

**DOCKET NO. OAR-2003-0119**

**Comments of  
the Utility Solid Waste Activities Group,  
the Edison Electric Institute,  
the American Public Power Association,  
and the National Rural Electric Cooperative  
Association  
on  
Standards of Performance for New Stationary  
Sources and Emission Guidelines for  
Existing Sources: Commercial and Industrial  
Solid Waste Incineration Units  
(69 Fed. Reg. 7390 (February 17, 2004))**

*Submitted to*  
**The United States Environmental Protection Agency  
Office of Air and Radiation  
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THE UTILITY SOLID WASTE ACTIVITIES GROUP,  
THE EDISON ELECTRIC INSTITUTE,  
THE AMERICAN PUBLIC POWER ASSOCIATION, AND  
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION  
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(69 FED. REG. 7390 (February 17, 2004))**

**I. INTRODUCTION**

The following comments in response to EPA's supplemental solicitation of comments on Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units ("CISWI") (69 Fed. Reg. 7390 (February 17, 2004)) are submitted on behalf of the Utility Solid Waste Activities Group (USWAG), the Edison Electric Institute (EEI), the American Public Power Association (APPA), and the National Rural Electric Cooperative Association (NRECA).<sup>1</sup>

USWAG's central comment on the supplemental notice is that EPA must make absolutely clear that the definitions of "commercial and industrial waste" and "commercial and industrial solid waste incineration ('CISWI') unit" do *not* inadvertently result in the Clean Air Act ("CAA") section 129 program regulating electric utility boilers,

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<sup>1</sup> USWAG is an association of EEI, APPA, NRECA and approximately 80 electric utility operating companies (hereafter collectively referred to as "USWAG"). EEI is the principal national association of investor-owned electric power and light companies. APPA is the national association of publicly owned electric utilities. NRECA is the national association of rural electric cooperatives. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S., and service more than 95% of the nation's consumers of electricity.

including circumstances where such boilers simultaneously co-combust non-hazardous solid waste with fuel during the production of power (referred to herein as “co-combustion practices”). This view is consistent with the position that EPA took in the final December 1, 2000 CISWI rule (65 Fed. Reg. 75338), and the Agency should adhere to that position in responding to comments on the supplemental notice.

USWAG’s points on the proposal are summarized as follows:

- USWAG made clear to EPA in its original comments on the CISWI proposal that electric utility boilers that periodically engage in co-combustion practices are not “solid waste incineration units” and should not be regulated under the section 129 CISWI rule. USWAG urged EPA to make clear in the final CISWI rule that the CAA section 129 regulations apply only to combustion units whose *primary* function is the incineration of non-hazardous solid waste and not to electric utility boilers that are operated to recover energy to produce power, even in instances when such boilers co-combust small amounts of non-hazardous solid waste with fuel during the production of electric power.
- EPA fully agreed with USWAG in its final CISWI rule published on December 1, 2000. The phrase “commercial and industrial waste” was defined in that rule to include, in pertinent part, “solid waste combusted in an enclosed device using controlled flame combustion *without energy recovery* that is a distinct operating unit of any commercial or industrial facility.” (Emphasis added.) The term “solid waste incineration unit” was defined to include “any combustion device that combusts commercial and industrial waste.” Taken together, these two definitions appropriately limited the universe of the section 129 CISWI rule by keying the applicability of the rule to the *function* of the combustion unit – *i.e.*, only those units whose primary function was the incineration of non-hazardous solid waste were subject to the regulation.
- Nothing has changed in the text of CAA section 129 or its legislative history since EPA issued its final December 1, 2000 CISWI rule. Therefore, nothing in the supplemental notice warrants *any* deviation from EPA’s original CISWI rule wherein the Agency made clear that the CAA section 129 regulations are applicable *only* to combustion units whose primary function is the combustion of non-hazardous waste for destruction.

