

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

JOINT PROPOSED BRIEFING SCHEDULE AND FORMAT

Pursuant to the Court’s February 13, 2012 Order, all parties in these consolidated cases – Petitioner the National Association of Clean Water Agencies (“NACWA”) (No. 11-1131), Petitioner Hatfield Township Municipal Authority (“Hatfield”) (No. 11-1167), Petitioner Sierra Club (No. 11-1185), Petitioner-Intervenor MaxWest Environmental Systems (“MaxWest”), and Respondents the Environmental Protection Agency and Lisa Perez Jackson (“EPA”) (collectively, the “Parties”) – jointly submit the following proposed briefing format and schedule to govern further proceedings.

As discussed below, NACWA and Sierra Club have filed additional petitions for review before this Court challenging EPA's recent denial of NACWA's and Sierra Club's petitions for administrative reconsideration of the same Clean Air Act rule at issue in these consolidated cases. NACWA's petition (No. 12-1236) was filed on May 30, 2012; and Sierra Club's petition (No. 12-1237) was filed on June 1, 2012. Both petitioners also filed unopposed motions to consolidate their respective petitions with the above-captioned consolidated cases. Therefore, the Parties have proposed a single briefing format and schedule that includes all issues to be raised in the three consolidated cases (Nos. 11-1131, 11-1167, and 11-1185) and in the two new cases for which consolidation is pending (Nos. 12-1236 and 12-1237).

PROCEDURAL BACKGROUND

1. These consolidated petitions seek review of a final EPA action entitled "Standards of Performance for the New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units," 76 Fed. Reg. 15372 (Mar. 21, 2011), which establishes emission limitations and other requirements under section 129 of the Clean Air Act ("CAA"), 42 U.S.C. § 7429, applicable to sewage sludge incinerators (the "SSI Rule").
2. Three petitions for review of the SSI Rule were filed by NACWA (No. 11-1131), Hatfield (No. 11-1167), and Sierra Club (No. 11-1185). On May 25, 2011,

the Court consolidated the three cases under the lead case, No. 11-1131. Further, NACWA and Hatfield have intervened on behalf of EPA in opposition to Sierra Club's petition; Sierra Club has intervened on behalf of EPA in NACWA's petition; and MaxWest has intervened on behalf of the Petitioner in NACWA's petition.

3. In May 2011, Sierra Club and NACWA separately petitioned EPA to administratively reconsider numerous and different aspects of the SSI Rule. NACWA's petition for reconsideration also asked EPA to stay the effectiveness of the SSI Rule while the agency conducted its reconsideration proceedings. Litigation continued in these consolidated cases while EPA reviewed the petitions for reconsideration.

4. Shortly after the Court entered an Order setting February 24, 2012 as the date for filing opening briefs, counsel for EPA informed NACWA and Sierra Club that EPA planned to issue letters by March 23, 2012 taking action on the petitions for reconsideration. Because EPA's decision on the petitions for reconsideration was expected to change issues to be raised in petitioners' briefs, the Parties filed a joint motion (ECF #1357837) asking the Court to vacate the prior briefing schedule to allow EPA to complete its review of the petitions for reconsideration. The Court granted the motion by Order dated February 13, 2012 (ECF #1358020)

and directed the Parties to submit a new proposed briefing schedule and format by June 1, 2012.

5. On April 6, 2012 EPA issued letters denying both NACWA's and Sierra Club's petitions for reconsideration and published the decisions in the Federal Register on April 27, 2012. See "Denial of Reconsideration Petitions on Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units," 77 Fed. Reg. 25087-25088 (Apr. 27, 2012). NACWA and Sierra Club filed a petitions for review (Nos. 12-1236 and 12-1237) on May 30 and June 1, 2012, respectively, challenging the denial and have filed unopposed motions to consolidate the newly filed petitions with these consolidated cases.

6. The Parties anticipate that the Court will consolidate the recently filed petitions with these consolidated cases and, therefore, propose word allotments that allow briefing of all issues raised by the three consolidated cases (Nos. 11-1131, 11-1167, and 11-1185) and in the two cases for which consolidation is pending (Nos. 12-1236 and 12-1237).

