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April 27, 2011

Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Petition for Administrative Stay Pending Reconsideration of (1) the National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 76 Fed. Reg. 15,554 (Mar. 21, 2011) (Docket No. EPA-HQ-OAR-2002-0058), and (2) the Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 76 Fed. Reg. 15,704 (Mar. 21, 2011) (Docket No. EPA-HQ-OAR-2003-0119)

Dear Administrator Jackson:

The American Forest & Paper Association, National Association of Manufacturers, American Chemistry Council, American Coke and Coal Chemicals Institute, American Home Furnishings Alliance, American Iron and Steel Institute, American Municipal Power, Inc., American Petroleum Institute, American Wood Council, Biomass Power Association, Chamber of Commerce of the United States of America, Corn Refiners Association, Council of Industrial Boiler Owners, Florida Sugar Industry (joined by sugarcane processors in Texas and Hawaii), National Oilseed Processors Association, Rubber Manufacturers Association, Society of Chemical Manufacturers and Affiliates, Treated Wood Council, and their members (collectively the “Petitioners”), respectfully request an immediate stay of (1) the National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 76 Fed. Reg. 15,554 (Mar. 21, 2011) (Docket No. EPA-HQ-OAR-2002-0058) (the “Boiler rule”), and (2) the Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 76 Fed. Reg. 15,704 (Mar. 21, 2011) (Docket No. EPA-HQ-OAR-2003-0119) (the “CISWI rule”) pending reconsideration. As demonstrated below, EPA has ample authority and justification to grant an administrative stay under Section 307 of the Clean Air Act (“CAA”), 42 U.S.C. § 7607, and Section 705 of the Administrative Procedure Act (“APA”), 5

U.S.C. § 705, during the reconsideration process that the Agency itself initiated, and that will be enlarged by reconsideration requests from numerous third parties, including the undersigned.

An administrative stay pending reconsideration is justified for three principal reasons:

- *First*, given the certainty of reconsideration on a wide range of issues, Petitioners will suffer significant, irreparable harm unless a stay is granted. EPA’s intent to reconsider significant, but yet to be fully decided or explained, portions of the rules, together with the expected multiplicity of third party reconsideration requests invited by the Agency, presents Petitioners with considerable uncertainty and risk as they attempt to determine how to comply with the rules. Absent a stay, facing a ticking compliance clock, Petitioners will be forced to make major investments in compliance measures that may ultimately be misdirected or rendered unnecessary by the outcome of the reconsideration process.

Because the rules require major equipment installations across a large numbers of existing facilities within a limited timeframe, Petitioners cannot wait until the final resolution of reconsideration before making these purchases and still ensure timely compliance with the new, stringent standards. Thousands of existing facilities will need to begin to make major compliance investments soon, in light of the pressing compliance deadlines, and will not be able to undo such investments if EPA ultimately changes the rules and standards following reconsideration. Furthermore, the rules will immediately and adversely impact new facilities and force companies to make crucial decisions regarding plant upgrades or shutdowns, all of which may be undone depending on the outcome of the reconsideration process.

Petitioners have compiled a robust set of examples of the types of irreparable harms that companies, municipalities and industry sectors will face if these rules are not stayed and have included them in **Appendix 1** hereto. As discussed in these examples, the uncertainty surrounding the rules pending reconsideration may force major shutdowns of U.S. industrial operations, costing jobs and devastating communities. For example, the Boiler rule could cost thousands of jobs in the sugarcane industry. *See, e.g.*, Appx. 1, Harm to Economic Sectors: 1. Sugar Production. Further, various environmentally beneficial projects may be delayed or scrapped entirely. *See, e.g.*, Appx. 1, Harm to Economic Sectors: 3. Iron and Steel Production, Harm to Specific Companies: 7. A Chemical Manufacturing Plant. Finally, those companies that move forward with compliance projects face the substantial possibility of squandering some or all of the resources they devote to design, engineering and installation of control equipment, as those resources may not achieve the requirements of the final, post-reconsideration rules.

- *Second*, the need for a stay is particularly heightened given EPA’s own decision to reconsider major elements of the rules. In announcing reconsideration, EPA acknowledged that its own concerns “involve issues of central relevance that arose after the period for public comment or may have been impracticable to comment upon.”

