA's Proposed Rule appears to be more about accommodating the Administration's activist group allies than about protecting public health—the EPA's true mission. Again, this is signified by the EPA's evident rush to sign off on the consent decree filed in *East Yard Communities for Environmental Justice, et al*, No. 1:22-cv-0094 (D.D.C., May 23, 2023). Again, it is only because of this consent decree (and its artificial deadlines) that the EPA is promulgating the Proposed Rule under the current timeframe.

Further, the EPA appears to be returning to the days of "sue and settle," allowing its priorities to be dictated by activist litigation rather than statutory direction and the disinterested pursuit of actual environmental protection. And the premise of the 2018 voluntary remand from litigation in the Court of Appeals for the District of Columbia Circuit—according to which the

[9] *Id*. at 4261, 4262.
[10] U.S. Environmental Protection Agency, *From Field to Bin: The Environmental Impacts of U.S. Food Waste Management Pathways* (October 2023), https://www.epa.gov/land-research/field-bin-environmental-impacts-us-food-waste-management-pathways.

EPA now issues this proposal—is that the EPA erred in 1995 when first setting MACT standards when it looked at facilities' permit limits rather than their actual emissions performance.[11] The EPA now claims to be attempting to reconstruct a picture of actual emissions performance among WTEs in the early 1990s when the EPA first started to develop these standards. By not considering the impact of new trends among the 152 total units nationwide[12] relative to performance in 1990-1995, or through the statutorily required residual risk analysis on MACT standards, the EPA fails to appropriately consider the performance of modern WTEs, thereby leading to an arbitrary Rule through unreliable methods. *See Little Sisters of the Poor*, 140 S. Ct. at 2383-84. And, instead of using science to inform these standards, the EPA tries to use misguided calculations from 2000-2009 data to estimate 1990-1995 data. The EPA uses and has used misestimations and miscalculations to guide regulatory decisions that impact WTEs and local governments.

It is plainly irresponsible, arbitrary, and capricious for the Agency to advance yet another round of regulations without ever having conducted the statutorily required residual risk review. Congress designed that review based on common sense: to inform the EPA whether, and to what extent, risk remained after initially issuing regulations.[13] Instead of issuing arbitrary regulations in a capricious manner, the EPA should conduct appropriate studies of WTEs and note the astonishing environmental successes many WTEs have had over the last few decades. Therefore, by failing to conduct statutorily required analysis, the EPA acts in an arbitrary and capricious manner by issuing these new regulations for WTEs.

C. The EPA's Proposed Rule ignores industry stakeholders and the major steps they already have taken to limit environmental impact.

The proposed EPA regulation for WTEs ignores major steps the industry has already taken to limit environmental impact. First, the Proposed Rule requires existing facilities to reduce their emissions by up to 85% below emissions levels that the EPA only last year found acceptable for a brand-new facility.[14] Further, the nitrogen oxide limits in this new proposal are stricter than those contained in EPA's promulgated "Good Neighbor" Rule, which has recently been the subject of oral arguments before the United States Supreme Court.[15]

Next, the EPA should carefully consider comments from industry professionals who can offer a complete picture of the historic and current emissions performance of the small number of WTEs that operate nationally. These industry experts can point to a decrease in emissions as well as an increase in environmental benefits. For instance, Covanta—located in the City of Indianapolis, Indiana, and founded by a public-private partnership forged in 1985—not only diverts the City's residential waste from landfills, but also disposes of waste in an environmentally safe manner.[16] Covanta also safely turns combust waste not reused, reduced, or recycled into steam

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[11] 89 Fed. Reg. at 4249.
[12] 89 Fed. Reg. at 4260.
[13] CAA amendments require EPA to set MACT floors and then 8 years later perform Residual Risk analysis.
[14] Proposed limits for both new and existing units are far more aggressive than what the EPA considered Best Available Control Technology ("BACT") in November of 2022.
[15] *Ohio, et al., v. Environmental Protection Agency, et al.*, No. 23-1183 (October 2023), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23a349.html.
[16] Covanta, INDIANAPOLIS COVANTA, https://www.covanta.com/where-we-are/our-facilities/indianapolis (last visited Mar 18, 2024).

for export to local Indianapolis industries, including companies which provide steam-heating systems to city customers.[17]

Further, the EPA must not impose impossible-to-meet monitoring standards, but instead should take seriously the technical and practical limitations of WTE facilities as well as available monitoring technology. WTE facilities function as part of the solution to our nation's energy and environmental challenges, and the EPA should treat them as partners in their environmental efforts, not just enemies. By not taking input from industry stakeholders, the EPA acts in an arbitrary and capricious manner, dictating to the world that it is correct in its analysis and authority to the detriment of an industry in localities across the nation.