PETITIONERS OPENING BRIEFS AND INTERVENOR-PETITIONER BRIEF

7. After consultation and for the reasons set forth herein, the Parties propose a briefing format comprised of two opening briefs for Petitioners (each within the 14,000 word limit provided by the Federal and Circuit Rules) and one Intervenor-

Petitioner Brief. As explained below, the interests of two Petitioners, NACWA and Hatfield (collectively the “Municipal Petitioners”), are aligned in these consolidated cases; and the Parties propose a single Municipal Petitioners Brief not to exceed 14,000 words. However, Sierra Club’s interests in these cases are not aligned with either NACWA or Hatfield, and vice versa, so the Parties propose that Sierra Club file a separate Petitioner Brief, also not to exceed 14,000 words.

8. The Parties propose a 14,000 word limit for the two Petitioner Briefs as the allotment we believe to be reasonable and appropriate to argue the significant number of issues raised in the consolidated petitions, while avoiding unnecessarily duplicative or lengthy briefs. In all instances, aligned parties would file joint briefs and the proposed word allotments do not exceed the standard allotments for individual briefs. NACWA, who has nearly 75 local government members covered by the SSI Rule, and Hatfield, one of the many small municipalities covered by the SSI Rule, anticipate raising numerous legal and factual challenges arguing that the SSI Rule imposes emission limits that are both extremely costly for municipalities and contrary to the CAA. The Municipal Petitioners envision presenting several distinct issues, some with multiple sub-issues, including:

- Statutory arguments challenging EPA’s authority to set more stringent standards under CAA section 129, instead of under CAA section 112;

- Statutory and substantive challenges to the database and methodology used to set the SSI emission standards;
- Substantive challenges to EPA's decision not to establish certain additional subcategories recognizing fundamental class and use differences among SSIs;
- Substantive challenges to EPA's treatment of SSIs during periods of start-up, shutdown and malfunction provisions for SSIs; and
- Substantive and procedural arguments that EPA did not provide rational responses to important factual and legal issues raised in comments and failed to provide adequate notice and an opportunity for comment on requirements in the final SSI Rule.

9. Sierra Club anticipates needing 14,000 words for its opening brief, based on the following individual estimates of words needed for each section.

- Statement of facts (including factual background, statutory background and regulatory background): 5,000
- Standing: 1000
- Argument: 7000
- Other: 1000

These estimates were arrived at after considering the points likely to be raised and reviewing briefing in past challenges to similar rulemakings. In support of these estimates, these sections are described in more detail below:

- The statement of facts will include information about SSIs, their emissions, the health effects of these emissions, and measures to control them. This section will also address Sections 112 and 129 of the CAA and relevant case law interpreting those sections. In addition, it will cover EPA's collection of data for this rulemaking, the approaches EPA used to establish the statutory minimum stringencies ("floors") for the 36 emission limits at issue in this case, and the results EPA arrived at. It will further describe EPA's decisions not to set more protective "beyond-the-floor" requirements. Finally, this section of the brief will cover objections Sierra Club raised during the comment period, EPA's responses to those objections, and relevant differences between the proposed rule and the final rule.
- The mandatory standing section will describe injuries to Sierra Club members, ranging from their personal health to their professional and recreational interests.
- The argument section will address following issues (estimated words needed in parentheses):

- EPA's floor analysis (3,500): Sierra Club plans to argue that in setting the floors for its emission standards, EPA contravened the CAA and acted arbitrarily and capriciously. This section of the argument will challenge, among other things, the method EPA used to collect data, EPA's use of a 99-percent "Upper Prediction Limit," EPA's treatment of "non-detect" test results, EPA's decision to round numbers up to two significant figures, and EPA's decision to set floors for new units at the level established for existing units. Sierra Club also anticipates arguing that EPA did not provide rational responses to important factual and legal comments Sierra Club made on these topics.
- EPA's beyond-the-floor analysis (2,000): Sierra Club also plans to argue that EPA failed to set standards reflecting the "maximum" degree of reduction that is achievable considering the statutory factors and that the agency's rejection of standards reflecting the use of specific control measures was arbitrary and capricious. This section of argument could raise issues of first impression, such as whether EPA can base "beyond-the-floor" decisions on cost-effectiveness. Again, Sierra Club also anticipates arguing that EPA did not provide rational responses to important factual and legal issues raised by Sierra Club in comments.