National Emission Standards for Hazardous Air Pollutants; Notice of Reconsideration (“Notice of Reconsideration”), 76 Fed. Reg. 15,266, 15,267 (Mar. 21, 2011). Notably, in its motion to extend the deadline for promulgating these rules in related district court litigation, EPA argued to the court that several months were needed to re-propose the rules because re-proposal “would result in standards that are more defensible and will yield environmental benefits earlier, because the final standards will more likely withstand substantive review.” EPA’s Mem. in Support of Mot. to Amend Order of Mar. 31, 2006 (“Mot. for Extension”) (ECF No. 136) at 20, *Sierra Club v. Jackson*, No. 1:01CV01537 (D.D.C Dec. 7, 2010). EPA even cautioned the court that, without supplemental rulemaking, the rules likely would not survive judicial review. See *id.* at 19 (finalizing the rules could “result in a far longer delay” because rules would be legally invalid). Unfortunately, EPA did not get the extra time it requested and, therefore, did not re-propose the rules prior to promulgating final versions. For the very reasons EPA put forward to the district court and that justify the Agency’s *sua sponte* decision to reconsider the rules, they must be stayed during the period needed to resolve the significant substantive and procedural flaws contained in the final rules.

- *Third*, the defects with the final rules go far beyond those that EPA itself has described in the notice of reconsideration. As described below and as will be detailed in supplemental petitions for reconsideration that will be submitted shortly by Petitioners (and, likely, by others), there is substantial uncertainty as to the applicability of the final rules (especially as to the fundamental question of what is a “fuel” versus what is a “waste”), key elements of the final rules are not supported by the underlying data, and several of the emissions standards are so stringent that companies predict that no viable means of complying with them will be devised. These issues alone provide compelling justification for EPA to call a “time out” so that the compliance clock is not ticking as the issues are resolved through the upcoming reconsideration proceeding.

In sum, the grounds for granting an administrative stay pending reconsideration here are compelling and meet the statutory standards pursuant to CAA Section 307 and APA Section 705. EPA has previously concluded that an administrative stay is particularly appropriate where, as here, EPA is considering amending a rule, and a stay would prevent facilities from incurring “compliance expenditures . . . which may prove unnecessary in light of the projected amendments.” See Final Rule, Amendments of Final Rule To Postpone Requirements, 61 Fed. Reg. 28,508 (June 5, 1996). Given the far reaching, multi-billion dollar impact of these rules on a wide swath of U.S. industry and local governments, and the confusion that would ensue if EPA were to move forward with parts of the rules while reconsidering others, justice and basic principles of good government require that EPA stay the rules for the duration of the reconsideration process.

I. BACKGROUND

On June 4, 2010, EPA published the proposals of the rules at issue. Stakeholders responded with an outpouring of comments criticizing these proposals. According to EPA it

“received over 4,800 individual comments” in response to the proposed standards that “raise[d] issues that EPA had not fully considered and also provided substantial additional data that raise questions about some of the Agency’s initial conclusions.” Mot. for Extension 2. EPA also admitted that these comments “may materially affect important decisions relating to source categorizations and coverage for the final emissions standards.” *Id.* EPA recognized that these comments would lead to changes so significant that they would not be a logical outgrowth of the proposal, and the Agency consequently requested an extension of time in the district court litigation in order to re-propose the rules. Mot. for Extension. The district court denied the request because it believed “EPA’s concerns about the merits of its rules *could be addressed under Section 307(d)(7)(B)*, obviating any purported need for re-proposal and further delay.” Slip op. at 19, *Sierra Club v. Jackson*, No. 1:01CV01537 (D.D.C Jan 20, 2011) (emphasis added). In other words, the district court anticipated the need for EPA to undertake a reconsideration proceeding, potentially including an administrative stay, to address defects in the rules caused by the court’s aggressive schedule and, therefore, was instrumental in creating the circumstances that now warrant a stay pending completion of those proceedings.