Not too long ago, the EPA ignored industry concerns when it issued a rule that forced the closure of many medical waste incinerators, jeopardizing the existence of a critical and necessary industry. That rule led to the shutdown of 94% of Hospital, Medical, and Infectious Waste Incinerators (HMIWI) units, and an additional 3% of units obtained exemptions from the EPA's regulations."[18] There, the EPA admitted it was not "confident in using much of the same data relied upon in setting the original MACT floors."[19] A lawsuit ensued, and the D.C. Circuit found that the EPA was "functionally regulating on a blank slate."[20] In its Proposed Rule, the EPA admits to taking a similarly irresponsible approach, with the only difference being that WTEs have not been retiring significantly like the 94% shutdown of HMIWI units.[21] By this action, the EPA not only puts billions of dollars of local government infrastructure at risk, but places the environment it so vigorously claims to protect at risk. Therefore, the EPA is acting arbitrarily and capriciously by not taking into account industry stakeholders and the major steps they have taken to limit environmental impact.

II. The EPA's Proposed Rule should not have considered any "environmental justice" analysis.

The Proposed Rule should not consider an environmental justice analysis because that would go beyond the scope of the enabling statutory authority as shaped by Congress. "Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 723 (2022) (quoting E. Gellhorn & P. Verkuil, Controlling *Chevron* Based Delegations, 20 Cardozo L. Rev. 989, 1011 (1999)). "We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *Id.* (quoting *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CADC 2017) [Kavanaugh, J., dissenting from denial of rehearing en banc]). A decision that relies on the environmental justice concerns reflected in the Proposed Regulations would be arbitrary and capricious for relying "on factors which Congress has not intended [you] to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). More than that, a decision to regulate that turns on whether the regulation benefits particular racial or ethnic subgroups would be constitutionally

[17] *Id*.
[18] 89 Fed. Reg. at 4252.
[19] *Id*.
[20] *Id. See also Medical Waste Institute and Energy Recovery Council v. E.P.A.*, 645 F.3d 420 (D.C. Cir. 2011).
[21] 89 Fed. Reg. at 4252.

suspect. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (requiring federal racial classifications to pass strict scrutiny). The EPA appears to have spent some time on an analysis that has no bearing on the question before it.

As in this case, even if the EPA was both congressionally and constitutionally permitted to perform an environmental justice analysis in its rulemaking venture, then the analysis would be irrelevant to the alleged cause of environmental justice. The public, which the EPA claims to protect around WTEs, are majority white, with Hispanics, Latinos and African Americans being a close second and third, respectively.[22] Of those living within 50 km of a WTE facility, 88% of people are above the poverty level, over the age of 25, and possess a high school diploma.[23] And 84% of those living within 5 km of a WTE facility are above the poverty level, and 85% of those living within 5 km of a WTE facility are over the age of 25 with a high school diploma.[24] Based on the EPA's analysis, those individuals living near WTE facilities clearly are not uneducated or poor. Ultimately, the EPA should not mask its policy decisions behind the cloak of "environmental justice." The EPA's environmental justice analysis goes beyond the scope granted to it by Congress. Moreover, the analysis demonstrates that the Proposed Rule is arbitrary and capricious.

III. The EPA should extend the comment period to allow for substantive input from all stakeholders.

The EPA should extend the comment period to gain valuable insight from all industry stakeholders. The purpose "of the APA's notice and comment requirements are '(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.'" *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011) (quoting *Int'l Union, United Min Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)). Including irrelevant material in proposed rules, like an "environmental justice" analysis, undermines those purposes. *See* discussion *supra* Section II. And commentators do not have infinite resources. Time spent addressing material that is legally irrelevant and improperly being considered by an agency subtracts from time spent addressing relevant matters. That detracts from the public's ability "to communicate [relevant] concerns in a comprehensive and systematic fashion . . . ." *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996). For a similar reason, it detracts from the ability of commentators to provide evidence supporting their criticism of a proposed rule. And by undermining commentators' ability to make their case before the agency, the agency undermines the fundamental fairness of the process.

Furthermore, the EPA has refused to grant local governments any request for a 30-day comment extension to have more time to analyze and provide informed commentary on a regulatory package that the EPA itself has spent years designing. By not providing any extension, the EPA acts in an unfair manner towards affected parties and does not develop any sort of viable record for judicial review. *See Prometheus Radio Project* at 449. In short, 60-days is not enough time for the States, industry stakeholders, local stakeholders, and other commenters to perform a

[22] 89 Fed. Reg. at 4263.
[23] *Id.*
[24] *Id.*

thorough analysis of the Proposed Rule. We urge the EPA to allow time for meaningful submissions from all stakeholders to aid the agency in its rulemaking process. Therefore, to avoid acting in an arbitrary and capricious manner, the EPA should extend the comment period to allow substantive comments from all stakeholders.

Conclusion

For the reasons set forth above, the EPA should abandon the proposed regulation. We look forward to your response.

Sincerely,

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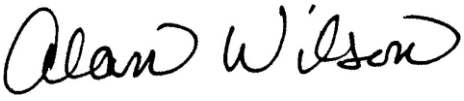

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