## **II. BACKGROUND OF USWAG’S INTEREST IN THIS RULEMAKING**

USWAG members, and electric utilities generally, are in the business of producing and providing electricity for millions of industrial, commercial and private

customers throughout the United States. To generate this critical and indispensable product, utilities combust a variety of fuels, including coal, oil, natural gas, and other fuels, in electric utility boilers for the express purpose of recovering energy to produce power. To ensure that these combustion operations are not inappropriately regulated under the CAA section 129 program, USWAG has closely followed EPA's development of this program and has repeatedly cautioned EPA to guard against regulating electric utility combustion practices as solid waste incineration units.

USWAG submitted extensive comments on EPA's original November 30, 1999 CISWI proposal. See USWAG comments in Docket No. A-94-63 (filed January 31, 2000) (incorporated herein by reference). USWAG's comments explained, among other things, that the proposed CISWI regulatory text swept too broadly by potentially capturing the episodic circumstances in which electric utilities combust small amounts of non-hazardous solid wastes simultaneously with fuel during electric utility production operations (*i.e.*, when materials having little or no heat content are simultaneously co-fired into the boiler with the fuel stream). USWAG explained that, for a number of legal and practical reasons (reiterated below), electric utility boilers that periodically engage in such co-combustion practices plainly are not "solid waste incineration units" and should not be regulated under the section 129 CISWI rule.

EPA fully agreed with USWAG in its final CISWI rule published on December 1, 2000. The phrase "commercial and industrial waste" was defined in that rule to include, in pertinent part, "solid waste combusted in an enclosed device using controlled flame combustion *without energy recovery* that is a distinct operating unit of any commercial or industrial facility . . . ." See 65 Fed. Reg. at 75359 (emphasis added) (codified at 40

C.F.R. § 60.2265). The term “solid waste incineration unit,” in turn, was defined to include “any combustion device that combusts commercial and industrial waste.” *Id.* Taken together, these two definitions appropriately limited the universe of the section 129 CISWI rule by keying the applicability of the rule to the *function* of the combustion unit – *i.e.*, only those units whose primary function was the incineration of non-hazardous solid waste were subject to the regulation.

This approach is fully consistent with and, indeed, mandated by the plain text and legislative history of CAA section 129. As EPA explained in the final CISWI rule, “the overall intent of the CAA provisions is that section 129 rules are to apply to devices conventionally regarded as incinerators, that is, devices burning wastes in order to destroy the wastes,” and that “it is particularly important to distinguish between units that will be regulated as boilers as well as other devices whose primary purpose is energy recovery . . . and devices that will be regulated as incinerators under section 129 of the CAA.” 65 Fed. Reg. at 75342. As the Agency explained – and as is still true now – this “distinction is necessary to avoid dual regulation of the many combustion units in use at commercial and industrial facilities that function as energy recovery devices and may be subject to regulation under other sections of the CAA.” *Id.* To underscore this point, EPA explained that the “primary difference between incinerators and boilers is that incinerators burn materials for the purpose of disposal, whereas boilers burn materials for the purpose of energy recovery,” and that the “concept of energy recovery is the key to distinguishing between CISWI units and boilers.” *Id.* at 75343.

In the instant supplemental notice, EPA once again requests comment on the key regulatory terms that will define the jurisdictional scope of the CISWI rule –

including the terms “commercial and industrial waste” and “commercial and industrial solid waste incineration unit.”<sup>2</sup> 69 Fed. Reg. at 7396. Nothing has changed in the text of the law or its legislative history since EPA issued its final December 1, 2000 CISWI rule. Therefore, nothing in the supplemental notice warrants *any* deviation from EPA’s original CISWI rule wherein the Agency made clear that the CAA section 129 regulations are applicable *only* to combustion units whose primary function is the combustion of non-hazardous waste for destruction – in other words, solid waste incineration units as Congress intended. As it did in its December 1, 2000 final rule, EPA must once again ensure that the regulatory terms defining the scope of the CISWI rule do not inadvertently capture electric utility boilers, including instances when such boilers co-combust small amounts of non-hazardous solid waste with fuel during the production of electric power.

