IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB,	
Plaintiff,	
v.	**Civil Action No. 1:01CV01537 (PLF)** **(and consolidated cases)**
LISA P. JACKSON, *Administrator* **U.S. Environmental Protection Agency,**	
Defendant.	

RESPONSE BY INTERVENORS TO EPA MOTION TO AMEND ORDER OF MARCH 31, 2006

Intervenors the Coalition for Clean Air Implementation (comprised of the American Forest & Paper Association ("AF&PA"), American Iron & Steel Institute ("AISI"), American Petroleum Institute ("API") and National Mining Association ("NMA")), the American Chemistry Council ("ACC"), and the National Association of Clean Water Agencies ("NACWA") (hereinafter collectively, "Intervenors") strongly support the Defendant's, the U.S. Environmental Protection Agency ("EPA" or "Agency"), motion of December 7, 2010 for extensions of the deadlines in this Court's order entered March 31, 2006 as most recently amended on September 20, 2010.

In EPA's "Memorandum in Support of Motion to Amend Order of March 31, 2006" ("EPA Memo") the Agency explains its request for an extension from January 16, 2011 to April 13, 2012 to complete rulemakings to establish interrelated emission standards for major source boilers, certain area source boilers, and commercial and institutional solid waste incineration ("CISWI") units under sections 112 and 129 of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7412 and 7429. EPA requests an extension from

January 16, 2011 to July 15, 2011 to complete its rulemaking to establish emission standards for sewage sludge incineration ("SSI") units.

The Intervenors and their members have cooperated actively with EPA in its gathering of information on emissions data, control technologies, measurement methods, costs and other matters and in its conduct of the complex determinations required by CAA sections 112 and 129. As revealed in the enclosed declarations and summarized below, the Intervenors and their members have made unusually large investments to gather and report the data requested in EPA's information collection requests and to prepare and submit comments on EPA's rulemaking proposals, all in an effort to ensure that the final rules are rational and defensible. *See* Exhibits 1-6 attached hereto: [Exh. 1] Declaration of Timothy G. Hunt in Support of the Response by Intervenors to EPA's Motion to Amend Order (Dec. 23, 2010) ("Hunt Decl."); [Exh. 2] Declaration of James D. Griffin in Support of the Response by Intervenors to EPA's Motion to Amend Order (Dec. 23, 2010) ("Griffin Decl."); [Exh. 3] Declaration of Howard J. Feldman in Support of the Response by Intervenors to EPA's Motion to Amend Order (Dec. 22, 2010) ("Feldman Decl."); [Exh. 4] Declaration of Kevin M. Dempsey in Support of the Response by Intervenors to EPA's Motion to Amend Order (Dec. 21, 2010) ("Dempsey Decl."); [Exh. 5] Declaration of Nathan Gardner-Andrews in Support of the Response by Intervenors to EPA's Motion to Amend Order (Dec. 22, 2010) ("Gardner-Andrews Decl."); and [Exh. 6] Declaration of Katie Sweeney in Support of the Response by Intervenors to EPA's Motion to Amend Order (Dec. 22, 2010) ("Sweeney Decl.").

These associations and their members are motivated not only by the immense and far-reaching economic impact of the rules, but also by the great need that the regulated

community has for certainty in their compliance obligations under sections 112 and 129. As the EPA Memo and Mr. Tsirigotis' supporting declaration recount, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") vacated EPA's last effort to establish emission standards for major source boilers and CISWI units. *See NRDC v. EPA,* 489 F.3d 1250 (D.C. Cir. 2007). It is critical that the new rules EPA promulgates for each of these sectors be sound enough to withstand legal scrutiny.

Unfortunately, in the view of the Intervenors, EPA's rulemaking proposals on boilers, CISWI and SSI are fundamentally flawed. As a result, they each submitted extensive comments pointing out the flaws, providing additional data, and offering solutions. Many commenters urged EPA to re-propose the emission standards for all four rules not only to assure that EPA receives feedback on significant changes from the proposal, but also to avoid the disruption of yet another vacatur. *See infra* pp. 8-12.

