

**The Inside Story on the Legal Challenge
to EPA's Municipal Waste Combustor Rule:
The Mouse That Roared, Round 1**

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INTRODUCTION

An article in the Deseret News, one of two general circulation newspapers in Salt Lake City, Utah, dated December 13, 1996, reported that "David" took on "Goliath" and won. The article referred to the Davis County Solid Waste Management and Energy Recovery Special Service District's (the "District") victory on its challenge to the EPA's municipal waste combustor rules. On December 6, 1996, the United States Court of Appeals for the District of Columbia Circuit ruled that the EPA violated the plain language of Section 129 of the Clean Air Act,¹ when it wrote size categories for municipal waste combustors ("MWCs") based on aggregate plant capacity, rather than unit capacity. The District argued that Congress divided the universe of MWC units into two categories: those with unit capacities above 250 tons per day, and those with unit capacities equal to or less than 250 tons per day. The EPA, however, had set the dividing line at 248 tons per day* aggregate plant capacity in its municipal waste combustor rule. The Court said this was wrong.

The Deseret News report certainly echoed the feelings of the District. Those of you familiar with the EPA, the process of judicial review of administrative ruling making, and the Biblical story of David and Goliath, however, will quickly see that this is not the best metaphor to describe what happened. When David slew Goliath, that was the end of Goliath. He didn't get back up. Of course, that will not happen to the EPA in the Davis County case. Like an 800-pound gorilla, it will always get back up after being challenged by a mouse.

What happened, therefore, is probably described best by reference to a book I enjoyed as a teenager, the Leonard Wibberley novel about the Duchy of Grand Fenwick: *The Mouse that Roared*. The Davis County District is the mouse. It has roared a mighty roar with its victory in the Court of Appeals. Yet, despite its mighty roar, the EPA is still there. And, an 800-pound gorilla is much bigger than a mouse -- even a mouse that roars. More than likely, this is just the end of Round 1.

This paper tells the story of the challenge to the MWC rule from the District's perspective. The District has not been popular with either the EPA or many industry players. But, the District was faced with a real problem that, given the District's location and the local economy, forced its hand in this case.

BACKGROUND OF THE DISTRICT

Those of you from the East will, no doubt, wonder why a municipal waste incinerator was even built in Utah, which is famous for arid deserts and other vast wastelands that would seem perfect spots for landfills. Indeed, one of the largest subtitle D landfills in the country — 2400 acres worth — is permitted and operating in eastern Utah. Movies like *Independence Day* were filmed in Utah to take advantage of our deserts. The District's burn plant is the only one in Utah, and the only one in the EPA's Region VIII. It also has some of the highest disposal fees in the area. Yet, when it was conceived, it was a very good idea and made perfect economic sense. Changes over the last decade and the precarious position the District now finds itself in speak volumes for why the District mounted the challenge to the MWC rule.

* The "dividing line" was set at 248 tpd due to EPA's use of the metric system. The court directed EPA to use 250 tpd, as required by statute.

Formation of the District

Geographically, the District is comprised of Davis County, Utah and all cities in Davis County, except for the City of Bountiful where I live. It also includes Morgan County and the City of Morgan. The governing bodies of each municipality and county formally elected to participate in the District. Davis County is a narrow strip of land bounded by mountains on the east and the Great Salt Lake on the west. Given these geographic limitations, few, if any, appropriate sites remained for construction of a landfill in the County. In 1984 when the District was formed, the North Area Refuse Disposal ("NARD") landfill, located in Layton, Utah, was rapidly reaching capacity and Davis County needed to examine other options for solid waste management.

To reduce the volume of waste by approximately 90% and extend the life of the NARD landfill, the District was formed and, as part of an integrated solid waste system, as defined by the EPA, a waste-to-energy facility was planned. This approach provided a reasonable solution that was environmentally sound and that at the time was also economically sound. The plan was to incinerate solid waste to reduce its volume, and to use the heat to produce steam to be sold to Hill Air Force Base for use in its heating loop. The price at which steam would be sold to Hill Air Force Base was tied to the price of natural gas. At the time of the original financing, it was anticipated that energy revenues would be substantial because natural gas prices were projected to go through the roof over the following decade. Instead, they went through the toilet.

Establishment of the District was not driven merely by local concerns. The District was established with the encouragement of federal laws, agencies and grant money. The Wasatch Front Regional Council in the early 1980's received a grant of approximately \$750,000 from the EPA, which was authorized by the Resource Conservation and Recovery Act. The purpose of the grant was to study and address solid waste disposal issues in Northern Utah. The culmination of that study, paid for by the EPA, was the establishment of the District. The District's burn plant was also planned and established so that it would qualify and function as a "small power production facility" and as a "qualifying facility" as those terms are used in regulations of the Federal Energy Regulatory Commission, issued pursuant to the Public Utility Regulatory Policies Act of 1978.

Commencement of Operations

In October of 1987, construction was completed on the District's waste-to-energy facility (the "Burn Plant") and shakedown and testing of the facility began. The Burn Plant has two 210 ton-per-day mass burn refractory wall furnaces. Each unit is equipped with a dry sorbent injection system ("DSI") and a high efficiency electrostatic precipitator ("ESP"). In October, 1988, the Burn Plant was accepted by the District and commercial operation commenced. Initially, a private contractor ran the Burn Plant, but the District took over operations in 1991.