**III. EPA MUST CONTINUE TO MAKE CLEAR THAT ELECTRIC UTILITY CO-COMBUSTION OPERATIONS ARE NOT REGULATED UNDER CAA SECTION 129**

The preamble to the supplemental notice appears to signal EPA’s clear intent to properly limit the scope of the final CISWI rule to units whose primary function is the incineration of non-hazardous solid waste. Nonetheless, the definitions of “commercial and industrial waste” and “commercial and industrial solid waste incineration unit” on which EPA seeks comment (69 Fed. Reg. at 7396) are drafted too loosely and could be mistakenly construed as capturing *any* combustion unit that burns any amount of non-

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<sup>2</sup> EPA is requesting additional comment on these terms because it granted a petition for reconsideration of the final rule. The petition alleged EPA failed to provide adequate notice and an opportunity to comment on the definitions adopted in the final rule. 69 Fed. Reg. at 7393.

hazardous solid waste, including electric utility co-combustion scenarios. This loose regulatory text *must* be corrected to limit the CISWI rule only to combustion units burning materials without energy recovery; alternatively, EPA should simply adhere to the relevant definitions of “commercial and industrial waste” and “commercial and industrial solid waste incineration unit” contained in the December 1, 2000 CISWI rule.

A. EPA Properly Focuses the Section 129 Rule on Combustion Units Dedicated to the Incineration of Non-Hazardous Solid Waste

EPA correctly explains in the supplemental notice that a key function of the three regulatory definitions at issue – “solid waste,” “commercial and industrial waste,” and commercial and industrial solid waste incineration unit” – is to delineate the jurisdictional boundaries between the CAA section 129 CISWI rule and the CAA section 112 rules for other categories of combustion units, including electric utility boilers. 69 Fed. Reg. at 7393. This is because the language of the CAA makes clear Congress’ intent “for EPA to regulate nonhazardous combustion sources under either CAA section 129 or CAA section 112, *but not both.*” *Id.* at 7392 (emphasis added).

Of particular relevance here, EPA expressly states that one category of boiler that should *not* be subject to the CAA section 129 program is electric utility boilers subject to “regulations promulgated pursuant to Section 112(n) for hazardous air pollutants from electric utility steam generating units.” *Id.* at 7393 n2. USWAG fully concurs with this conclusion and, therefore, there is absolutely no question that electric utility boiler combustion practices – including when utilities simultaneously co-combust solid waste with fuel – *cannot* be subject to the CAA section 129 program. EPA must ensure, however, that this position is not in any way altered as a result of its supplemental notice.

B. EPA Must Correct the Regulatory Definition of “Commercial and Industrial Solid Waste” or Retain the Definition From the December 1, 2000 Rule

While EPA attempts to draw the proper jurisdictional boundaries around the CAA section 129 program, the definitions on which it seeks comment are vague and open to misinterpretation, especially as applied to electric utility boilers that episodically combust small amounts of non-hazardous solid waste during the production of electricity. This is because the term “commercial and industrial waste” set forth in the supplemental notice is not clearly linked to the function of the combustion unit in which the wastes are burned. Rather, the term would be defined simply as “solid waste . . . combusted for reasons that do not include the recovery of heat for a useful purpose, or combusted without heat recovery . . . .” *Id.* at 7396.

This definition could be construed as encompassing solid wastes that have no heat value, but which are nonetheless combusted in units that are in fact recovering heat – *e.g.*, the electric utility co-combustion scenario. Plainly, in these circumstances, electric utility boilers are not functioning as “solid waste incineration units” as that term is contemplated under CAA section 129. To correct this problem, the definition of “commercial and industrial waste” must be explicitly linked to the primary function of the combustion unit in which the waste is being burned. This is the approach EPA adopted in the final December 1, 2000 CISWI rule, and that approach should be retained going forward.

In fact, EPA correctly acknowledges in the supplemental notice that the key criterion for defining the scope of the section 129 program is to focus on the predominant function of the combustion unit in question. As the Agency explains,

for purposes of CISWI units, the critical consideration in determining whether the unit is burning commercial or industrial waste [and thus subject to the section 129 program] is the *primary function of the combustion unit*, and the primary indicator of function is whether or not a unit is designed and operated to recover heat for a useful purpose.