The Intervenors strongly support EPA's request for the time required fully to consider and respond to the current round of comments and the time required to re-propose the rules as necessary to deal with the implications of these comments. EPA's request signals that the rulemaking process is working as designed and could well produce rational and defensible final rules. EPA has received thousands of substantive comments on the four proposals combined, and the Agency clearly requires substantial additional time beyond January 16, 2011 just to react to them. At present, EPA has reached the preliminary conclusion that at least three of the proposals are flawed and hence re-proposals are in order, *see* Tsirigotis Decl. ¶¶34-35, and EPA has not yet made a final determination on the fourth proposed rule, *id.* ¶48. The Intervenors respectfully ask

the Court to afford sufficient time for EPA to complete the re-proposal processes it says are very likely necessary to establish rational and defensible rules.

The Intervenors provide detailed information supporting EPA's motion below.

BACKGROUND

The pertinent provisions of the CAA, sections 112(d) and 129, together with the principles of rational decision-making embedded in CAA section 307(d), require EPA to make determinations that are not only unusually complex, but highly dependent on the accuracy and representativeness of the data EPA uses. *See, e.g., Sierra Club v. EPA,* 479 F.3d 875 (D.C. Cir. 2007); *Cement Kiln Recycling Coalition v. EPA,* 255 F.3d 855 (D.C. Cir. 2001); *National Lime Association v. EPA,* 233 F.3d 625 (D.C. Cir. 2000).

As a threshold determination, EPA must properly define the universe of sources that are the targets of the standard-setting process and the boundaries between subcategories of sources that will be subject to standards of differing stringency. Indeed, EPA is engaged in the instant rulemakings precisely because, according to the D.C. Circuit, it earlier failed to distinguish properly between boilers and CISWI. *See NRDC v. EPA,* 489 F.3d 1250 (D.C. Cir. 2007). EPA's upcoming response to the D.C. Circuit's remand – the Non-Hazardous Solid Waste Rule – will have a profound effect on all four rules. In that rule EPA is revisiting the definition of "solid waste" under the Resource Conservation and Recovery Act and hence re-drawing the line between the universe of boilers and process heaters that will be subject to major and area source emission standards under CAA section 112 and the universe of boilers and process heaters that are "solid waste incineration units" and subject to the CISWI rule under section 129. *See*

EPA Memo p. 11; Tsirigotis Decl. ¶24. The importance of this regulatory distinction to EPA's rulemaking process cannot be overstated – EPA literally cannot perform the first step of the MACT floor analysis until it knows which sources belong in which categories.[1] Yet, as the proposed Non-Hazardous Solid Waste Rule reveals, where the regulatory line falls will turn on fine-grained factual analysis of the myriad ways in which materials move through the solid waste management system, critical details on which EPA has not made a final decision.

Once EPA has properly defined the relevant categories, it then must gather enough data of sufficient quality to establish rationally whether and in what ways to subcategorize sources based on attributes such as size, technology, and the like. It must gather adequate data on the units within each subcategory, their emissions, and the available control technologies. Subcategorization in this way is critical to satisfying the overarching achievability requirement of sections 112(d) and 129. *See Sierra Club v. EPA,* 479 F.3d at 884-86 (concurring opinion of J. Williams).

EPA is then required to gather and analyze sufficient emissions data for each subcategory in order to set an achievable "MACT floor" emission limit, taking into account the variability in the data in order to meet the overarching achievability requirement. For *new* units, the MACT floor is the level of control that is achieved in practice by the best controlled similar unit. For *existing* units, it is the average emissions

[1] Indeed, although not emphasized by EPA in its motion, the Non-Hazardous Solid Waste Rule is also significant for the proposed SSI rule because that rule simply assumes that SSIs will be solid waste incineration units subject to regulation under section 129, in effect pre-supposing the outcome of the Non-Hazardous Solid Waste Rule.

limitation achieved by the best performing 12 percent of units in the subcategory. *See* CAA §§ 112(d) and 129(a)(2).