The Burn Plant and related facilities and equipment were financed through the issuance of \$54.75 million in municipal revenue bonds. Fifty-one million dollars of the bonds were refinanced in 1993, and the current outstanding indebtedness supported by the bonds is approximately \$45 million. The bonds are not scheduled to be paid off until 2009.

District Revenue Problems and Tipping Fees

Because of decreasing energy prices in addition to concessions on the part of the Utah Public Service Commission to allow Hill Air Force Base to purchase natural gas on the spot market and to transport that gas over Mountain Fuel lines, the energy revenues received by the District were cut by nearly 50% from what was projected at the time construction commenced on

the Burn Plant. Even though the District has a contract with Hill Air Force Base to provide a minimum of 514,600,000 pounds of steam per year, the District still has not reached the total annual energy revenues that Hill Air Force Base anticipated it would pay the District in the first year of operation, which was projected to be about \$2.5 million. As a result, the District was required to raise user fees and enforce flow control to ensure adequate revenues.

Upon assuming operation of the NARD landfill in April, 1987, the tipping fee was \$9.00 per ton. Steady increases over the years saw that tipping fee increase to \$62.00 per ton by July 1, 1995. In contrast, the average tipping fee in Utah in April, 1996, was just \$26.77 per ton.

Waste Flow Control

The District adopted a flow control ordinance in 1986, and additional flow control ordinances in 1992 that contained enforcement provisions. This was necessitated by the rise in tipping fees to well over the market rates for Utah and the strong economic incentive for haulers to take their waste to less expensive facilities.

The District was aware that flow control had been the subject of legal challenges in various parts of the United States. It monitored the development of the case law and was aware immediately when *C & A Carbone, Inc. v. Town of Clarkstown*² was handed down by the United States Supreme Court. While it was believed that the District's flow control ordinances did not impact interstate commerce and were not affected by *Carbone*, it was a concern that future changes in the solid waste market, such as construction of a transfer station, could result in the flow control ordinances impacting interstate commerce. Therefore, with the idea of preparing for the future, the District began looking at ways other than flow control to exercise the powers granted under State law to assure sufficient revenues to meet its operating expenses, obligations under the bonds, and future capital needs.

Household Fee Program

On July 1, 1995, the District implemented a household fee program for residential waste. This fee is assessed on a per-household basis. Each household pays \$10 per month for the first container and \$3 per month for each additional container they use. Each city or county that provides collection services tells the District the number of containers to be billed for any given month, and each city or county remits the assessed amount directly to the District on a monthly basis. A household fee is also imposed on apartment units at the rate of \$6.50 per unit, regardless of whether the unit is vacant. It is estimated that these fees are the equivalent of an \$82.00 per ton tipping fee.

Commercial Fee Program

On April 3, 1996, the District adopted a commercial container fee program. This program was carefully prepared over a period of more than one and one-half years. Under the commercial container fee program, a monthly \$2.00 fee is imposed on each billable bulk yard of solid waste generated in the District and collected in commercial containers. The fee is calculated based on the size and compaction ratio of the container collected and the number of times each container is collected in a month.

Laidlaw Litigation

Following the adoption of the household and commercial container fee programs, Laidlaw, one of the largest commercial haulers in the District, filed a lawsuit in federal district court challenging the new fees and the flow control ordinances. The challenge to the flow

control ordinances was based on the **Carbone** case. The challenge to the new fees was based purely on state law theories. Laidlaw argued that the District did not have power under State law to adopt the new fees it did.

At about the same time the opening brief was due in the D.C. Court of Appeals on the challenge to the MWC rule, the District filed a motion to dismiss the Laidlaw case arguing that there is no interstate market for solid waste within the District, and that the federal tax injunction act precludes a challenge to the new fees in federal court. To the District's delight, and frankly some surprise, the district court granted the District's motion on both issues. Fortunately for the District, Laidlaw chose not to appeal. As such, the District has one of the few flow control ordinances in the Country that has withstood a constitutional Commerce Clause challenge.

BACKGROUND OF THE MUNICIPAL WASTE COMBUSTOR RULE

EPA promulgated the MWC rule pursuant to Section 129 of the Clean Air Act,³ which directs EPA to regulate air emissions from new and existing incinerators of solid waste. Section 129 requires EPA to set new source performance standards ("NSPS") and emission guidelines applicable to existing sources for four categories of incinerator units, including two categories that combust municipal solid waste.⁴ The two municipal solid waste incinerator categories are "solid waste incineration units with capacity greater than 250 tons per day combusting municipal waste" and "solid waste incineration units with capacity equal to or less than 250 tons per day combusting municipal waste. . ."⁵

Section 129(a)(1) also directs EPA to "establish performance standards and other requirements . . . for each category of solid waste incineration units."⁶ A "solid waste incineration unit" is defined as "a distinct operating unit of any facility which combusts solid waste material . . ."⁷ Congress, therefore, established small and large categories of MWCs using unit size as the distinguishing factor.