*Id.* at 7395 (emphasis added). Under this rationale, an electric utility boiler – whose primary function is to recover heat for a useful purpose – should not be subject to section 129 controls, even on those occasions when non-hazardous solid waste is simultaneously co-combusted with fuel in the boiler.

Again, USWAG believes there is no reason to deviate from the definitions in the December 1, 2000 CISWI rule. Nonetheless, if EPA amends these definitions as a result of comments received on the supplemental notice, the term “commercial and industrial solid waste” should be amended to include only wastes combusted in units without any heat recovery, as EPA did in its December 1, 2000 rule.<sup>3</sup> EPA can readily do this by amending, in pertinent part, the term “commercial or industrial waste” in the supplemental notice as follows:

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<sup>3</sup> On a related issue, it also is important to confirm that the practice of using fluid bed combustion technology to further improve the quality of coal combustion byproducts (“CCB”) (*i.e.*, coal ash) for beneficial use is not subject to CAA section 129 controls. This technology involves combustion of the residual carbon in the CCB to produce a higher quality CCB for use as a product. This is a continuous process and is fueled solely by the heat recovered from the residual carbon (natural gas or oil may be burned during start-up). This process clearly is not subject to CAA section 129 controls for a number of reasons, including (1) the CCB is not being combusted for incineration, but rather to further process the CCB for beneficial use, (2) the fluid bed combustion process does not involve an enclosed unit using controlled flame combustion (a criterion in the definition of “commercial and industrial waste”), and thus the combustion technology would not qualify as a “commercial and industrial solid waste incineration unit,” and (3) such units are potentially subject to other CAA emission controls, including the NSPS Subpart Db emission limits for steam generating units, and thus should not be subject to duplicative CAA section 129 controls. USWAG requests that EPA confirm this position in its response to comments on the supplemental notice.

Commercial or industrial waste means solid waste (as defined in this subpart) combusted in a unit that *does not recover heat for a useful purpose* (e.g., no heat recovery in the combustion firebox) and such combustion occurs in an enclosed unit using controlled flame combustion .

#### IV. APPLYING SECTION 129 TO UTILITY BOILERS CO-COMBUSTION OPERATIONS WOULD RESULT IN LEGAL AND PRACTICAL PROBLEMS

Because EPA has once again requested comment on the jurisdictional boundaries of CAA section 129, it is important to reiterate the legal and practical reasons why EPA must adhere to its original position not to subject electric utility co-combustion practices to CAA section 129.<sup>4</sup>

##### A. Application of Section 129 Controls to Electric Utility Boilers that Co-Combust Solid Waste With Fuel Would Result in an Impractical and Illogical Regulatory Scheme.

Subjecting electric utility boilers that co-combust solid waste with fuel to the section 129 controls would result in an impractical and illogical regulatory scheme. During the episodic co-combustion of fuel and solid waste, it would be extremely difficult, if not impossible, to distinguish the emissions from the combustion of solid waste (regulated under section 129) from the emissions from the combustion of fuel (which are not regulated under section 129). This problem is compounded by the fact that the solid waste component of the co-fired stream is generally *de minimis* relative to

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<sup>4</sup> USWAG believes that definition of "solid waste" on which EPA solicits comment is acceptable. USWAG agrees with EPA that it has wide discretion to adopt a definition of "solid waste" (i.e., nonhazardous solid waste) keyed exclusively to the section 129 regulatory program for solid waste incineration units. 69 Fed. Reg. at 7394. Congress has directed only that the term shall have the meaning established by EPA pursuant to the RCRA. Otherwise, the statutory text leaves intact EPA's administrative discretion to define solid waste for the purposes of the section 129 regulatory program. EPA may reasonably interpret section 129(g)(1) as requiring only that the Agency define the term "solid waste" consistent with the broad statutory definition under SWDA section 1004(27).

the volume of fuel. It follows that the emissions from the solid waste component of the co-fired stream are essentially non-detectable when compared to the emissions from the fuel component of the co-fired stream.