The accuracy and representativeness of the data EPA collects and uses is critically important to making MACT floor determinations. EPA's data collection and review processes establish the foundation for all other aspects of the rule development process. To obtain information from the public, the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq*. ("PRA"), requires EPA to submit its proposed information collection requests for public comment, make the necessary adjustments after considering public responses, and then re-submit the information collections requests for OMB and additional public review. Although the PRA allows OMB to permit expedited review in limited circumstances, EPA's requests for these rules affected such a large number of entities and were of such magnitude and cost that denying the public opportunity to weigh in on the information collection requests would have jeopardized the usefulness of the data for EPA's rulemaking and therefore undermined the goals of federal agency openness, burden reduction, and program efficiency embodied in the PRA. *See* 44 U.S.C. § 3506(b). For example, EPA estimated that the boiler rule information collection requests alone resulted in a public burden exceeding $19 million, including over $18 million for stack testing and data reporting costs and nearly $0.5 million in agency cost and burden.

In certain circumstances, EPA may adopt emission standards more stringent than the MACT floor – that is, "beyond the MACT floor" – provided EPA demonstrates that the more stringent standards are achievable and justified considering costs, energy impacts and other relevant factors. This requires EPA to collect and use adequate data for the pre-MACT level of the pollutants being emitted, adequate information on the

potential for emission control, and adequate information regarding the cost of that control, as well as adequate data on the other factors.

EPA's motion and Mr. Tsirigotis' supporting declaration recount the procedural histories of the several interrelated rulemakings at issue. *See* EPA Memo pp. 7-15; Tsirigotis Decl. ¶¶12-31. As EPA expressly acknowledges in the instant motion, it can see that the original proposals are flawed and that it has a great deal of work ahead in order to promulgate rational and defensible rules. For instance, EPA states: "The comments raise issues that EPA had not fully considered and also provided substantial additional data that raise questions about some of the Agency's initial conclusions. Based on its initial review of the significant comments, EPA's preliminary assessment is that the comments may materially affect important decisions relating to source categorizations and coverage for the final emission standards." EPA Memo p. 2 (citations omitted). EPA adds: "Importantly, certain submissions identified data that called into question the accuracy of data previously relied upon by the Agency in its proposal." EPA Memo p. 17.

EPA asks the Court to amend the rulemaking deadline for these four remaining rules so that it has the time needed to consider the public comments, change course as necessary, and then re-propose in a manner consistent with the Agency's mandate under the CAA.

ARGUMENT

When acting under section 304(a) of the CAA, 42 U.S.C. § 7604(a), to enforce a nondiscretionary duty that EPA has failed to perform, a federal district court may

exercise its equity powers to fashion a tight but pragmatic schedule assuring action as soon as possible, but not sooner than possible. The key test is impossibility. *See, e.g., Sierra Club v. Johnson,* 444 F. Supp. 2d 46, 52-54 (D.D.C. 2006). Here, EPA contends and has demonstrated that it cannot produce defensible rules for boilers and CISWI units any sooner than April 13, 2012 and for SSI units any sooner than July 15, 2011. The Intervenors strongly agree. Taking the Intervenors' extensive comments as prime illustrations, as detailed in the attached declarations, it is clear that EPA faces a massive and time-consuming job in digesting the comments of regulated entities, deciding what changes to its proposed determinations are necessary, articulating those changes, and then re-proposing the rules when necessary. In the view of the Intervenors, their comments alone call for substantial changes in EPA's proposed determinations, and those changes could well warrant re-proposal in order to assure that the final rules are defensible from a procedural standpoint.

Thus, we believe EPA has demonstrated that it needs additional time to analyze comments, decide on a course of action for each rule, and go through the necessary re-proposal processes. EPA undoubtedly cannot accomplish even the initial task of analyzing comments by the present deadline of January 16, 2011. The Agency has requested an additional approximately 15 months for the boiler and CISWI rules and six months for the SSI rule based on the volume and complexity of the information presented in the comments. The Intervenors contend this schedule is the minimum necessary for the reasons explained below.