The statute further requires that emissions standards promulgated pursuant to Section 129 are to "reflect the maximum degree of reduction in emissions of air pollutants . . . that the Administrator . . . determines is achievable for new or existing units in each category."⁸ "The Administrator may distinguish among classes, types (including mass-burn, refuse-derived fuel, modular and other types of units), and sizes of units within a category in establishing such standards."⁹

Section 129 appears in Title III of the Clean Air Act Amendments, through which Congress established a general framework for the EPA to promulgate by source category emissions standards for 189 hazardous air pollutants ("HAPs") based on MACT.¹⁰ Significantly, solid waste incinerators are the only class of stationary sources for which Congress provided specific statutory guidance on the development of emissions standards for HAPs. The detailed instructions in Section 129 for establishing emissions standards for specified categories of solid waste incinerators, moreover, stand in stark contrast to the wide latitude given to EPA in defining other categories of stationary sources for purposes of setting MACT standards under section 112.

EPA's efforts to establish emissions standards pursuant to Section 111 of the Act for MWCs actually predate the enactment of Section 129. The Agency initially proposed emission standards for new and existing MWCs in 1989.¹¹ The 1989 proposed rules set out three categories of MWCs based on aggregate (plantwide) capacities: 1) up to 250 tons per day (tpd); 2) 250 tpd to 2,200 tpd; and 3) over 2,200 tpd.¹² Section 129, however, directed EPA to change its approach and establish emissions standards on a unit basis, rather than an aggregate plant capacity basis, within statutorily defined categories. Consequently, Congress rendered the 1989 proposed rule inapplicable to all except MWC incineration units with capacity greater than 250

tons per day.¹³

The final NSPS and MWC guidelines for MWCs issued by EPA in January, 1991, adhered to these statutory categories of large and small units. Facilities with unit capacities of greater than 250 tons per day were subject to the regulations; those with smaller units were not.¹⁴ Standards were set differently in each subcategory. Therefore, the 1991 rules properly excluded facilities like the District's facility because its units have capacities less than 250 tons per day.

The District was aware of the definitions contained in Section 129 and Subpart Ea, and in the Spring of 1994 argued with the Utah Division of Air Quality (the "DAQ") over whether the 1991 MWC rule was applicable to the District's units. The DAQ believed that it may be, but the District argued that because its units both had capacities less than 250 tons per day, the 1991 MWC rule was not applicable. DAQ sought guidance from EPA Region VIII on the issue, and the District's interpretation was confirmed -- that the 1991 MWC rule applied only to MWCs with unit capacities above 250 tons per day.

THE EPA'S 1994 PROPOSED MWC RULE

Still fresh from this battle with the DAQ, the District was surprised when in the proposed NSPS and MWC Guidelines issued on September 20, 1994, the EPA reverted to its 1989 approach and proposed regulating MWCs on an aggregate plant capacity basis, with the line between large and small plants drawn at 225 Mg/day aggregate plant capacity (slightly less than 248 tons). The proposal clearly ignored the statutorily defined large and small MWC categories based on unit size.¹⁵ Facilities like the District's, which had not been subject to the 1991 MWC rules due to their small unit size, were grouped with the large facilities in the 1994 proposal, and suddenly became subject to the most stringent limits for existing facilities. The EPA did not explain in the preamble its departure from the statutory dividing line of 250 tons per day per unit, nor is any such explanation provided anywhere in the docket.

Under Section 129, the EPA is required to set emission standards for particulate matter ("PM"), opacity, sulfur dioxide ("SO₂"), hydrogen chloride ("HCl"), oxides of nitrogen ("NO_x"), carbon monoxide ("CO"), lead, cadmium, mercury, and dioxins and furan (together "dioxins").¹⁶ Pursuant to the statute, the standards are to

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 [other factors], determines is achievable for new or existing units in each category.¹⁷

When setting these standards, the EPA cannot set a standard less stringent than "the average emissions limitation achieved by the **best performing 12 percent of units** in the category"¹⁸ The standards the EPA is to set are known as "MACT," or "maximum achievable control technology," and the average of the best performing 12 percent of units is known as the "MACT floor."

When it proposed the MACT floor for the regulated pollutants, the EPA admitted that it was supposed to find the best performing 12 percent of the units for each category of existing units, but suggested that it could not figure out how to do that. It noted that about 45 percent of the existing units were "being operated with the best emission control technologies," and stated:

Based on the examination and analysis of the emission data available from these units, the EPA has not found a basis for separating the top 12 percent of these

units from the remaining units in the subset of those units that are well-equipped, maintained, and operated.¹⁹

Because it could not figure out how to do what Congress directed, the EPA instead proposed taking the permitted emissions limits for each pollutant for each MWC unit and ranking them from lowest to highest.²⁰ Then it proposed taking the cumulative average of the top 12 percent of the permitted emission limits for each pollutant as the MACT floor.²¹

Based on this method for large plants the EPA proposed setting MACT at its calculated floor for PM, SO₂, and HCl.²² The EPA went beyond its calculated MACT floor for the other pollutants.²³ For small plants the EPA did a similar pollutant-by-pollutant analysis and set most standards beyond the MACT floor.²⁴