The section 129 standards, including the compliance demonstration standards, are not designed to address the periodic, co-combustion of solid waste with fuel during the production of electricity. See, e.g., 40 C.F.R. § 60.2125 (performance testing). Rather, the standards are understandably designed for regulated units that, during normal operations, continuously combust non-hazardous solid waste – *i.e.*, solid waste incinerator units as that term is commonly understood and as envisioned by Congress in the legislative history to section 129.

An example of an electric utility non-hazardous solid waste co-combustion practice illustrates this point. Electric utilities periodically clean the deposits that accumulate on the interior of boiler tube walls. These cleanings – referred to as boiler cleanings – are conducted with specified cleaning agents that remove the deposits from the boiler tubes. The timing of a boiler cleaning depends on the maintenance schedule of a particular utility and the type of boiler at issue, though it is common for a utility boiler to undergo a cleaning once every four to eight years. It is a common practice for some electric utilities to co-combust non-hazardous boiler cleaning waste with fuel (e.g., coal or oil) in their boilers during normal production operations where the boiler is recovering heat to produce power. Combustion in a high efficiency boiler has been found to provide the most efficient and effective method for disposing of this material.

Recognizing the episodic nature of these co-combustion practices, and the insignificant effect they have on boiler emissions, many state air permits expressly recognize and authorize the combustion of non-hazardous boiler cleaning wastes in electric utility boilers. See Attachment F to USWAG's November 30, 1999 Comments in Docket No A-94-63, Letter from Bill Wilson, Central and South West Services (referencing air permits issued by Texas and Oklahoma for the combustion of boiler chemical cleaning waste in utility boilers). These state permits recognize that the emissions from such combustion practices are insignificant and/or *de minimis* in comparison to the regulated emissions from the combustion of fossil fuels in utility boilers. *Id.* CSWS reported that the total emissions from combustion of the boiler cleaning waste from a particular boiler (approximately 140,000 gallons) was estimated at 0.04 tons per year. In contrast, the total yearly emissions from this particular boiler were 27,000 tons per year (including all criteria pollutants). *In this case, the practice of combusting boiler cleaning waste in the boiler amounted to less than 0.00015 percent of the total boiler emissions on an annual basis.*

To determine compliance with the section 129 controls under such circumstances would be virtually impossible. Under the CISWI rules, compliance with the emission standards must be based on performance testing. See, e.g., 40 C.F.R. §§ 60.2125-.30. Therefore, it would be necessary to identify and quantify the emissions of the regulated pollutants from the boiler cleaning waste separately from the emissions from the fuel, the latter of which are not subject to section 129 controls. Since the two streams are fired into the boiler at the same time, with the boiler waste being fired into the boiler through a separate nozzle, the flue gas is composed of emissions from both

the fuel and the boiler cleaning waste. In these circumstances, it would be extremely difficult, if not impossible, to measure the emissions separately. It is unclear, therefore, how regulated entities could demonstrate compliance with the solid waste emission standards when the regulated solid waste component of the emissions is indistinguishable from, and insignificant in relation to, the much larger component of emissions from the fuel. It is axiomatic that a regulation that is not “‘achievable’ would defy the Administrative Procedure Act’s mandate against action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *National Lime Ass’n v. EPA*, 627 F.2d 416, 430 (D.C. Cir. 1980).

Other elements of the CISWI standards also would be nonsensical as applied to the episodic combustion of boiler cleaning wastes. For example, it would be necessary to install and operate monitoring equipment to assess minimum and maximum operating parameters (see, e.g., 40 C.F.R. § 60.2145) during the episodic intervals that boiler cleaning wastes (or other nonhazardous solid wastes) are co-combusted with fuel. Compliance with these complex monitoring requirements simply does not make sense in the context of a boiler that only periodically combusts small amounts of solid waste, and whose emissions are virtually all from the combustion of fuels, which, in turn, are not regulated under section 129. The same logic applies to the CISWI rule’s record keeping and reporting requirements – standards written for incineration units that combust solid waste on a continuous basis. See *id.* at §§ 60.2175-.2240.