A. THE WORK EPA MUST UNDERTAKE TO RESPOND TO COMMENTS AND CORRECT THE FLAWS IN ITS PROPOSALS IS IMMENSE AND TIME-CONSUMING.

EPA must complete an immense and time-consuming volume of work in order to digest and respond properly to the comments on the proposed rules.

A critical factor to consider is the sheer volume of information submitted to EPA. The Agency received an unusually large and comprehensive public response to these four proposals, including approximately 2,360 substantive comments (as opposed to mass-mailed comments) on the major source boiler rule, 2,200 substantive comments on the area source boiler rule, 250 substantive comments on the CISWI rule, and over 80 substantive comments on the SSI rule. *See* Tsirigotis Decl. ¶¶32 and 48.

Each of the Intervenors submitted comments on two or, in some cases, three of the proposed rules offering new emissions data, technical advice, information on cost and regulatory impacts, and legal analysis that individually and collectively demonstrate fundamental flaws in the initial proposals. These six trade associations alone submitted just over 2,000 pages of comments, including hundreds of pages of narrative comments and hundreds more pages of new data, studies, and other supporting information. The following summary is provided in an effort to illustrate the overall volume of the information submitted by the Intervenors on these four proposed rules:

- ACC submitted comments totaling 409 pages on the two boiler rules and the CIWSI rule. Several members of ACC also submitted 23 sets of comments on these rules totaling 1,874 additional pages. *See* Griffin Decl. ¶3.

- AF&PA and the American Wood Council submitted joint comments on the two boiler rules totaling 661 pages of narrative comments plus several hundred additional pages of supporting information. *See* Hunt Decl. ¶¶4 and 5.

- AISI submitted 69 pages of narrative comments plus five pages of technical supporting information on three of the rules, and several of AISI's members submitted over 89 pages of additional information. *See* Dempsey Decl. ¶4.

- API submitted comments totaling over 200 pages on the two boiler rules and the CISWI rule. *See* Feldman Decl. ¶4.

- NACWA's comments on the proposed SSI rule totaled about 500 pages, including over 200 pages of narrative comments and approximately 300 pages of technical support. *See* Gardner-Andrews Decl. ¶4. Several of NACWA's members also submitted comments, many of which include data and technical information not contained in NACWA's comments. Together, NACWA and its members submitted over 750 pages of information and analysis. *See id.*

- NMA submitted nearly 200 pages of comments on the major source and area source boiler rules. *See* Sweeney Decl. ¶4.

Thus, EPA has before it an unusually large task of digesting and responding to the information submitted by the Intervenors and contained in over 3,000 sets of comments submitted by other parties.

More substantively, EPA has several interrelated regulatory decisions that it must make before it can promulgate rational and defensible rules. As mentioned above,

because the CAA requires EPA to regulate boilers and CISWI units differently, EPA must decide on the boundary between boilers and CISWI units and then work through the implications of that decision as to which units belong in which categories and subcategories for standard setting purposes. Until this decision is made it is not possible to define categories and subcategories of boilers and CISWI units or to perform the analysis necessary to set standards. Even a small change from the proposed Non-Hazardous Solid Waste Rule in the composition of categories and subcategories can make major differences in the final emission standards as the "best performing" units move from one category or subcategory to another, requiring EPA to re-calculate MACT floors and re-visit any potential beyond-the-floor standards. EPA's motion does not tell us the schedule for finalizing the Non-Hazardous Solid Waste Rule, but by any account it must be promulgated well enough in advance of the boiler, CISWI and SSI rules to permit the proper classification and standard setting for each of these categories.

Once it has finalized the Non-Hazardous Solid Waste Rule, the Intervenors' comments show that EPA has a number of major substantive issues to address in the four rules. The comments deal with a large number of issues, but the following are four examples illustrating the amount of work EPA has to do.

