ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES,	)	
Petitioner	)	**No. 11-1131 (consolidated with Nos. 11-1167 and 11-1185)**
v.	)	
ENVIRONMENTAL PROTECTION AGENCY and LISA PEREZ JACKSON, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY	)	
Respondents	)	

REPLY TO SIERRA CLUB'S OPPOSITION TO MOTION FOR STAY

The National Association of Clean Water Agencies ("NACWA") and Hatfield Township (together, "Movants") hereby reply to Sierra Club's opposition to the Emergency Motion for Stay ("Mot.").

I. SUCCESS ON THE MERITS

Clean Air Act ("CAA") § 112(e)(5) states that EPA "shall promulgate" standards under § 112(d) for publicly owned treatment works ("POTWs"), as defined by the Clean Water Act ("CWA"), within five years after the 1990 amendments to the CAA. As discussed in Movants' reply to EPA, the Agency

does not dispute that sewage sludge incinerators ("SSIs") are within the meaning of POTW under CAA § 112(e)(5) and CWA § 212(2)(A). EPA Opp'n at 9. Nor could it – the extraordinarily broad definition of POTW clearly encompasses SSIs, and EPA has consistently and repeatedly interpreted the term to include SSIs. EPA has repeatedly found that SSIs are part of POTWs as a predicate to providing CWA Title II grants for the construction and improvement of SSIs. Mot. at 7.

However, Sierra Club does dispute that SSIs are part of POTWs, arguing instead that SSIs are not "land" and they do not combust "sewage" nor "industrial wastes of a liquid nature."[1] Sierra Club Opp'n at 7. Sierra Club's reading ignores essential language in the definition. The CWA defines "treatment works" as:

> (2)(A) The term "treatment works" means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 1281 of this title, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process (including land used for the storage of treated wastewater in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment.

[1] Sierra Club duplicates several arguments raised by EPA in its opposition (ECF #1334650), and Movants address several of these arguments in the reply to EPA (filed this same day) to avoid repetition of argument.

> (B) In addition to the definition contained in subparagraph (A) of this paragraph, "treatment works" means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems. Any application for construction grants which includes wholly or in part such methods or systems shall, in accordance with guidelines published by the Administrator pursuant to subparagraph (C) of this paragraph, contain adequate data and analysis demonstrating such proposal to be, over the life of such works, the most cost efficient alternative to comply with sections 1311 or 1312 of this title, or the requirements of section 1281 of this title.

33 U.S.C. § 1292(2)(A)-(B).[2] This broad definition clearly covers SSIs, and the fact that SSIs are within the POTW definition is consistent with the holistic approach to sewage management that Congress mandated, as expressed through the national policy that any such treatment project "shall be considered as an overall waste treatment system for waste treatment and management." CWA § 218(a). Because the definition is so broad, SSIs appear as POTWs in several ways: (1) they are "devices" and "systems" that are used in the "treatment" of sewage;[3] (2) they are equipment, appurtenances, extensions and improvements to the devices and systems that perform POTW functions; (3) they are "works,"

[2] EPA promulgated a nearly identical definition, merging the bifurcation between § 212(2)(A)-(B) and making other clarifications. See 40 C.F.R. § 35.905.

[3] Although irrelevant, Sierra Club claims that SSIs do not combust "sewage." SSIs combust sewage sludge and are clearly part of the system for treating sewage at a POTW.

including works used for the ultimate disposal of residues;[4] and (4) they are "any other method or system" for "reducing, storing, treating, separating, or disposing of" the types of wastes received by POTWs.[5] Sierra Club's limited reading does not account for any of these meanings, and produces the unlikely result that the POTW encompasses land used for sludge disposal miles away from the treatment plant and yet excludes the incinerator (and any other works used for ultimate disposal) sitting inside the POTW and physically integrated into the sewage management system. Sierra Club offers no reason why the Court should believe that Congress intended this outcome.

Sierra Club argues further that SSIs cannot be covered under CAA § 112(e)(5) because they receive waste from commercial and industrial establishments. Sierra Club Opp'n at 18-20. Beyond duplicating arguments made by EPA, Sierra Club offers the view that POTWs are "commercial or industrial establishments" based on two claims: (1) POTWs charge for services and thus are

[4] Movants emphasized this particular language in the Motion because of EPA's prior statement that "[t]reatment works treating domestic sewage, as noted above, include facilities dedicated to the disposal of sewage sludge (i.e., surface disposal sites and incinerators)." 58 Fed. Reg. 9248, 9359 (Feb. 19, 1993) (Mot. App. A).