II. EPA HAS AMPLE AUTHORITY TO GRANT A STAY.

EPA has broad authority and discretion to stay the effectiveness of rules promulgated under the CAA under both Section 307 of the CAA and Section 705 of the APA. The criteria that EPA must apply are significantly less stringent than the criteria generally used by the courts, for example, because a demonstration of irreparable harm is not mandatory:¹

- First, CAA Section 307(d)(7)(B) provides that EPA may grant a stay if the Agency has decided to reconsider a rule. See 42 U.S.C. § 7607(d)(7)(B).² No other criteria or conditions are imposed on the Agency’s authority to issue a stay.
- Second, “when justice so requires,” EPA may stay the effective date of a CAA rule pending judicial review, under Section 705 the APA, 5 U.S.C. § 705.³ See, e.g., Final

¹ Nothing in the CAA requires a showing of irreparable harm in order to justify an administrative stay; instead, all that is required are proper grounds for reconsideration. The APA deliberately contrasts what is required for an administrative stay (“justice so requires”) and a judicial stay (“conditions as may be required” and “irreparable harm”). 5 U.S.C. § 705. Such differences must be given effect, and therefore there is no irreparable harm requirement for an administrative stay under the APA either.

² CAA § 7607(d)(7)(B) provides, in relevant part:

If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. . . . The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

³ APA § Section 705 reads:

Rule, Amendments of Final Rule To Postpone Requirements, 61 Fed. Reg. 28,508 (June 5, 1996).

Thus, the only express condition imposed on EPA’s authority to grant a stay under CAA § 307 is that the Agency must have decided to reconsider the rule. APA § 705 is similarly broad, authorizing EPA to issue a stay: (1) if judicial review is pending; and (2) when “justice so requires.”⁴ Of course, EPA also has the fundamental obligation to engage in reasoned decision making and must not make arbitrary and capricious determinations. All of these criteria leave EPA with considerable authority to stay the rules – especially under the current circumstances.

A stay under § 307 is clearly warranted. EPA already has acknowledged that objections to its Boiler and CISWI rules satisfy the CAA Section 307(d)(7)(B) standard for reconsideration, and it follows that the standard for a stay under the CAA has similarly been met. Specifically, EPA has stated that objections to these rules “involve issues of central relevance that arose after the period for public comment or may have been impracticable to comment upon.” Notice of Reconsideration, 76 Fed. Reg. at 15,267. EPA also has stated that “to ensure that the final rules are logical outgrowths of the proposals,” the Agency would have to re-propose its rules in altered form. Mot. for Extension 3. A rule that is not a logical outgrowth of its proposal is, as EPA’s own statements confirm, the archetype of a rule warranting reconsideration and stay under Clean Air Act Section 307(d)(7)(B). Reconsideration is essential here because, *inter alia*, a final rule that is not a logical outgrowth is invalid. *See, e.g., Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

EPA’s authority to issue a stay under APA Section 705 is even broader than Section 307 in two respects. First, 5 U.S.C. § 705 allows EPA to grant a stay “[r]egardless of whether [the stay request] meet[s] the requirements of Section 307(d)(7)(B).” *See Ohio: Approval and Promulgation of Implementation Plans*, 46 Fed. Reg. at 8,582 n.1. Second, EPA’s stay authority is not limited to three months. Furthermore, nothing in the CAA has abrogated EPA’s authority under § 705 of the APA. *See, e.g., CAA § 7607(d)(1)* (specifying sections of the APA that do not apply to CAA rulemaking, but not including APA § 705). EPA has regularly used this authority to “postpone”⁵ the effective date of a rule indefinitely. *See, e.g., Reconsideration of*

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

⁴ At least one petition for review is currently pending in the United States Court of Appeals for the District of Columbia Circuit, and Petitioners anticipate that more such petitions for review will be on file by the time EPA makes its stay decision.

⁵ EPA can utilize the authority of APA § 705 either before, or after, the rules at issue have become effective. The plain meaning of the term “postpone” encompasses rules that are already in effect, just as a baseball game may be postponed after it has begun. Nonetheless, Petitioners have submitted this petition sufficiently far in advance that EPA can act to “postpone” the rules at issue pursuant to APA § 705 before they become effective.

the Prevention of Significant Deterioration and Nonattainment New Source Review NSR: Aggregation, 75 Fed. Reg. 27,643 (May 18, 2010); Final Rule, Amendments of Final Rule To Postpone Requirements, 61 Fed. Reg. 28,508 (June 5, 1996) (staying rules to prevent facilities from incurring “compliance expenditures . . . which may prove unnecessary in light of the projected amendments”); Hazardous Waste Management System: Identification and Listing of Hazardous Waste; Burning of Hazardous Waste In Boilers and Industrial Furnaces, 56 Fed. Reg. 42874 (Sept. 5, 1991).