The EPA's proposal to set MACT at its calculated floor for large plants for SO₂, PM, and HCl was based on its consideration of the costs associated with setting MACT lower. For large plants, the EPA considered only the costs associated with meeting MACT for plants with a spray dryer ("SD") and either an ESP or a fabric filter ("FF") to control air pollution.²⁵ The EPA did not consider the costs for a large facility with DSI/ESP control to meet MACT. The EPA determined that existing facilities with SD/ESP controls could meet the MACT floor for SO₂, HCl, and PM, but that they could not reach the levels of control obtained by facilities with SD/FF controls.²⁶ The EPA then examined the cost of retrofitting an SD/ESP with SD/FF to determine whether MACT should be set lower. It wrote:

[T]he cost of requiring existing SD/ESP systems to retrofit an SD/FF to meet SO₂ controls levels more stringent than the MACT floor **would be prohibitively expensive and is considered unreasonable.** For example, at a typical 1,400 Mg/day MWC plant already equipped with an SD/ESP, the capital cost to remove the ESP and retrofit a new FF . . . would be about \$14 million. This cost would be in addition to paying the remaining debt for the relatively new ESP (about \$5 million including interest payments) and would result in a relatively small increase in control device efficiency. The incremental **cost of control for requiring a retrofit from an SD/ESP to an SD/FF would be greater than \$10,000/Mg of acid gas reduction** and would increase removal efficiency by only about 6 percent.²⁷

A cost of \$10,000 per megagram is about the same as \$9,075 per ton.** This same rationale was cited for setting MACT for HCl and PM at their MACT floors, and was used for not setting MACT for cadmium and lead any lower than a facility with SD/ESP could achieve.²⁸

The EPA did not even consider the retrofit costs for units like those at the Davis Facility -- refractory walled furnaces equipped with DSI/ESP technology.²⁹ The EPA did, however, know that the Davis Facility is equipped with DSI/ESP controls.³⁰

The EPA also discussed the proposed rules for small plants. When determining where it would set MACT for small plants with DSI/ESP, the EPA noted that,

[r]etrofitting a new SD/FF system would achieve greater acid gas control and small additional reductions in other MWC pollutants, but **the associated costs of**

** A megagram is equivalent to 2,204 pounds.

such retrofits at small MWC's would be prohibitively high (greater than \$10,000 Mg of acid gas reduction).³¹

The EPA also labeled the cost of such a retrofit as "unreasonably expensive."³² The EPA based MACT for small plants for other pollutants on DSI/ESP control levels.³³

THE DISTRICT'S COMMENTS TO THE PROPOSED RULE

The District filed comments objecting to the EPA's failure to adhere to the 250 tons per day per unit dividing line set by Section 129, by setting the dividing line at 225 Mg/day aggregate plant capacity.³⁴ In particular, the District wrote:

Section 129(g)(1) of the Clean Air Act defines the term 'solid waste incineration unit' as a distinct operating unit of any facility. In Section 129(a)(1)(A) the Administrator is charged with establishing standards for categories of solid waste incineration units with capacity greater than 250 tons per day. Section 129(c)(1)(C) requires that separate standards be developed for solid waste incineration units with capacity equal to or less than 250 tons per day. The proposed guidelines have violated the mandate stated in the Clean Air Act by proposing collective standards for facilities with capacity greater than 250 tons per day.

This change in categories between the CAA and regulations implementing the CAA lumps extremely large units built to LAER requirements in with those of more moderate size designed to meet incinerator standards. The effect is to require moderate sized units to meet the limitations economically met by extremely large units without following the legislated process or obtaining necessary amendments. The categories originally specified by the law should be analyzed first. Separate standards should be developed for units that combust more than 250 tons per day and units that combust less than or equal to 250 tons per day.³⁵

The District also explained that it has a DSI/ESP system and that calculations done in 1993 showed that it would cost in excess of \$15,000 per ton of acid gases removed to retrofit an SD/FF at the Davis Facility.³⁶ Fifteen thousand dollars per ton is equal to approximately \$16,500 per megagram. Finally, among other things, the District commented on the EPA's pollutant-by-pollutant approach to setting the MACT floors. The District primarily was concerned that by using this approach, the EPA would come up with emissions limitations for the regulated pollutants that no single plant in the United States could simultaneously attain.³⁷

THE FINAL MWC RULE

On December 19, 1995, the EPA published final regulations setting MACT for new and existing MWCs pursuant to Section 129.³⁸ The EPA kept the 225 Mg/day aggregate plant capacity dividing line between large and small plants from the proposed regulations.

