

ORAL ARGUMENT NOT YET SCHEDULED

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

---

SIERRA CLUB,	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 09-1041
	)	Consol. with No. 09-1038
ENVIRONMENTAL PROTECTION	)	
AGENCY,	)	
	)	
Respondent.	)	

---

**EPA’S AND SIERRA CLUB’S LODGING OF SETTLEMENT AND  
MOTION TO SEVER AND HOLD CASE IN ABEYANCE**

Petitioner Sierra Club and the Environmental Protection Agency (“EPA”) (collectively, the “Parties”) respectfully notify the Court that they have negotiated a settlement addressing all of the issues that Sierra Club would otherwise raise in these proceedings. Accordingly, the Parties move to sever the above-captioned case from consolidated case number 09-1038 and hold the proceedings in abeyance pursuant to the terms of the attached settlement agreement. In this regard, Sierra Club and EPA alert the Court that there is currently a September 16, 2010 deadline in place for the filing of Sierra Club’s opening brief, and request that the briefing schedule in case number 09-1041 be suspended.

Counsel for Sierra Club has conferred with counsel for all other parties to ascertain their respective positions on this motion. API does not oppose the relief requested in this motion, provided that there is no delay in the briefing or argument of API's case. Intervenor Energy Technology Council does not oppose this motion. Intervenors Metals Industry Recycling Coalition, American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest and Paper Association Inc., Synthetic Organic Chemical Manufacturers Association, Inc., Treated Wood Council, Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association, and American Gas Association take no position on the motion. Counsel for Intervenors National Mining Association and Counsel for Utility Solid Waste Activities Group oppose the motion.

## **BACKGROUND**

At issue in these consolidated proceedings is EPA's 2008 rule revising the regulatory definition of solid waste under the Resource Conservation and Recovery Act ("RCRA"). *See* 73 Fed. Reg. 64,668 (Oct. 30, 2008). This rule conditionally excludes from the definition of solid waste, and therefore from regulation as hazardous waste, certain "hazardous secondary materials." *Id.*

Sierra Club petitioned for review of the rule in this Court on January 28, 2009, and on January 29, 2009, Sierra Club filed an administrative petition with

the agency requesting that EPA voluntarily reconsider its revisions to the definition of solid waste.

On February 20, 2009, EPA filed an unopposed motion to consolidate the Sierra Club's petition with a petition previously filed by the American Petroleum Institute ("API") and further moved to hold the proceedings in abeyance so that the newly inaugurated Administration could evaluate its position. Over the ensuing year and a half, EPA considered the issues raised in the Sierra Club's administrative petition and initiated a public process to vet possible revisions to the 2008 Rule. *See* 74 Fed. Reg. 25,200 (May 27, 2009). In addition, EPA agreed to undertake a comprehensive environmental justice analysis of the rule's impacts in response to concerns raised by the public, including the Sierra Club. *See* EPA, *Environmental Justice Analysis for the Definition of Solid Waste Rule*, [www.epa.gov/epawaste/hazard/dsw/ej.htm](http://www.epa.gov/epawaste/hazard/dsw/ej.htm) (last checked Sept. 7, 2010).

On February 1, 2010, the Court ordered the parties to submit proposed briefing formats for both of the consolidated cases. As the Parties represented in their Joint Motion to Establish Briefing Format (filed April 2, 2010), settlement negotiations were then ongoing, and on September 7, 2010, the Parties were able to finalize a settlement that promises to dispose of the Sierra Club's case in its entirety.

Under the terms of the agreement, which is attached for the Court's information, EPA has agreed to issue a Notice of Proposed Rulemaking addressing all of the issues raised in the Sierra Club's administrative petition on or before June 30, 2011 and to take final action on the proposed rulemaking on or before December 31, 2012. In return, the Sierra Club has withdrawn its pending administrative petition and agreed to dismiss its case with prejudice if EPA issues revised DSW rules that address the issues raised in the Sierra Club's administrative petition.

The Parties further agreed to lodge the settlement agreement with this Court and to request that the Sierra Club's case be severed from the API case and held in abeyance until the terms of the settlement are effectuated. In making the instant motion, the Parties are not seeking any action from this Court relative to the settlement agreement.

**I. GRANTING THE PARTIES' JOINT MOTION WILL CONSERVE JUDICIAL RESOURCES**

In light of the settlement agreement discussed above, it will conserve the resources of this Court and all parties to these proceedings to deconsolidate Sierra Club's case and hold it in abeyance. Under the current briefing schedule, Sierra Club's deadline for filing its opening brief is September 16, 2010, but briefing is now unnecessary.