Finally, if EPA chooses to issue a stay of more limited duration, such as three months, EPA should use the period of that stay to expeditiously promulgate a rule deferring the imposition of the Boiler and CISWI rules.

III. JUSTICE REQUIRES THAT EPA STAY THE BOILER AND CISWI RULES.

The situation here is precisely the type of situation where reconsideration and an administrative stay should occur in tandem, because objections to the Boiler and CISWI rules “involve issues of central relevance that arose after the period for public comment or may have been impracticable to comment upon.” Notice of Reconsideration, 76 Fed. Reg. at 15,267. This outcome is not surprising, given that EPA was compelled to promulgate the rules on a schedule that it admitted was insufficient for conducting reasoned rulemaking or “ensur[ing] that the final rules are logical outgrowths of the proposals.” Mot. for Extension 3.

It is impossible for EPA to wall off the flaws that the Agency has identified in its rules. As EPA has repeatedly emphasized, these rules “are complex and inter-related.” Mot. for Extension 3. It would be impossible to quarantine the numerous parts of the rules that EPA has promised to reconsider, especially given EPA’s acknowledgement that the rules as a whole are legally flawed. *Id.* at 19 (forgoing re-proposal would “result in a far longer delay” because rules would be legally invalid). Furthermore, as will be detailed in soon-to-be filed supplemental petitions to reconsider the rules, other provisions of the rules are also infected with numerous substantive legal errors, some of which are noted below in Section IV.B.

Finally, this is precisely the type of case in which EPA has stated that a stay is warranted. In 1996, EPA stayed rules for boilers and furnaces burning hazardous waste, because it was considering amending the rules. 61 Fed. Reg. 28,508. As EPA explained then, it would be unjust and unwise to subject facilities to “compliance expenditures . . . which may prove unnecessary in light of the projected amendments.” *Id.* Failing to stay the Boiler and CISWI rules here would have precisely the same effect, subjecting Petitioners’ members to significant harms from rules that EPA has already committed to reconsider. As EPA takes the necessary time to issue rules that are procedurally and substantively sound, justice requires that the Agency not force industry and local governments to begin to make significant investments in rules that are flawed and that may change dramatically.

Although irreparable harm is not required, 42 U.S.C. § 7607(d)(7)(B); 5 U.S.C. § 705, Petitioners have demonstrated that serious harm would result from a failure to stay the Boiler

rule and the CISWI rule, as demonstrated in Section IV.A. below and described in the examples set forth in **Appendix 1**. Furthermore, as demonstrated in Section IV.B., a stay would avoid substantial harm to the national economy. These demonstrations confirm that justice requires a stay.

IV. EVEN UNDER THE MORE STRINGENT JUDICIAL STANDARD, A STAY IS WARRANTED.

While a stay is warranted under the standards established by both the CAA and APA, it would be justified even under the more stringent standard employed by the courts. Courts typically consider four factors in determining whether to grant a judicial stay: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). These factors must be balanced against one another, such that “[a] stay may be granted with either a high probability of success and some injury, or vice versa.” *Cuomo v. US Nuclear Reg. Com’n*, 772 F.2d 972, 974 (D.C. Cir. 1985). All four factors are amply satisfied in this case.

A. Petitioners’ Members Will Be Irreparably Harmed by the Boiler and CISWI Rules Absent a Stay.

Failure to grant a stay will result in irreparable harm to Petitioners’ members. Without any certainty regarding which aspects of its rules EPA will ultimately reconsider and potentially revise, Petitioners’ members must immediately begin complying with rules that are in flux and likely invalid. In this context, a stay is necessary to avoid industry-wide and local government expenditure of significant resources that may prove to be become unnecessary and therefore wasted.⁶

Such wasted expenditures clearly constitute irreparable harm, as recently recognized by the D.C. Circuit. In January 2011, the Court granted a motion for expedited consideration of a challenge to the Portland Cement MACT. Order, *Portland Cement Association, Inc. v. EPA*, No. 10-1359 (D.C. Cir. Jan. 19, 2011). In order to justify expedited consideration, a party “must demonstrate that the delay will cause irreparable injury.” D.C. Cir. Handbook at 34. In that case, petitioners argued that they faced irreparable injury from having to commit resources to implement a MACT rule that was subject to challenge and potential change. In the face of strong opposition from EPA and environmental organizations, the D.C. Circuit granted expedited