[5] The term "waste" as used in the CWA definition is not a synonym of the term "solid waste" under the Resource Conservation and Recovery Act ("RCRA"). Domestic sewage is excluded from the definition of solid waste under the domestic sewage exclusion in RCRA § 1004(27).

engaged in commerce, (2) POTWs are "industrial" based on two anecdotal references made in contexts unrelated to regulation of POTWs under the CAA. Both claims are wrong and irrelevant to the meaning of the term under the CAA.

That POTWs engage in commerce is irrelevant to whether they are "commercial establishments." After all, industrial establishments, individuals, and even Sierra Club itself all engage in commerce, yet none are commercial establishments. The two references Sierra Club identifies – one to "industries" in a Senate Report and the word "industry" in Congressional testimony, both in contexts unrelated to the CAA – simply have no bearing on the meaning of "industrial" in CAA § 129.[6] The POTWs impacted by the SSI Rule are owned by local governments and, in all but a few instances, are operated by local agencies.

Looking at the statute, Subchapter I of the CAA does not define the term commercial or industrial establishments. However, when Congress chose to include government agencies within the text, the language it used draws a distinction between commercial/industrial sectors and governmental and other sectors. For example, when establishing authority for the Chemical Safety Board under CAA § 112(r), Congress directed the Board to conduct studies with "State and local governmental agencies and associations and organizations from the

[6] Sierra Club also inartfully brands Movants as "Industry" throughout its opposition.

industrial, commercial, and nonprofit sectors." CAA § 112(r)(6)(F). Similarly, also in § 112, Congress directed the Attorney General to prepare a report to Congress "in consultation with appropriate State, local, and Federal Government agencies, affected industry, and the public." CAA § 112(r)(7)(H)(xi)(I). It is unlikely that Congress would have drawn these express distinctions if it understood the words commercial or industrial to include local governments.

Finally, CAA § 129(a)(1)(D) instructs EPA to set standards for the category of "commercial and industrial" solid waste incineration units ("CISWI"). EPA promulgated the CISWI rule and the SSI Rule on the same day, and the CISWI rule does not include SSIs. See 76 Fed. Reg. 15704, 15709 (Mar. 21, 2011). Although EPA incorrectly believes that SSIs are solid waste incineration units, it certainly does not claim that SSIs are CISWI.

II. IMMINENT HARM

Sierra Club contends that the communities impacted by the SSI Rule have not demonstrated imminent harm for three reasons: (1) the harms identified are too speculative, (2) some of these harms are not directly caused by the SSI Rule, and (3) environmental harms from forcing communities to convert from incineration to landfilling are not irreparable harm to the communities, but instead are relevant only to the public interest.

Movants disagree for the several reasons explained below. In particular, Sierra Club's (and EPA's) opposition misconstrues the likelihood and irreparable nature of the harms to communities who rely on SSIs. In addition, Sierra Club skews the legal framework by mischaracterizing this Court's decision in Cuomo v. NRC, 772 F.2d 972 (D.C. Cir. 1985). According to Sierra Club, even with a showing of likelihood of success and some irreparable injury, a stay must be denied unless the balance of equities or public interest strongly favors the stay. See Sierra Club Opp'n at 6 (citing 772 F.2d at 978). In Cuomo, this Court found that the petitioners "failed to establish that they have a substantial case on the merits, and have further failed to demonstrate that the balance of equities or the public interest strongly favors the granting of a stay." 772 F.2d at 978. The Court also did not find irreparable injury in the petitioners' contentions that workers would be exposed to some level of radiation during nuclear plant testing and that there would be "some extremely small possibility" of a radiation release. Id. at 976-77. Contrary to Sierra Club's depiction, Cuomo embraces an overall balancing test, such that a strong showing on any factor may justify a stay. Id. at 974 ("stay may be granted with either a high probability of success and some injury, or *vice versa*").

