UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 18 2012

THE ADMINISTRATOR

The Honorable Ron Wyden
United States Senate
Washington, D.C. 20510

Dear Senator Wyden:

Thank you for your letter of January 11, 2012, requesting an update on the status of the reconsideration of the 2011 major source air toxics rule for boilers and the companion rule for certain incinerators ("the 2011 Boiler Air Toxics Rules" or "2011 Rules").[1] You request clarification of the implications of the recent decision by the United States District Court for the District of Columbia to vacate the administrative stay that the EPA put in place during the reconsideration process. The EPA has reviewed the potential impacts of the court decision. In short, the EPA can and will use legally available and long standing tools to address compliance concerns that boilers and incinerators subject to the 2011 Rules may have as a result of this court decision.

As you know, in March 2011, the EPA finalized the major source air toxics rule for boilers and incinerators, but chose to reconsider certain aspects of these finalized rules, accept more feedback from industry and other stakeholders and issue a new proposal, leading to new final rules to reduce toxic emissions from this sector. These changes maintain the public health benefits of the rules, while also providing industry more certainty and flexibility. We are on track to take final action on the reconsideration by spring of this year. We expect this final action will carry forth many of the features that resulted in Congress commenting as part of the recent Consolidated Appropriations Act that "the conferees are encouraged by the outcome of EPA's reconsideration of the Boiler MACT rule and offer no directives regarding Boiler MACT standards. The proposed rule addresses substantive concerns by including additional flexibility with respect to compliance costs, and a biomass exemption."

Regarding the impact of the recent court decision, we have carefully reviewed the effect that vacating the stay may have on new and existing sources and plan to address potential impacts. Specifically, using our enforcement discretion, the EPA will issue a no action assurance letter shortly, informing sources that EPA will not enforce any of the administrative notification requirements for new or existing boilers and incinerators in the 2011 Rules for a period of time while the EPA works to take final action on the proposal to reset these dates. For existing boilers and incinerators, these administrative notification requirements are the only obligations sources would otherwise have under the 2011 Rules prior to when the EPA intends to finalize the reconsideration process. To the extent sources may be concerned about

[1] National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 76 Federal Register 15608, March 21, 2011; Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 76 FR 15704, March 21, 2011.

civil action by parties other than the EPA, please note that noncompliance with notice provisions that we have proposed to amend would be unlikely to warrant such action. However, in the event that a party does seek to bring such an action they must give the EPA and the source 60 days advance notice of their intent to do so, which would give the EPA sufficient time to take more definitive steps to address any such impacts from the lifting of the stay.

With respect to new boilers and incinerators, based on the information currently available, it appears that there are no sources that are subject to requirements other than administrative notifications under the 2011 standards that are being reconsidered. If, however, the EPA becomes aware of any such sources facing permitting or compliance challenges as a result of the stay being vacated, the EPA will issue a 90-day stay of the rule under the Clean Air Act. Furthermore, if necessary, the EPA will issue a longer stay under the Administrative Procedures Act consistent with the court's opinion or take other such action as may be appropriate. If you or any of your colleagues become aware of new facilities that feel they have compliance burdens due to the court's decision on the stay, please have them contact us – we are confident that we have legal authorities that can address their concerns.

Finally, the EPA recognizes that industry needs sufficient time to comply with these standards. As a result, the reconsideration proposal included a provision that would set new, later deadlines for meeting the standards set forth in the reconsideration proposal. While this is subject to the public comment process, it was the EPA's intent in the proposed rule to allow the compliance clock to "reset" to provide the industry the full length of time – three years - provided in the Clean Air Act for compliance with the rules once they are finalized.

I appreciate your continued interest in the Boiler Air Toxics Rules and this opportunity to provide additional certainty to the regulated community. EPA's major focus in the coming months will be on reviewing the public comments we receive and finalizing the reconsidered standard as expeditiously as possible. As I have noted, we have not identified any compliance or permitting issues of concern other than administrative requirements, which we are addressing promptly. We have no reason to believe that we will be facing additional court actions prior to finalizing the rule, but have the tools discussed above if the need for them should arise.

If you have further questions or comments, please feel free to call me or have your staff contact Arvin Ganesan, EPA's Associate Administrator for Intergovernmental and Congressional Relations at (202) 564 - 5200.

Sincerely,

Lisa P. Jackson