⁶ In the context of a stay, irreparable injury is injury for which a party will not be adequately compensated through money damages or other corrective relief if ultimately successful on the merits. *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Economic losses unrecoverable from an immune federal agency and losses threatening a company’s viability both constitute irreparable harm. See *Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62, 76–77, n.19 (D.D.C. 2010), *aff’d sub nom. Sottera, Inc. v. FDA*, No. 10-5032, 2010 WL 4942132, at *7 (D.C. Cir. Dec. 7, 2010) (upholding the district court’s finding of irreparable loss as “entirely reasonable”); see also *Cal. Pharms. v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009); *Kan. Health Care Ass’n v. Kan. Dep’t of Soc.*, 31 F.3d 1536, 1543 (10th Cir. 1994).

consideration, clearly indicating that the harms in question constituted irreparable harm. It necessarily follows that the broader impact the Boiler and CISWI rules will have across multiple industries, combined with the significant legal uncertainty EPA itself has introduced in the reconsideration process, similarly constitutes irreparable harm and warrants a stay.

1. Petitioners Must Begin Making Significant Investments and Decisions Immediately and During the Period of Reconsideration, In Light of the Pressing Compliance Deadlines.

Petitioners' members do not have the luxury of waiting for the reconsideration process to conclude before taking steps to come into compliance with the rules. Any new NESHAP or CISWI sources have to comply with the rules essentially at start-up. While existing NESHAP sources have three years to achieve compliance and existing CISWI sources have up to five years to achieve compliance, these sources must begin planning and making significant capital investments almost immediately.

Retrofitting a boiler is a complex and costly undertaking that can take years to complete, from the earliest planning stage through installation, testing, and startup. EPA itself has recognized that the full "3 years for compliance [with the Boiler rule] is necessary to allow adequate time to design, install and test control systems that will be retrofitted onto existing boilers, as well as obtain permits for the use of add-on controls." 75 Fed. Reg. 32,035. Several examples of municipal and industry-specific compliance schedules are described in **Appendix 1**. They demonstrate just how tight the compliance deadlines are.

Petitioners' members will need to invest resources immediately, starting with testing of fuels and boilers to identify gaps between existing control equipment and final regulatory requirements. *See, e.g.*, Appx. 1, Harm to Economic Sectors: 2. Chemical Production, Harm to Specific Companies: 1. Multi-state Paper Company; *see also* Appx. 2. One company, for example, has estimated that millions of dollars in initial compliance expenditures will be squandered if EPA takes significantly longer than four months to revise its rules. Appx. 1, Harm to Economic Sectors: 3. Chemical Production (Example 3). Immediately thereafter, that company will need to begin design engineering, and then move on to obtaining vendor design guarantees. *Id.* Also within the first year, it will need to perform new source review ("NSR") applicability analyses and apply for NSR or other construction permits, if necessary, and determine whether its Title V permits will need to be modified. *Id.* In subsequent years, the equipment design, fabrication, and installation will need to be completed. Those tasks will be followed by optimization and validation testing, which all need to be completed before the compliance deadline. Squeezing all of those steps into a three- or five-year period is a formidable, if not impossible, task that cannot be delayed.

Further, the timing of the actual retrofit work needs to be carefully planned far in advance, particularly for boilers that provide the primary energy supply for the company's facilities. A facility owner will only shut down a boiler when everything is properly staged to ensure minimal disruption of the facility's operation. In addition to ensuring that the design

work is completed and the control equipment and other supplies are on-site and ready for installation, the facility owner needs to make sure that the full suite of consultants and laborers are available for the installation. This type of precise staging is exceedingly difficult to do in a three- or five-year period without substantial advanced planning and early commitments of resources.

Any installation of equipment to comply with the Boiler and CISWI rules will be severely hampered because demand for the skilled personnel needed to provide this work will likely far exceed the available supply. *See* Appx. 1, Harm to Economic Sectors: 1. Sugar Production. Thousands of boiler owners across the country will be performing the same work during the same time frame, and they will be drawing on the same talent pool that will be needed to help other industries comply with EPA’s other new air permitting requirements. *Id.* Substantial further demands on these resources will be imposed by the Utility MACT, state BART/Regional Haze rules, and the Clean Air Transport Rule – all of which will be implemented concurrently with the Boiler and CISWI rules. Thus, across the multitude of industries impacted by the Boiler rule, boiler owners will be scrambling to find and retain the relatively few qualified consultants who can perform the retrofits necessary to make boilers compliant with this stringent rule. There are a limited number of engineering companies with the expertise to assist in such retrofits and there will be a similar scarcity in equipment vendors, construction contractors, construction equipment (*e.g.*, heavy lifting cranes), skilled labor (*e.g.*, boilermakers), and other critical suppliers. Companies may even be unable to secure the basic building materials and control equipment (*e.g.*, baghouses, electrostatic precipitators (ESPs), and scrubbers). Furthermore, the state and local permitting authorities who must approve and assist with many of these steps are already overwhelmed with new EPA rules (*e.g.*, the “Tailoring” Rule) and concurrent budget cuts, which may add further delays.