Sierra Club correctly notes that the declarations submitted by NACWA's members do not say that SSIs are already shutting down. These SSIs have not yet

been shuttered because, since March 2011 when the SSI Rule was promulgated, these and other municipalities have been performing testing and engineering assessments to determine whether they can comply with the SSI Rule. Some POTWs have now made their determinations. For example, Hampton Roads, VA and Albany County, NY have concluded that *none* of the 12 SSIs they own comply with the SSI Rule. See LeBlanc Decl. ¶¶ 5-6 (SSIs cannot meet standards despite being among the top performing units identified by EPA); Lyons Decl. ¶ 6. The operators also conclude that there are no pollution control technologies available that will allow them to operate in compliance with the rule. See LeBlanc Decl. ¶¶ 5-6 (no available control for NOx); Ball Decl. ¶ 7 (no available control for mercury); Lyons Decl. ¶ 6 (same). Some POTWs also do not have the space and other necessary facilities that would be required even if the necessary control technologies existed. See LeBlanc Decl. ¶ 7; Ball Decl. ¶ 7. Because landfilling is the only remaining alternative for these communities, it is neither a complicated series of events nor a "chain of speculation" (Sierra Club Opp'n at 8) that leads to the resulting economic and environmental harms to these communities. It is alarmingly simple for these communities: Their SSIs cannot comply with the SSI Rule so they must make costly decisions regarding other management options.

The immediate consequences of shutting down SSIs are both economic and environmental: (1) millions of dollars in local government funds will be

irretrievably committed to the elimination of the SSIs and the construction of buildings and equipment for landfilling (LeBlanc Decl. ¶¶ 7-9), and (2) loss of SSIs will cause major environmental impacts due to increases in air pollution, truck traffic, landfill burdens and other harms (NEORSD Decl. ¶¶ 12-13; LeBlanc Decl. ¶ 8). These impacts are decidedly local, Sierra Club's claim notwithstanding. Such impacts include a huge number of new daily truck trips through the neighborhoods surrounding POTWs (NEORSD Decl. ¶ 12; Ball Decl. ¶ 8), major increases in diesel exhaust emissions from those trucks (LeBlanc Decl. ¶ 8), and overburdened local landfills. Id. Increased greenhouse gas ("GHG") emissions from landfilled sludge[7] are particularly important to municipal clean water agencies due to likely effects of climate change on precipitation patterns and increased inflow to sewer systems.

Even municipalities who may be able to comply with the existing source standards are suffering impacts on their operations because the new source standards are now in effect. Beneficial projects, such as mechanical upgrades and energy recovery systems, may be "modifications" that trigger more stringent new

[7] Sierra Club incorrectly claims that NEORSD's declaration improperly credits SSIs with GHG reductions from "potential" energy recovery projects. The energy recovery project at NEORSD's Southerly Plant is under active construction, although it may now become only a "potential" beneficial project because of the SSI Rule. See NEORSD Decl. ¶ 5.

source standards. These projects are in jeopardy because they may trigger impossible new SSI Rule requirements. See Lyons Decl. ¶ 7; NEORSD Decl. ¶¶ 14-15; Ball Decl. ¶ 8. These chilling effects are current, significant and (absent a stay) will cause irreversible environmental harms through increases in energy consumption and air pollution.

III. PUBLIC INTEREST AND HARM TO OTHERS

Sierra Club adopts the same public interest and harm to other parties rationale as stated in EPA's opposition; therefore, these equitable factors weigh in favor of a stay for the reasons stated in the Motion for Stay. Sierra Club adds a claim that the SSI Rule was due nearly seven years ago and that a stay would prolong this "delay." Sierra Club Opp'n at 20. This claim is incorrect, and merely begs the question whether SSIs can properly be regulated under § 129. No harm due to alleged "delay" in imposing new requirements on SSIs has been shown, nor could such a claim be substantiated given the comprehensive programs already in place regulating air pollutants from SSIs.

CONCLUSION

For the reasons set forth in the Motion for Stay and the replies in support thereof, Movants respectfully request that the Court issue a stay of the SSI Rule.

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Respectfully submitted,

/s/ Jeffrey A. Knight .

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October 2011 copies of the foregoing Reply to EPA's Opposition to Motion for Stay was served electronically through the Court's CM/ECF system on all registered counsel.

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