Also as in the proposed regulations, the EPA set the MACT floor by analyzing the permitted emissions limits for each pollutant for each MWC unit, ranking them from lowest to highest, and taking the cumulative average of the top 12 percent of the permitted emission limits as the MACT floor. For large plants, this time the EPA set MACT at its calculated MACT floor

for PM, SO₂, HCl, lead, and NO_x. Because of projected retrofitting costs and based on the comments received, the EPA calculated the MACT floor for NO_x separately for each subcategory of combustor type and set MACT for each subcategory at the MACT floor.³⁹

The EPA went beyond its calculated MACT floor for cadmium, mercury, and dioxins and furans, but set the limits at levels that can be achieved by a plant with SD/ESP control.⁴⁰ The EPA set two different dioxin limits -- a high one for SD/ESP plants and a lower one for SD/FF plants. The basis for this was the "prohibitively expensive and unreasonable" cost for retrofitting an SD/ESP plant with SD/FF.⁴¹ For small plants, the EPA did a similar pollutant-by-pollutant analysis and set most standards beyond the MACT floor, but again at levels that can be achieved by plants with DSI/ESP control.⁴²

The EPA did not respond to the District's comments about ignoring the size categories set by Section 129 of the Clean Air Act or about the cost to the District to retrofit its units with SD/FF. The EPA did respond to the argument that it should not have set MACT floors on a pollutant-by-pollutant basis, but wrote only that:

EPA believes that the statute and case law support its interpretation that it is legally permissible for the EPA to set the MACT floor pollutant-by-pollutant, as long as the various MACT floors do not result in standards that are not achievable.⁴³

Because the EPA viewed its interpretation as reasonable, it concluded that the pollutant-by-pollutant approach was permitted.

Under the Guidelines, States were required to submit plans to implement and enforce the Guidelines by December 19, 1996.⁴⁴

THE DECISION TO SEEK REVIEW

The decision to seek review of the MWC rule was not difficult for the District to make given this background. Because the Davis County facility has aggregate plant capacity of 420 tons per day, it was considered a large facility under the guidelines. Preliminary results from testing conducted in November, 1995, just prior to the promulgation of the final rule, indicated that, while the District's facility could meet many of the guidelines for large MWC's, all of the standards for small facilities could be met at low cost. To meet the small plant standards, the District would only have to install powdered activated carbon ("PAC") capacity to its DSI system. This modification would cost between \$150,000 and \$1,500,000 to build with annualized capital and operating costs between \$120,000 and \$295,000 per year. This cost will be incurred irrespective of which standards are finally determined to be applicable to the District's facility because PAC injection is needed to meet both the large and small plant mercury emissions guidelines. PAC injection also reduces dioxins below both the large and small plant emissions guidelines for existing ESP equipped facilities.

Significant additional modification of the District's facility would have been necessary for the District to comply with the guidelines for large plants. If those still applied, the facility would need to install an SD/FF on each unit only to achieve certain compliance with acid gas standards. The District's expert consultant, Dr. Greg Rigo, estimated the cost of construction and covering lost revenues and extra solid waste management costs during the retrofit process to be about \$17,250,000. Including extra operating costs and debt retirement, the increased annual cost to the District would have been about \$2,500,000. Given the financial strain the District already was in, this was a cost it simply could not bear if there was any way around it.

Dr. Rigo also estimated that this cost increase would reduce acid gas emissions from the District's facility by about 150 tons per year, meaning that the cost of the retrofit would have been more than \$15,700 per ton of acid gas removed. (Ironically, as discussed above, the EPA determined that a cost of \$10,000 per megagram of acid gases removed [about \$9,075 per ton] "would be prohibitively expensive and is considered unreasonable" in the preamble to the September, 1994 proposal.)⁴⁵

THE DISTRICT FILES A PETITION FOR REVIEW

Against this backdrop, when the final MWC rule was promulgated on December 19, 1995, the District was prepared to file its petition for review. Of course, Administrator Browner had signed the order actually issuing the regulations on October 31, 1995, so we had a couple of months to review them and the background documents. The petition for review was filed on or about December 21, 1995. The District considered it a worthwhile investment to spend a few hundred thousand dollars to ward off having to spend \$18 million. When the petition for review was filed, the District, perhaps naively, had little doubt that it would win, given what it considered the EPA's clear violation of the plain language of Section 129 of the Clean Air Act. In fact, the District could not understand why the EPA did not seem to take the litigation seriously.

Motion to Expedite and Application to Stay

Shortly after filing the petition for review, on January 22, 1996, the District filed a motion with the court to expedite review. The basis for this motion was the December 19, 1996, deadline imposed by Section 129 for states to submit state plans. Based on our experience with cases in federal courts of appeals, it was not clear that review could be completed by December 19, 1996, even though that was nearly one year off. Moreover, the state plans had to take the form of regulations adopted by the state. If the state of Utah were to go through required regulatory procedures to adopt a state plan, the District estimated it would need to have an answer from the court by August, 1996, so that it could make a decision regarding retrofitting or closing.

On January 22, 1996, the District also filed an application with the EPA to stay the effective date of the regulations. Again, the District emphasized the fact that if the state were going to adopt a state plan through regulatory procedures, the District and the state would need to know by August, 1996, whether the large plant or small plant standards would be applicable to the District's facility. The application for a stay was filed with the EPA rather than the court pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which requires the agency to act on a stay request before a stay is sought from the Court.

In support of both the motion to expedite review and the application for a stay, the District emphasized primarily the EPA's violation of the plain language of Section 129 and the harm it would cause the District from being illegally lumped with the large plants. The District did not advance any other substantive arguments at that time.