In addition to their impacts on existing sources, the rules will immediately and adversely impact new facilities. Companies will soon be required to make major decisions regarding whether to build new facilities as a means of complying, or to retrofit existing facilities. Given the timeline for compliance and the unachievable emission limits in the new source standards, companies will forego the installation of new facilities, unless EPA reconsiders the new source standards.

2. Unless a Stay Is Granted, the Reconsideration Process Will Waste Both Resources and Time During the Limited Compliance Window, Harming Petitioners.

EPA’s planned reconsideration of major portions of the rule will compound the harm to Petitioners’ members, absent a stay. The short compliance window, combined with the extreme competition for these resources and the potential for permitting delays, will make quick action on planning and early financial commitments for resources a necessity for companies. However, unless the rules are stayed, companies will be forced to invest valuable resources in working towards compliance with rules that EPA will simultaneously be reconsidering. Thus, those companies that move forward with compliance projects will have to do so in the face of significant regulatory uncertainty and risk concerning the final rules.

Reconsideration without a stay will harm companies by forcing them to make potentially unnecessary investments. In order to meet the aggressive compliance deadlines, Petitioners' members will be forced to make major investments in compliance measures that may ultimately be rendered unnecessary or misguided. EPA may change the rules in substantial ways during reconsideration, thereby obviating early investments in compliance with the published final rules. Depending on the rule changes, those early investments may not have been necessary in the first place. Alternatively, the early investments may end up having been focused on the wrong areas, resulting in a company not being in a position to timely ensure compliance with the rules that EPA ultimately finalizes after reconsideration.

The substantial expenditures required for planning, engineering, and purchasing the equipment itself would likely be wasted if the standards are changed, as different limits and other requirements would likely call for different control strategies and equipment. The types of control devices that will be needed are neither off-the-shelf nor cookie-cutter equipment. Rather, they are customized pieces of equipment that have to be designed, engineered, and installed to meet the specific and unique needs of each individual facility and type of pollutant. Even if the companies are able to meet the requirements of the ultimate rules, given the precise engineering required to meet the multiple standards, companies will squander resources on equipment that is not optimized to meet the final requirements. Such wasted expenditure would constitute irreparable harm to the companies.

Reconsideration without a stay will waste resources by forcing companies to design contingencies for an uncertain outcome. Companies will need to be designing and deciding on the appropriate control technology at the same time that EPA is reconsidering the very standards that the control technology is intended to meet. Thus, in order to meet the suite of possible reconsideration outcomes, companies will need to plan for an unnecessarily large number of contingencies. This planning dilemma will require companies to overspend on testing and design options to accommodate the various potential reconsideration outcomes.

Should companies wait until reconsideration is complete to see what rules result from that process, they will not have adequate time to comply. *See, e.g.*, Appx. 1, Harm to Economic Sectors: 1. Sugar Production, 4. Municipal Solid Fuel-Fired Utility Boilers, Harm to Specific Companies, 1. Multi-State Paper Company. The reconsideration process will likely consume months, if not more than a year, of the short compliance periods. Given the tight schedules and long lead times required to make major compliance changes, there is not sufficient time for such a delay. Companies will be harmed if they wait too long and find that they are ultimately unable to achieve compliance with post-reconsideration rules.

Lastly, in many instances, companies are faced with emissions limitations for which no viable means of compliance has been or reasonably will be devised. For example, numerous examples are provided in **Appendix 1** of companies that do not believe the dioxin/furan standards are achievable – in part because the standards are set at or below the detection limits of the applicable test methods and in part because the mechanism by which dioxins and furans are formed is not well understood, which frustrates the development of reliable abatement methods.