B. The Legislative History Makes Clear that Congress Intended Section 129 to Apply Only to Units Dedicated to Solid Waste Combustion.

The legislative history of section 129 illustrates that Congress drafted this provision to address a specific concern: the increased use of incineration as a means

to dispose of non-hazardous solid waste. Nowhere does the legislative history indicate that Congress envisioned this provision applying to electric utility boilers that, on occasion, combust small amounts of solid waste with fuel during normal electricity production operations; indeed, the focus of the legislative history (in so far as solid waste incineration units are concerned) was on controlling emissions from units whose function is to combust solid waste, not on combustion units that produce power.

During debate on section 129, members of Congress described the facilities that would be affected as “municipal waste combustion units” and “solid waste incinerators.” See statements of Sen. Durenberger and Sen. Baucus, 136 Cong. Rec. S3757-S3759 (daily ed. April 3, 1990), *reprinted in* S. Rep. No. 103-38, 103d Cong., 1<sup>st</sup> Sess., *A Legislative History of the Clean Air Act Amendments of 1990* (hereinafter *Leg. Hist.*) at 7050, 7053 (Nov. 1993). Senator Graham characterized this section of the legislation as “the provision of this bill establishing emission standards for municipal incinerators.” 136 Cong. Rec. at S17241 (daily ed. Oct. 26, 1990), *reprinted in Leg. Hist.* at 1136. None of the floor statements indicate any intention to control emissions from units that combust nonhazardous solid waste incidental to production. To the contrary, Sen. Baucus emphasized that the section “exempts facilities regulated under the Public Utilities Regulatory Policy Act (PURPA). These facilities are important because they are actually cogenerators of electricity. They turn waste into energy.” Statement of Sen. Baucus, 136 Cong. Rec. at S3758 (daily ed. Apr. 3, 1990), *reprinted in Leg. Hist.* at 7054.

When discussing the number of units potentially subject to the legislation, it is plain that Congress was contemplating units designed for and used to combust solid waste – e.g., solid waste incinerators as that term is typically understood – and not electric utility boilers that produce power and that, on occasion, combust small amounts of nonhazardous solid waste that is generated incidental to the power production process. For example, in describing the need for controls on solid waste incineration units, Senator Durenberger explained that “[i]n my home state of Minnesota, nearly one-half of the municipal solid waste stream is signed up for a garbage burner. If all of the planning [sic] facilities are completed we will have 14 units in Minnesota.” 136 *Cong. Rec.* at S3757 (daily ed. Apr. 3, 1990), *reprinted in Leg. Hist.* at 7051. Senator Baucus explained that “[b]eyond the universe of existing incinerators, 200 or more new incinerators are being planned. Seventy-two of these are in the advanced stages of construction.” 136 *Cong. Rec.* at S3758 (daily ed. Apr. 3, 1990), *reprinted in Leg. Hist.* at 7053. Representative Mrazek reported that “EPA estimates that by the year 2000, there will be 400 incinerators nationwide, disposing nearly 33 percent of the country’s waste.” *Leg. Hist.* at 2767.

Plainly, there are far greater than 400 combustion units in the industrial and commercial sector that are not “solid waste incineration units” as that term was understood by Congress during the legislative debates on section 129 but that, nonetheless, combust small amounts of solid waste during normal production operations. Congress could not have possibly intended for EPA to sweep all of these production units into the section 129 program for solid waste incineration units without ever mentioning, let alone implying, that it intended such a far reaching result. Any

section 129 rule that applies to any unit that ever burns any amount of nonhazardous solid waste, without regard to the type of units at issue or the circumstances in which such combustion occurs, impermissibly extends the parameters of section 129 beyond the intent of Congress.