The standard for obtaining a stay is quite difficult to meet. The court has listed the factors to be considered in determining whether to grant a stay as:

- (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others will be harmed if the court grants the stay; and
- (4) the public interest in granting the stay.⁴⁶

To justify the granting of a stay, "the movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*." ⁴⁷

Based on this standard, the District believed a stay should have been granted by the EPA. Congress clearly set, we thought, the dividing line between large and small MWCs at a 250 tons per day per unit level, rather than the 250 tons per day aggregate capacity the EPA adopted. Moreover, application of the EPA aggregate capacity standard to the District's facility pending the court's review could have resulted in the closure of the District's plant because the projected costs to retrofit were too much for the District to absorb with its already high debt load.

On the flip side, the District believed that if a stay were granted, no harm would result to others. The District had conducted health risk assessments that showed that the facility posed no material health risks at its current emissions levels. The District also argued that a stay would also further the public interest, particularly the affected public of Davis and Morgan Counties, Utah, because it would assure the public would not lose a \$55 million investment.

Filing the motion to expedite review was a good move because it forced the EPA to take a position early on concerning its interpretation of Section 129(a)(1). In response to the motion to expedite, the EPA argued that it had properly promulgated guidelines applicable to all MWCs with capacities above 35 Mg/day, and that Section 129(a)(1) merely set deadlines for promulgating the regulations for the different size categories; it did not dictate different standards for the two categories of MWCs.

The court did not give the District a clear victory on the motion to expedite review, but the court did appear to assign an expedited schedule to the case. Following that ruling, the District continued to prepare its case and wait.

In the meantime, two other parties challenged the MWC rule. Waste Energy Partners ("WEP"), which runs a facility in Harford County, Maryland, filed a petition essentially piggybacking on the District's arguments. The Cement Kiln Recycling Coalition ("CKRC") filed a petition challenging the potential application of the MWC rule to cement kilns that combust municipal waste. Ultimately, these petitions were consolidated with the District's and the parties were ordered to prepare joint briefs.

Although the District had filed an application to stay the effective date of the regulations with the EPA in January, by March 5, 1996, the District had not heard anything from the Agency on that application. A telephone call was had that day between Leslye Fraser of the EPA Office of General Counsel, and Larry Jenkins. Ms. Fraser reported to Mr. Jenkins that she did not believe the District had met the standard necessary for obtaining a stay of the effective date of the regulations. She anticipated that she would make a decision sometime in early April, 1996, on the District's application.

By April 22, 1996, the District still had not heard from the EPA on its application for a stay. Counsel for the District wrote to Leslye Fraser that day asking for a decision on the matter. No decision, however, was forthcoming.

On May 10, 1996, representatives of the District were asked to meet with representatives of the Utah DAQ and the Utah Attorney General's office to discuss the state plan the DAQ had to prepare and submit under Section 129. At that meeting, the District was informed that its estimate that the state would have to commence formal state plan promulgation procedures by August, 1996, was accurate. The DAQ representatives informed the District that any input the District wanted to have into the state plan would have to be received by the DAQ no later than August 1, 1996.

After receiving this information, the need for the District to obtain a stay of the effective date of the regulations became clear. The District waited a couple of more weeks for the EPA to act on the application for a stay. Then, on May 28, 1996, when it appeared that the application with the EPA was futile, the District filed a motion to stay with the court advancing essentially the same arguments it had with the EPA. Neither WEP nor CKRC joined in this motion.

On June 28, 1996, just four days after the District, WEP, and CKRC had filed their opening brief on the petition for review, the court shocked the EPA and granted the District's motion to stay. In a short paragraph ruling on the motion, the court wrote only that "Petitioner has satisfied the standards required for a stay pending court review."

The EPA's Motion for Voluntary Remand of Record

The EPA was clearly taken aback by the court's decision to issue a stay of the effective date of the regulations. In response to this, the EPA filed a motion seeking a voluntary remand of the record so that it could explain more fully why it had established the standards and guidelines the way it had. The EPA believed that if it were allowed to explain itself for the record then, it would help the court avoid having to go through oral argument and drafting an opinion. It also believed it could clear things up so that there would be no need to go further. The EPA, however, did not offer to reconsider its decision.

The District, WEP, and CKRC each opposed the EPA's motion for voluntary remand. To the District and WEP, it seemed that no amount of explanation could correct the fundamental problem created by the EPA when it based its MWC categories on aggregate plant capacity and drew the dividing line between large and small plants at 225 Mg/day aggregate plant capacity. That was not a mere procedural error or failure to explain. That error went to the heart of the rule itself and could not be explained away.

On July 31, 1996, the court entered an order denying the EPA's motion we thought would have sent a message to EPA. The court's reasons for denying the motion were listed as follows:

Respondent did not submit its motions until after petitioners had filed their brief, despite having prior notice that petitioners were challenging respondent's failure to respond to the comments submitted by the District and CKRC. . . . Moreover, the petition for review presents threshold issues, that may render unnecessary a resolution of the failure-to-explain questions. In addition, remand would be inappropriate where, as here, the agency does not seek to reconsider its decision. . . Finally, an agency should provide contemporaneous, rather than *post hoc* reasons for its rulemaking decisions.

We were surprised that after receiving this order EPA did not initiate some form of settlement discussions.