See, e.g., Appx. 1, Harm to Economic Sectors: 3. Chemical Production (Example 3), Biomass Power Producers; Harm to Specific Companies: 2. An Eastern Paper Mill, 8. A Multi-State Forest Products Company. Similarly, **Appendix 1** contains several examples of companies with biomass boilers that cannot meet the CO standard, or cannot meet the CO standard without creating other intractable problems (such as corresponding NO_x emissions increases). *See, e.g.*, Appx. 1, Harm to Specific Companies: 2. An Eastern Paper Mill, 10. Softwood Lumber Manufacturer.

Companies considering the installation of units that will be subject to the new source standards have not been able to obtain suitable guarantees from boiler vendors that the units will achieve the new source limits. *See, e.g.*, Appx. 1, Harm to Economic Sectors: 1. Sugar Production, 3. Iron and Steel Production, Harm to Specific Companies: 1. Multi-State Paper Company. So, notwithstanding their best efforts, companies facing these issues will not reasonably be able to meet the new standards. These problems are further compounded by fundamental and unresolved questions as to the applicability of the rules – e.g., the new interpretation of the term “contained gas,” potential classification of many secondary materials (such as biomass residuals and even tire-derived fuel) as solid wastes, and the corresponding changes to the CISWI rule have upended previous expectations as to what units are “boilers” and what units are “incinerators.” A stay would provide the time needed to solve these problems without unreasonably truncating the compliance time that will be needed once the solutions are implemented.

Thus, the short compliance deadlines, combined with EPA’s reconsideration of the rules will irreparably harm Petitioners and their members. Further, as discussed in the examples in **Appendix 1**, the uncertainty surrounding the rules pending reconsideration may force plants, companies, and even entire industry sectors, to shut down U.S. operations. Appx. 1, Harm to Economic Sectors: 1. Sugar Production. Such shut-downs will cost jobs and injure communities. The uncertainty about the rules may also result in the delay or abandonment of certain environmentally beneficial projects, such as the installation of boilers to burn process gas and reduce pollutants. *See, e.g.*, Appx. 1, Harm to Economic Sectors: 3. Iron and Steel Production, Harm to Specific Companies: 7. A Chemical Manufacturing Plant. Each and every one of these potential harms is sufficient to justify a stay.

B. The Rules Are Procedurally and Substantively Flawed.

There is little doubt about the legal vulnerabilities of the final rules. As EPA has anticipated, Petitioners are likely to succeed on the merits of at least some of their objections to these rules. EPA has acknowledged that these rules are flawed procedurally, at least in part, stating that they “involve issues of central relevance that arose after the period for public comment or may have been impracticable to comment upon.” Notice of Reconsideration, 76 Fed. Reg. at 15,267. Consequently, parts of the rules are not logical outgrowths of the proposals, *see* Mot. for Extension 3, and will likely be struck down by the courts if EPA does not first reconsider them. *Env’tl. Integrity Project*, 425 F.3d at 996.

The rules also are substantively flawed in several respects. These flaws will be detailed in additional petitions for reconsideration that will soon be filed by Petitioners (and, likely, by others). A non-exhaustive list of some of the most problematic provisions in the Boiler and CISWI rules includes:

- i. The standards for dioxin are unlawful and unachievable.
- ii. In the final CISWI and solid waste definition rules, EPA, without notice, fundamentally and unlawfully changed the definition of what constitutes a “contained gaseous material,” resulting in widespread confusion among the regulated community over whether certain boilers are regulated under the Boiler rule or the CISWI rule because of the gases being combusted. This confusion extends to combustion devices covered under other MACT standards.
- iii. The particulate matter (PM) limits in the Boiler rule are infeasible for many boilers and EPA failed to employ a health-based compliance alternative or new subcategory.
- iv. The CO emission limits for certain biomass boilers in the Boiler rule are unachievable. EPA failed to consider conflicts between NO_x and CO emissions management, resulting in unachievable limits that are contrary to the statute.
- v. EPA improperly failed to adopt a Total Select Metals (TSM) alternative for PM.
- vi. EPA’s new source limits for the Boiler rule are unachievable for many subcategories.
- vii. EPA improperly considered stack test data from units not burning solid waste in establishing CISWI emission standards.
- viii. The CISWI limits for lead, cadmium, HCl and mercury are unachievable for many existing and new units burning solid materials.
- ix. The CISWI limits do not consider higher emissions of CO and other pollutants during start-up and shutdown when auxiliary fuels are used.