- Procedural requirements (1,500): Sierra Club also plans to argue that EPA failed to provide adequate notice and an opportunity for comments on parts of the final SSI Rule, and that it erred in denying Sierra Club's petition for reconsideration of five aspects of the SSI Rule.
- The "other" category includes the jurisdictional statement, statement of issues, statement of the case, summary of argument, standard of review, and conclusion.

10. The parties propose that Intervenor-Petitioner MaxWest shall file a separate Intervenor-Petitioner Brief not to exceed 8,750 words. MaxWest intends to present non-duplicative arguments on issues put before the Court in NACWA's Statement of Issues Supporting its Petition for Review.

11. The Parties propose July 24, 2012 as the filing date for opening briefs by Petitioners and the Intervenor-Petitioner, because the Parties believe this date is the earliest available date for opening briefs, considering counsels' schedules and deadlines in other cases.

EPA RESPONSE BRIEF AND INTERVENOR-RESPONDENT BRIEFS

12. The Parties propose that EPA be required to file a single Response Brief within 90 calendar days after the date for opening briefs. The Parties further propose that the Response Brief not exceed the combined word limit of the two

Petitioners Opening Briefs and the Intervenor-Petitioner Opening Brief – that is, not to exceed 36,750 words in length.

13. The Parties propose that the date for the Intervenor-Respondent Briefs shall be 10 calendar days after the date for EPA's Response Brief. Due to their aligned interests in opposing Sierra Club's petitions, the Parties propose that NACWA and Hatfield be required to file a single Municipal Intervenor-Respondent Brief of standard length not to exceed 8,750 words in length. The Parties propose that Sierra Club be required to file a single Intervenor-Respondent Brief not to exceed 11,750 words in length, with the slightly higher word limit reflecting the fact that Sierra Club will be responding to issues raised in the Intervenor-Petitioner MaxWest Opening Brief.

**PETITIONERS REPLY BRIEFS AND INTERVENOR-PETITIONER REPLY BRIEF,
DEFERRED JOINT APPENDIX AND FINAL BRIEFS**

14. The Parties propose that the date for the Municipal Petitioners Reply Brief, Sierra Club's Reply Brief, and the Intervenor-Petitioner Reply Brief be 45 calendar days after the date for EPA's Response Brief. The Parties further propose that the Municipal Petitioners Reply Brief and Sierra Club's Reply Brief be limited to 7,000 words each, and that the Intervenor-Petitioner Reply Brief be limited to 3,500 words in length.

15. The Parties propose that the Deferred Joint Appendix be filed 18 calendar days after the deadline for Reply Briefs, and that all Final Briefs be filed 10 calendar days after the deadline for the Deferred Joint Appendix.

16. The following table summarizes the foregoing proposed briefing schedule and format:

<u>Filing</u>	<u>Filing Date</u>	<u>Page Length (words)</u>
Municipal Petitioners Opening Brief and Sierra Club's Opening Brief	July 24, 2012	14,000 each brief
Intervenor-Petitioner Opening Brief	July 24, 2012	8,750
EPA Response Brief	90 calendar days after Petitioners' and Intervenor-Petitioner's Opening Briefs	36,750
Intervenor-Respondents' Briefs (NACWA/Hatfield and Sierra Club)	10 calendar days after EPA Response Brief	NACWA/Hatfield: 8,750 Sierra Club: 11,750
Municipal Petitioners Reply Brief and Sierra Club's Reply Brief	45 calendar days after EPA Response Brief	7,000 each brief
Intervenor-Petitioner Reply Brief	45 calendar days after EPA Response Brief	3,500
Deferred Joint Appendix	18 days after Reply Briefs	
Final Briefs	10 days after Deferred Joint Appendix	

CONCLUSION

The Parties believe that the recommended briefing format and schedule is reasonable and appropriate for the circumstances and that the proposed consolidated briefing of all petitions relating to the SSI Rule will allow for the most efficient use of the Court's and Parties' resources. Therefore, the Parties respectfully request that the Court enter an order adopting the proposed format and schedule for all consolidated cases.

Dated: June 1, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June 2012, a true and accurate copy of the foregoing Joint Proposed Briefing Format and Schedule was served electronically through the Court's CM/ECF system on all registered counsel.

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