The District's Arguments on Review.

The District and WEP advanced four primary arguments on review: (1) the EPA violated the plain language of Section 129(a)(1) when it regulated MWCs based on aggregate plant capacity and divided the universe of MWCs at 225 Mg/day aggregate plant capacity; (2) the EPA violated the Clean Air Act and the Administrative Procedures Act when it failed to respond to the District's significant comments; (3) the EPA violated the Clean Air Act and the Administrative Procedures Act when it failed to explain its departure from Section 129 of the Clean Air Act in its statement of basis and purpose; and (4) the EPA's failure to consider costs to the District to

retrofit SD/FF was arbitrary and capricious.

ORAL ARGUMENT

Oral argument was held October 3, 1996. As oral arguments go, this one was easy from the perspective of reading the court. The court was only interested in the District's first argument, and repeatedly hammered the EPA's attorney about why the EPA had used aggregate plant capacity, rather than unit size, when differentiating between large and small plants. At least two of the judges even used the word "irrational" when describing what the EPA had done.

The burning question for the court, however, was whether it would have to vacate all of the guidelines for existing plants if they agreed with the District's argument, or whether it could leave the guidelines in place for large units. We had looked at this issue for the District and, while retaining the guidelines for units with capacities larger than 250 tons per day would not impact the District, we did not believe the court could carve up the rule given the fundamental error the EPA had made. When the EPA's attorney was asked this question, he agreed. Only WEP's lawyer argued that the Court could carve up the rule and only vacate the part of the rule applicable to units with capacities equal to or below 250 tons per day.

A few weeks after oral argument, the EPA submitted a letter to the court suggesting that the court could leave the guidelines in place for the large units despite the comment its lawyer made at oral argument. Each of the petitioners responded in various ways with their own letters, but the court never read the letters and ordered that they be returned to the parties.

THE COURT'S DECISION

Apparently trying to beat the December 19, 1996 deadline for states to submit state plans under the MWC rule, the court issued its decision on December 6, 1996. The decision is reported at 101 F.3d 1395.

After going through painstaking detail into the history and background of the MWC rule, the court concluded that it only needed to reach the District's first argument. "In this case, our analysis need not proceed beyond Chevron's first step, for it is clear that the 1995 standards conflict with the plain meaning of section 129."⁴⁸ The court held that:

the most logical and straightforward reading of section 129(a)(1) is that it establishes four categories of solid waste incineration units -- MWC units with a unit capacity above 250 tons/day, MWC units with a unit capacity of 250 tons/day or less, units combusting hospital, medical and infectious waste, and units combusting commercial or industrial waste.⁴⁹

The court found the EPA's argument that Section 129(a)(1) is merely a scheduling provision "implausible in light of the regulatory scheme detailed in the following subsection of the statute, section 129(a)(2)."⁵⁰ Section 129(a)(2) is the section that describes how the MACT floor and MACT are to be set and requires that these be set within each category. "When this MACT methodology set out in section 129(a)(2) is viewed in light of the regulatory deadlines established in section 129(a)(1), it becomes apparent that Congress must have intended large and small MWC units to represent separate categories of solid waste incineration units."⁵¹

When the court came to deciding what to do about the EPA's error, it discussed what impact the shift in the line between large and small units would have on the standards and guidelines. Because the NSPS were the same for both large and small units, it recognized that "[t]his shift likely will not affect the NSPS for new units, regardless of unit capacity."⁵² The

court also recognized that the "new MACT floors for existing units with unit capacities above 250 tons/day [may] be nearly the same as those proposed for the large plant category in the 1995 standards."⁵³ It was also clear to the court that guidelines for existing small units "will become significantly more stringent."⁵⁴

Based on this analysis, the court reasoned that it may only need to vacate the guidelines as applied to existing small units and not everything else. Yet, because at oral argument "counsel for the EPA stated that he believed the 1995 standards would need to be vacated in their entirety if we were to decide that MWC units had to be recategorized by unit capacity," the court vacated the entire MWC rule.⁵⁵

THE EPA'S PETITION FOR REHEARING ON REMEDY

On February 4, 1997, the EPA filed a Petition for Rehearing on Remedy with the court. The EPA asked the court to reconsider only the remedy portion of the opinion. Thus, the Court's reading of the statute will stand. The EPA asked the Court to leave intact the NSPS and guidelines applicable to MWC units with capacities above 250 tons per day. It argued that none of the owners or operators of these units challenged the regulations and to leave these standards and guidelines in place would, therefore, not harm them and would not impact the District's units. The EPA also argued the significant loss of reduced emissions -- as much as 128,000 tons -- that would result if the compliance deadline were moved back by a new promulgation date justified the relief requested. The EPA claimed the court had power to carve up the MWC rule and leave part of it in place under the Court's general equity powers.

The District filed comments to the Petition for Rehearing on Remedy on February 19, 1997. The District agreed with nearly every issue argued by the EPA, except the EPA's argument concerning the court's equitable powers. As a general rule in the past, the court has only exercised its equitable powers to not vacate a rule on remand when the EPA has committed some kind of procedural error it can correct, such as a violation of the notice and comment provisions. That is not what the court found in this case. In this case, the court found a fundamental and substantive violation of Section 129 of the Clean Air Act. No amount of equitable or magical powers will wipe away this violation or make its effects go away.