- x. The CO and PM limits in the Boiler rule for existing and new oil-fired units are not achievable.
- xi. The criteria for qualifying as a Gas I boiler/process heater in the Boiler rule are inappropriate.
- xii. The “affirmative defense” requirement for boiler malfunctions is inappropriate.
- xiii. Various monitoring requirements, including PM Continuous Emission Monitoring System (CEMS) and O₂ monitoring, are impractical and inappropriate.
- xiv. The floor setting process for the various subcategories under CISWI is flawed.
- xv. The basis for the energy audit provisions in the Boiler rule is inappropriate.

C. A Stay Would Not Harm EPA or Other Parties and Is in the Public Interest.

These rules threaten significant harm to Petitioners’ members and the economy at a time when manufacturers are attempting to recover from the steepest economic downturn since the 1930s. Compliance costs associated with these harsh and inflexible proposed rules will cost thousands of manufacturing jobs in the United States and hurt America’s global competitiveness.

Staying and reconsidering these rules will not cause any environmental harm; in fact, taking the time to properly address these issues and promulgate corrected and valid rules will promote timely compliance with the rules. As the Agency has clearly stated: “A re-proposal would result in standards that are more defensible and will yield environmental benefits *earlier*, because the final standards will more likely withstand substantive review.” Mot. for Extension 20 (emphasis added). Thus, by EPA’s own theory, granting a stay would lead to the earlier realization of the rule’s intended benefits and thus help to avoid significant harm to the economy.

Finally, it is worth noting that even though any reconsideration will only be reviewable in the Court of Appeals, staying the rules is also fully in keeping with the district court’s order in *Sierra Club v. Jackson*. In that case, despite EPA’s position that finalizing the rules would lead to longer delay because of the rules’ legal defects, the Court noted that it would not allow EPA to re-propose its rules in part because the Agency could address these issues under “Section 307(d)(7)(B), obviating any purported need for re-proposal and further delay.” Slip Op. at 19. The district court thus did nothing to constrain EPA’s discretion under to CAA § 307(d)(7)(B) or APA § 705, nor could it have. The district court litigation concerned an allegation that EPA had failed to perform a nondiscretionary duty to promulgate the rules at issue. *See* 42 U.S.C. § 7604(a)(2) (citizen suit cause of action for seeking to compel EPA action that has been

unreasonably delayed). The district court had no basis in the first instance to constrain EPA’s authority to issue administrative stays under CAA § 307(d)(7)(B) or APA § 705 once the rules at issue had been promulgated, nor did it try to do so.

V. CONCLUSION

For the foregoing reasons, EPA should administratively stay both the Boiler rule and the CISWI rule pending reconsideration and should immediately commence the reconsideration process. Furthermore, EPA should act quickly in order to maximize the avoidance of irreparable harm. In the event that EPA believes its authority under APA § 705 may only be invoked in advance of the effective date of the rules – a legal position that Petitioners believe has no basis in § 705 as described above – EPA should act *before* the rules become effective.

Should you have any questions or comments concerning this petition, please feel free to contact any of the undersigned, or Timothy Hunt at the American Forest & Paper Association at (202) 463-2588. Mr. Hunt has kindly agreed to convey any questions or comments to the undersigned for response.

Sincerely,

AMERICAN FOREST & PAPER
ASSOCIATION

NATIONAL ASSOCIATION OF
MANUFACTURERS

AMERICAN CHEMISTRY COUNCIL

AMERICAN COKE AND COAL
CHEMICALS INSTITUTE

AMERICAN HOME FURNISHINGS
ALLIANCE

AMERICAN IRON AND STEEL INSTITUTE

AMERICAN MUNICIPAL POWER, INC.

AMERICAN PETROLEUM INSTITUTE

AMERICAN WOOD COUNCIL

BIOMASS POWER ASSOCIATION

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

CORN REFINERS ASSOCIATION

COUNCIL OF INDUSTRIAL BOILER
OWNERS

FLORIDA SUGAR INDUSTRY

NATIONAL OILSEED PROCESSORS
ASSOCIATION

RUBBER MANUFACTURERS
ASSOCIATION

SOCIETY OF CHEMICAL
MANUFACTURERS AND AFFILIATES

TREATED WOOD COUNCIL

Enclosures: Appendix 1 (Examples of Harm)