- The Intervenors provided data and analysis supporting the creation of additional subcategories in all four rules and solutions for the proper assignment of units to each subcategory. For example, Intervenors submitted support for (1) new subcategories of boilers (*see* Hunt Decl. ¶4(b) [subcategory for combination boilers], Dempsey Decl. ¶¶6, 8 and 9(c) [subcategory for coke oven gas-fired boilers], and Feldman Decl. ¶¶9, 13(a), and 13(f) [subcategories for turndown,

startup, and shutdown operations] (2) at least 11 new subcategories of CISWI units (*see* Griffin Decl. ¶¶5(b) and 5(h)); and six new subcategories of SSIs (*see* Gardner-Andrews Decl. ¶5). EPA will have to decide the validity of these comments and, if it agrees with them, work through the implications, especially the re-calculation of MACT floors because of the changes in the number and type of units within each subcategory. As currently envisioned by EPA, the boiler and CISWI rules together would apply to over 200,000 individual units located at nearly 100,000 facilities across virtually every industrial, commercial and institutional sector. *See* Tsirigotis Decl. ¶¶26-28. The SSI rule would affect SSIs at more than 100 municipally-owned sewage treatment works around the country. *See* Gardner-Andrews Decl. ¶6. The huge number and variety of facilities that would be affected by the four rules makes the subcategorization, data collection and analysis, and standard setting tasks under sections 112 and 129 a major logistical and technical challenge.

- All of the Intervenors submitted analyses of the data EPA used to set the level of the proposed standards and identified numerous instances in which the data are not sufficiently accurate and representative to meet the statutory mandate that the standards be achievable. *See* Griffin Decl. ¶¶5(a) and 5(d); Hunt Decl. ¶¶4(a) and 4(c); Dempsey Decl. ¶6; Feldman Decl. ¶¶7 and 11; Gardner-Andrews Decl. ¶6; and Sweeney Decl. ¶¶9-10. The comments provide EPA with technical advice and solutions for how to deal with these flaws, including huge amounts of new data that we believe EPA must include in new MACT floor computations. *See*

Griffin Decl. ¶5(e); Gardner-Andrews Decl. ¶6; Dempsey Decl. ¶7; and Feldman Decl. ¶6.

- Several Intervenors criticized EPA's inadequate assessment of emission reductions from the proposed rules, estimates of compliance costs and EPA's assessment of the broader economic impacts of the proposed rules on small entities. *See* Griffin Decl. ¶5(g); Feldman Decl. ¶5; Gardner-Andrews Decl. ¶7; and Sweeney Decl. ¶¶6-7. We believe the information provided by these comments will require EPA to change its regulatory and economic impacts analyses in fundamental ways and, in the case of the proposed SSI rule, perform Congressionally mandated assessments on the impact to small municipalities that will be adversely affected by the proposal.

- Finally, EPA will have to deal with the re-proposal issue and re-propose the rules as necessary. Several commenters previously urged EPA to re-propose the rules after addressing the flaws in the initial proposals. *See, e.g.,* Griffin Decl. ¶¶4 and 5(f); Gardner-Andrews Decl. ¶¶8-9; and Dempsey Decl. ¶11. If the Court grants EPA's request for additional time to re-propose the rules, it is particularly important to the Intervenors that the Court set a new deadline that is not so aggressive that the public comment period for the re-proposed rules is restricted.

B. CORRECTING THE FLAWS IN EPA'S PROPOSALS WILL RESULT IN EMISSION STANDARDS THAT DIFFER MATERIALLY FROM THE PROPOSED STANDARDS AND HENCE LIKELY REQUIRE RE-PROPOSAL.