On March 21, 1997, the court granted the EPA's Petition for Rehearing on Remedy. It modified the December 6, 1996 decision by vacating only the NSPS and guidelines applicable to MWC units with capacities equal to or less than 250 tons per day. The court left the NSPS and guidelines for large units in place and remanded the guidelines for large units for minor adjustment of the MACT floors.

CONCLUSION

Round 1 has been won by the District, but the war may be far from over. Despite the outcome on the EPA's Petition for Rehearing on Remedy, the EPA must still promulgate new guidelines applicable to MWC units with capacities of 250 tons per day or less. Until we see the EPA's proposal, we do not know whether more challenges will be needed. The District, however, has proved a point that others who feel overpowered by the EPA can learn from -- sometimes you can beat an 800-pound gorilla. Never again will the District assume that because the EPA said it, that's the way it must be. When the EPA is wrong, it must be challenged -- even by the weakest among us -- to ensure the sound and proper development of environmental policy and law.

REFERENCES

1. 42 U.S.C. § 7429
2. C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994)
3. 42 U.S.C. § 7629
4. Id. § 7429(1)(B) and (C)
5. Id.
6. Id. § 7429(a)(1)(A) (emphasis added)
7. Id. § 7429(g)(1) (emphasis added)
8. Id. § 7429(a)(2) (emphasis added)
9. Id. (emphasis added)
10. 42 U.S.C. § 7612
11. The proposed NSPS were published at 56 Fed. Reg. 5488 and the proposed Emissions Guidelines were published at 56 Fed. Reg. 5514.
12. 54 Fed. Reg. 52,209, 52,297
13. 42 U.S.C § 7429(a)(1)(B)
14. 40 C.F.R. 60.32a (1995); 40 C.F.R. 60.50a (1995)
15. 59 Fed. Reg. 48,228, 48,232
16. Id. § 7429(a)(4)
17. Id. § 7429(a)(2) (emphasis added)
18. Id. (emphasis added)
19. 59 Fed. Reg. at 48,244 (emphasis added)
20. Id.
21. Id.
22. Id. at 48,245-46
23. Id. at 48,246-47
24. Id. at 48,247-49

25. *Id.* at 48,245-47
26. *Id.* at 48,245-46
27. *Id.* at 48,245-46 (emphasis added)
28. *Id.* at 48,246
29. U.S. Environmental Protection Agency, Air and Radiation Docket No. A-90-45 ("Docket A-90-45"), III-B-1 at 3-13 through 3-16; U.S. Environmental Protection Agency, Air and Radiation Docket No. A-89-08 ("Docket A-89-08"), II-A-065 at 2, 8 and Table 2-3. The tables shown on the referenced pages of Docket A-90-45, III-B-1 show that EPA considered 17 model plants. A comparison of the tables reveals that of the large plants, none has refractory walled units with DSI/ESP technology. In Docket A-89-08, II-A-065, EPA notes that excluded from its models are "Katy-Seghers refractory-wall designs," and at Table 2-3 it specifically lists the Davis Facility as a facility not modeled.
30. Docket A-90-45, II-B-20; Docket A-89-08, II-A-065 at 2, 8 and Table 2-3
31. 59 Fed. Reg. at 48,248 (emphasis added)
32. *Id.*
33. *Id.* at 48,248-49
34. The District's comment was not the first occasion on which EPA was presented with this question. In September 1991, at a meeting hosted by EPA, David Sussman of Ogden Martin Systems said: "[I]t [is] irrational to combine MWC II (large plants) and MWC III (small plants) into one regulatory development effort." He said that since MWC III had much better cost effectiveness than MWC II, the combination of the two made the cost effectiveness of MWC II look better than it really is. Mr. Porter of EPA replied that EPA is just responding to schedule pressure, and it is more efficient to proceed with a combined regulatory package. Docket A-90-45, IV-E-12.
35. Docket A-90-45, IV-D-104 at 2
36. *Id.*
37. Docket A-90-45, IV-D-104 at 4-6
38. See 60 Fed. Reg. 65,387 (December 19, 1995)
39. 60 Fed. Reg. at 65,401-02
40. *Id.*
41. *Id.* at 65,401
42. *Id.* at 65401-02

43. Municipal Waste Combustion: Background Information Document for Promulgated Standards and Guidelines -- Public Comments and Responses, EPA - 4531 12-95-0136, U.S. Environmental Protection Agency, Research Triangle Park, 1995, p. 3-99.
44. 60 Fed. Reg. at 65,418, 40 C.Fed. Reg. § 60.39b(b)
45. 59 Fed. Reg. at 28,245 (Sept. 20, 1994))
46. Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 973, 974 (D.C. Cir. 1985)
47. Id.
48. Davis County Solid Waste Management & Energy Recovery Special Serv. Dist., 101 F.3d 1395, 1402 (D.C. Cir. 1996)
49. Id. at 1403-04
50. Id. at 1404
51. Id.
52. Id. at 1411
53. Id.
54. Id.
55. Id.