C. Application of Section 129 to Electric Utility Boilers Would Be at Odds with Section 112 of the CAA.

In addition to stretching the statutory text beyond its intended scope, interpreting section 129 to apply to electric utility boilers that periodically co-combust solid waste with fuel would create an express conflict with section 112(n)(1) of the CAA. Section 129 directs EPA to establish emission standards for “solid waste incineration units” based on maximum available control technology (MACT) for specific pollutants, including lead, cadmium, hydrogen chloride, mercury, and dioxins and dibenzofurans. CAA §§ 129(a)(2) & (a)(4). In fact, EPA just recently proposed to establish national emission standards for hazardous air pollutants (“NESHAPs”) under CAA section 112 for new and existing electric utility steam generating units. See 69 Fed. Reg. 4651 (Jan. 30, 2004); 69 Fed. Reg. 12398 (March 16, 2004).

Interpreting section 129 to encompass electric utility boilers that combust any amount of non-hazardous solid waste would create the precise conflict and potential for dual regulation under CAA section 129 and CAA section 112 that Congress specifically directed EPA to avoid. As explained above, the language of the CAA makes clear Congress’ intent “for EPA to regulate nonhazardous combustion sources under either CAA section 129 or CAA section 112, *but not both.*” See 69 Fed. Reg. at 7392 (emphasis added). Because EPA is in the process of subjecting electric utility boilers to

CAA section 112 emission controls, such boilers may not be subject to regulation under CAA section 129.

D. EPA Did Not Consider Electric Utilities That Co-Combust Solid Waste With Fuel in Its Rulemaking Analysis.

In addition to the above, EPA's regulatory impact analysis underlying the CISWI rules makes clear that the regulation "will affect [only] 112 existing facilities owned by 90 parent companies." 64 Fed. Reg. 67092, 67106 (Nov. 30, 1999). Of these 112 potentially affected facilities, "92 are spread among 25 different industries, 15 are spread among State, Federal and city government, and 5 are located at universities." *Id.* at 67103. There are approximately 3,000 fossil-fuel-fired electric utility boilers in the United States that could potentially, on occasion, combust small amounts of nonhazardous solid waste (*e.g.*, material with a heat content of less than 5,000 Btu/lb) during the production of electric power.

Thus, EPA's regulatory impact analysis did not contemplate, let alone expressly consider, including within the scope of section 129 the potential universe of electric utility boilers (as well as boilers in other industrial categories) that may on occasion combust non-hazardous waste incidental to normal production operations.

E. Some Electric Utility Boilers May Already Be Subject to Specific NSPS and Should Be Excluded From the Proposed Section 129 Controls.

To avoid the potential for overlapping regulation, the final CISWI rule appropriately excludes units subject to new source performance standards ("NSPS") for municipal waste combustors or medical waste incinerators from the section 129 controls. See 40 C.F.R. § 60.2020(c) & (d). The same rationale applies to electric utility

boilers that co-combust solid waste with fuel because they too are subject to pre-existing NSPS controls.

In particular, certain electric utility steam generating units – including those that co-combust solid waste with fuel – may be subject to NSPS controls under 40 C.F.R. Part 60, Subpart Da (Electric utility steam generating units for which construction began after September 18, 1978) and 40 C.F.R. Part 60, Subpart Db (Industrial, commercial and institutional steam generating units constructed or modified after June 19, 1984). Subjecting those electric utility boilers that are already subject to NSPS to another set of NSPS controls would create the same potential for “overlapping regulations” that led EPA to exclude other units from the proposed section 129 rules. Logic and basic principles of administrative law (*i.e.*, similarly situated entities should be treated alike) dictate that electric utility boilers subject to NSPS controls remain excluded from the section 129 controls.

## **V. CONCLUSION**

For all of the above reasons, USWAG urges EPA to adhere to the position taken in its December 1, 2000 CISWI rule that electric utility boilers – including boilers that co-combust solid waste simultaneously with fuel during the production of power – are not subject to the CAA section 129 program. USWAG appreciates the opportunity to provide these comments and would be pleased to provide EPA with additional information and to respond to any questions. Please direct your inquiries to USWAG Executive Director, Jim Roewer (jim.roewer@USWAG.com; 202-508-5645) or USWAG counsel, Douglas Green at Piper Rudnick LLP (douglas.green@piperrudnick.com; 202-861-3847).