If EPA is given additional time to correct the flaws that we perceive in the proposals, then the next versions of these rules will be very different from the initial

proposals. EPA now has a "different and better understanding of the facts and complexities" of the universe of boilers and CISWI units, *see* Tsirigotis Decl. ¶34, and expects the subcategorization scheme to change. *Id.* at ¶35. EPA also expects that new data will significantly change the level of the proposed emission standards for boilers and CISWI units. *Id.* at ¶34. Adopting some or all of the Intervenors' recommendations on subcategorization and data analysis will lead to different classification of boilers, CISWI units and SSIs. New MACT floor calculations will result, based on the performance of sources not considered in the initial proposals and using a more robust database of emissions information. Alternatively, EPA may be persuaded by comments illustrating measurement and standard setting limitations that justify the use of work practice and engineering standards in lieu of numerical emission standards as initially proposed.

The Intervenors agree with EPA's view that changes as substantial as those outlined in Mr. Tsirigotis' Declaration, and other changes requested in our comments, should be implemented through re-proposals and new opportunity for public review and input. This approach allows EPA to get expert feedback on its re-classification of units, interpretation of new data, ideas for newly proposed work practices, and the nuts-and-bolts of writing rule language. It also may be critical that EPA re-propose the rules in order to avoid the disruption of remand and vacatur by the D.C. Circuit. *See* EPA Memo pp. 18-19.

C. EPA NEEDS THE ADDITIONAL TIME IT REQUESTS IN ORDER TO ISSUE DEFENSIBLE RULES.

The core of EPA's motion is an expert judgment that the best way for it to produce defensible rules for boilers and CISWI units is to concentrate for several more months making the changes required by the comments and then to re-propose. By asking

for an April 2012 deadline, EPA in effect is saying it is reasonably confident now that re-proposal is necessary. Considering the Intervenors' comments, that confidence is well-placed. If EPA agrees even with some of the Intervenors' comments, it will have to change direction in substantial ways likely requiring re-proposal.

If the Court were to require EPA to proceed on the current schedule for signing these rules by January 16, 2011, EPA has acknowledged enough flaws in the four rules that they will very likely be vacated by the D.C. Circuit and remanded back to EPA for further rulemaking. Similarly, if the Court only allows EPA enough time to make changes, but not to re-propose the rules, then they will very likely be overturned only for different reasons. Therefore, the procedural course EPA proposes to the Court appears to be the most prudent means for achieving the underlying purpose of this Court's order in as little additional time as possible.

The only question then that we perceive is whether the timeframe EPA proposes is the minimum necessary. EPA proposes roughly 15 months (January 2011-April 2012) for completing its analysis of the comments and formulating new proposals, obtaining new public comments, completing Agency review and analysis of those comments, final rule drafting, OMB review, and signature by the Administrator. Fifteen months appears to us to be the minimum amount of time that is necessary given the volume of comments and the complexity of the new subcategorizations and other standard setting determinations EPA must make. More specifically with respect to SSIs, EPA had received NACWA's and the other public comments only eight days before filing the instant motion. *See* Gardner-Andrews Decl. ¶3; Tsirigotis Decl. ¶48. Thus EPA could not have considered the implications of the information contained in the more than 750

pages of comments and studies submitted by NACWA and several of its members. While EPA notes that it does not currently plan to re-propose the SSI rule, *see* EPA Memo pp. 3-4 and Tsirigotis Decl. ¶48, NACWA believes the numerous legal and technical errors it has identified and the new data and other technical information it has submitted call for fundamental changes in the approach EPA has proposed to regulate SSIs under the CAA. *See* Gardner-Andrews Decl. ¶¶5-7. If such changes are adopted, it is hard to imagine that EPA could accomplish these changes in a rational and defensible way in less than the six months EPA envisions. *Id.* at ¶¶8-9.

Given the high need here for rules that will survive D.C. Circuit review, the Intervenors believe EPA will need all of the additional time it has requested.

CONCLUSION

For the foregoing reasons, the Intervenors respectfully urge the Court to grant EPA's motion extending the deadlines for completion of the boiler/CISWI rulemakings to April 13, 2012 and the SSI rulemaking to July 15, 2011.

December 27, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2010, I caused the foregoing to be served on all counsel of record via the electronic case filing system or first class mail. The following counsel received service by first class mail.

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