Most fundamentally, EPA has committed to undertake a new rulemaking process. If EPA issues a new rule that addresses the issues raised by the Sierra Club in its administrative petition, the Sierra Club's case will be over. If EPA decides not to take final action to revise the rule, that decision will be subject to review on the basis of a new administrative record. In either case, briefing before the completion of the new rulemaking process would be premature.

Second, it makes sense to deconsolidate the Sierra Club and API petitions. Essentially, the Sierra Club alleges that the rule creates a regulatory exemption for hazardous secondary materials that is overbroad. In contrast, API alleges that the regulatory exemptions created by the 2008 rule should be expanded to encompass spent petroleum refinery catalysts. *See, e.g.*, Response of Petitioner API to EPA and Sierra Club Joint Motion to Govern (filed Nov. 25, 2009). API has stated that “even if EPA granted Sierra Club full relief and repealed the rule, API would still have a claim in the present case.” Response of Petitioner API in Opposition to EPA and Sierra Club Joint Motion to Govern, at 1 (May 19, 2009). API has further represented that it “expects to make two other arguments that do not depend upon the continuing existence of the challenged rule’s exclusions.” Response of Petitioner, API, to EPA and Sierra Club Joint Motion to Govern, at 2 (filed Nov. 25, 2009). Furthermore, API has itself suggested severing these two cases. *See* Motion of Petitioner API to Govern Further Proceedings, at 1 (filed Nov. 12,

2009). Therefore, briefing can go forward on API's petition, No. 09-1038, while the agency undertakes a new rulemaking process to determine whether its 2008 exclusions from the definition of solid waste should be narrowed or abandoned altogether.

### **CONCLUSION**

For all of the foregoing reasons, Sierra Club and EPA respectfully request that this Court grant its motion to sever and hold in abeyance proceedings on the Sierra Club's petition for review, No. 09-1041, until the terms of the attached settlement agreement have been effectuated. Further, pending an order on this motion, the Parties request that the briefing schedule for case number 09-1041 be suspended.

Respectfully submitted on this 10th day of September, 2010,

/s/ ABIGAIL DILLEN  
DEBORAH GOLDBERG  
Earthjustice  
156 William Street, Suite 800  
New York, NY 10038

JAMES S. PEW  
STEPHEN E. ROADY  
Earthjustice  
1625 Massachusetts Ave., N.W.,  
Suite 702  
Washington, D.C. 20036

LISA EVANS  
Earthjustice  
21 Ocean Avenue  
Marblehead, MA 01945

*Attorneys for Petitioner Sierra Club*

IGNACIA S. MORENO  
Assistant Attorney General  
/s/ DANIEL R. DERTKE, Attorney  
U.S. Department of Justice  
Environment & Natural Resources Div.  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-0994  
daniel.dertke@usdoj.gov

ALAN CARPIEN  
Office of General Counsel, U.S. EPA  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

*Attorneys for Respondent EPA*



Settlement Agreement

This Agreement is made by and between Sierra Club and the U.S. Environmental Protection Agency ("EPA").

WHEREAS, Sierra Club has filed a petition for judicial review of the final action entitled "Revisions to the Definition of Solid Waste," and published at 73 Fed. Reg. 64,668 (Oct. 30, 2008) ("DSW Rule"), which petition is currently pending before the U.S. Court of Appeals for the District of Columbia Circuit in *Sierra Club v. EPA*, No. 09-1041, consolidated under the lead case *American Petroleum Institute v. EPA*, No. 09-1038;

WHEREAS, the DSW Rule revises the definition of solid waste under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6912 et seq., and conditionally excludes from that definition, and therefore from regulation as hazardous waste, certain "hazardous secondary materials." 73 Fed. Reg. at 64,688-89;

WHEREAS, in January 2009, Sierra Club filed an administrative petition requesting EPA to reconsider and repeal the DSW Rule;

WHEREAS, on March 9, 2009, the Court held the consolidated cases in abeyance pending further order;

WHEREAS, on June 30, 2009, EPA held a public meeting regarding potential changes to the definition of solid waste. See 74 Fed. Reg. 25,200 (May 27, 2009);

WHEREAS, in the public notice announcing the June 2009 public meeting, EPA listed as the following areas in which EPA is particularly interested in obtaining public feedback on possible changes to the definition of solid waste:

- (A) the definition of "contained"
- (B) notification before operating under the exclusion

(C) the definition of "legitimacy"

(D) the transfer-based exclusion

WHEREAS, on February 1, 2010, the Court removed the consolidated cases from abeyance and ordered the parties to submit proposed briefing formats by April 2, 2010; and

WHEREAS, the Court has ordered Sierra Club to file its opening brief by September 16, 2010;

NOW THEREFORE, the Parties, intending to be bound by this Agreement, hereby stipulate and agree as follows:

1. EPA agrees that it will prepare a notice of proposed rulemaking which will address, at a minimum, the issues raised in Sierra Club's administrative petition including the four issues listed in the May 27, 2009, Federal Register notice, 74 Fed. Reg. 25,200.
2. No later than June 30, 2011, EPA agrees that the EPA Administrator will sign and promptly transmit to the Office of the Federal Register the notice of proposed rulemaking described in Paragraph 1. EPA shall provide Sierra Club with a copy of this notice of proposed rulemaking within five business days of signature.
3. After considering any public comments received concerning the proposed rule addressed in Paragraph 1, the EPA Administrator will sign and promptly submit to the Office of the Federal Register a notice taking final administrative action concerning the notice of proposed rulemaking no later than December 31, 2012. EPA shall provide Sierra Club with a copy of this notice regarding final administrative action within five business days of signature.
4. This Agreement constitutes the sole and entire understanding of EPA and Sierra Club and no statement, promise or inducement made by any Party to this Agreement, or any agent of such Parties, that is not set forth in this Agreement shall be valid or binding. The

provisions of this Agreement can be modified at any time by written mutual consent of Sierra Club and EPA.

5. After this Agreement is executed by counsel for the Parties, Sierra Club shall promptly withdraw its petition for administrative rulemaking and the Parties shall promptly lodge this Agreement with the Court, along with a joint motion requesting that the Court enter an order severing Case No. 09-1041 and holding Case No. 09-1041 in abeyance during the period required to effectuate the terms of this Agreement, with joint status reports to be filed every 90 days.

6. If EPA fails to satisfy any provision of this Agreement, Sierra Club may withdraw its consent to any order holding this case in abeyance and move the Court immediately to vacate any such order. The filing of such a motion shall constitute Sierra Club's sole remedy under this Agreement in the event any provision set forth in this Agreement is not met. Sierra Club agrees to give EPA fifteen (15) days written notice prior to exercising its right under this paragraph to file a motion. Nothing in this Agreement shall be construed to limit any right that Sierra Club may otherwise have to seek review of any final action pursuant to RCRA Section 7006(a), 42 U.S.C. § 6976(a).

7. If EPA takes final agency action pursuant to Paragraph 3 of this Agreement, which final agency action revises the DSW Rule with respect to the issues raised in Sierra Club's administrative petition, Sierra Club shall within fifteen (15) days thereafter stipulate to the dismissal with prejudice of Case No. 09-1041, in accordance with Rule 42 of the Federal Rules of Appellate Procedure.

8. Except as expressly provided in this Settlement Agreement, none of the parties waives or relinquishes any legal rights, claims, or defenses it may have.

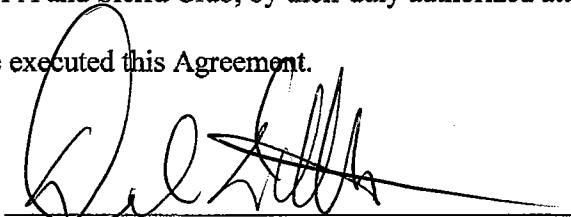
9. Nothing in the terms of this Agreement shall be construed to limit or modify the discretion accorded EPA under RCRA or by general principles of administrative law.

10. The commitments by EPA in this Agreement are subject to the availability of appropriated funds. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend, or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.

IN WITNESS WHEREOF, EPA and Sierra Club, by their duly authorized attorneys, whose signatures appear below, have executed this Agreement.

DATE:

9/7/10

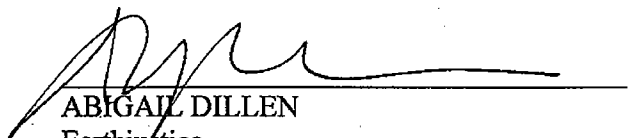


DANIEL R. DERTKE  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-0994

Counsel for EPA

DATE:

8/25/10



ABIGAIL DILLEN  
Earthjustice  
156 William Street  
Suite 800  
New York, NY 10038  
(212) 791-1881 ext. 221

Counsel for Sierra Club