ORAL ARGUMENT NOT YET SCHEDULED

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

No. 10-1359 and consolidated cases

PORTLAND CEMENT ASSOCIATION, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY
AND LISA PEREZ JACKSON,

Respondents.

ON PETITIONS FOR REVIEW OF RULES OF THE
ENVIRONMENTAL PROTECTION AGENCY

SSM COALITION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

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Dated: May 23, 2011

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, counsel for SSM Coalition certifies as follows:

SSM Coalition is an *ad hoc*, informal organization of trade associations, business organizations, and individual companies formed to fund and conduct advocacy and litigation concerning regulation under the Clean Air Act of emissions from stationary sources, with particular emphasis on emissions during startup, shutdown, and malfunction events. As such, it has no parent company, subsidiaries or affiliates. It is unincorporated and, therefore, has no publicly traded stock, and no publicly held corporation owns 10% or more of stock in SSM Coalition.

Although not required to be disclosed because SSM Coalition is a "trade association" within the meaning of Circuit Rule 26.1(b), the current members of SSM Coalition are: American Chemistry Council, American Forest & Paper Association, American Home Furnishings Alliance, American Iron and Steel Institute, American Petroleum Institute, American Wood Council, Brick Industry Association, Coalition for Responsible Waste Incineration, Council of Industrial Boiler Owners, Florida Sugar Industry, National Association of Manufacturers, National Petrochemical & Refiners Association, Rubber Manufacturers Association, Treated Wood Council, and

the Vegetable Oil SSM Coalition (consisting of the Corn Refiners Association, the National Cotton Council, the National Cottonseed Products Association, the National Oilseed Processors Association, and Sessions Peanut Company).

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GLOSSARY

CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
HAP	Hazardous Air Pollutant
MACT	Maximum Achievable Control Technology
NESHAP	National Emission Standards for Hazardous Air Pollutants under CAA § 112
NSPS	New Source Performance Standards under CAA § 111
Pet. Br.	Opening brief of Petitioners Portland Cement Association, *et al*.
SSM	Startup, shutdown, and malfunction
SSMC	*Amicus curiae* SSM Coalition

INTERESTS OF *AMICUS*

Amicus curiae SSM Coalition ("SSMC") is a broad-based, *ad hoc* unincorporated organization devoted to advancing the interests of industry in lawful, reasonable, achievable emission standards under the Clean Air Act ("CAA"). SSMC's members are national trade associations, business organizations, and individual companies involved in a wide range of manufacturing activities, encompassing the agricultural products, brick, chemical, food, forest products, petroleum, rubber, steel, and waste management sectors, among others.[1]

SSMC has a particular interest in the instant petitions for review of a rule establishing national emission standards for hazardous air pollutants ("NESHAPs") under CAA section 112, 42 U.S.C. § 7412, for the Portland Cement Manufacturing Industry, 75 Fed. Reg. 54,970 (Sept. 9, 2010) (the "Cement NESHAP Rule"). The Cement NESHAP Rule contains revisions to the NESHAP for cement plants that EPA asserts are allowed or required in response to decisions of this Court interpreting CAA section 112, in cases involving cement plants and other industries. *See* 75 Fed. Reg. at 54,972-73. This includes new language addressing emissions during startup, shutdown, and

[1] No party's counsel authored this brief in whole or in part, and no party or any other person other than SSM Coalition members contributed to its funding.

malfunction ("SSM") events, which EPA suggests is required by or consistent with the Court's decision reviewing SSM provisions in EPA's NESHAP General Provisions, *Sierra Club v. EPA*, 551 F.3d 1019 (2008) – a case in which numerous members of SSMC were intervenors. *See* 75 Fed. Reg. at 54,973, 54,991-93. This case thus involves EPA's interpretations of its duties and discretion under CAA section 112 which may be relevant to NESHAPs for SSMC members.

This brief is filed pursuant to this Court's order of January 19, 2011, granting SSMC the right to participate as an *amicus curiae*, pursuant to Circuit Rule 29(b), and authorizing *amici* supporting petitioners to file two briefs, provided they do not exceed 6000 words total.

ARGUMENT

I. EPA's Pollutant-by-Pollutant Approach Perverts the MACT Floor.

EPA claims Congress' directive in CAA section 112(d)(3) that MACT standards be at least as stringent as what is "achieved in practice" by similar sources allows EPA to promulgate a set of MACT standards that could only be met by a currently-nonexistent facility that has multiple air pollution control devices, each the most effective available for a particular hazardous air pollutant

("HAP'), added one after the other.[2] This completely divorces the MACT floor from its focus on what actual plants have achieved in practice.

EPA asserts that, although no existing source may currently comply with the Cement NESHAP Rule, it is possible for existing best-performing sources to install additional controls to meet the limitations for all pollutants.[3] EPA unabashedly defends its pollutant-by-pollutant approach on the grounds that without it, EPA could not justify such standards under the second, beyond-the-floor criteria because the statute would not allow EPA to impose such excessive costs. *See* 75 Fed. Reg. at 55,000. This supposed justification reveals the unreasonableness of EPA's interpretation of section 112(d).

EPA claims (apparently based solely on a floor statement by one congresswoman) that Congress adopted the MACT floor to ensure that EPA would not eschew stringent emissions standards because of their excessive costs. 75 Fed. Reg. at 55,000. On its face, however, the MACT floor is

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[2] *See* 75 Fed. Reg. at 55,000-55,001 (asserting that plants could comply with cement kiln emission limits supposedly representing the MACT floor by putting five control devices in series, or by using some not-yet-demonstrated combination of fewer technologies that "would likely be utilized successfully").

[3] Contrast this with EPA's statement in another NESHAP rulemaking that it is "impermissible" for floor standards to require best performing sources to install upgraded air pollution control equipment, because that imposes "what amounts to a beyond the floor standard without consideration of the beyond the floor factors… ." 70 Fed. Reg. 59,402, 59,443 (Oct. 12, 2005).

concerned with ensuring feasibility, not forcing economically unachievable standards. It reflects Congress's expressed judgment that it should be "achievable" – a concept that definitely involves economic feasibility, *see* CAA section 112(d)(2) – for all sources to do what the top 12% of their peers are achieving. *See Sierra Club v. EPA*, 353 F.3d 976, 980 (D.C. Cir. 2004).

EPA claims that the statutory language can be read to require EPA to promulgate either (a) emission limitations that could be met by the average of the best-performing 12% of existing cement plants, or (b) emission limitations based on the best performers for each pollutant – potentially a different set of sources for each limitation. 75 Fed. Reg. at 54,999. But if the latter interpretation leads to results that conflict with the statutory scheme, it is <u>not</u> a permissible interpretation. *See Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975). There is no reason to believe Congress intended the MACT floor to produce emission limitations that would not be considered economically achievable in a beyond-the-floor analysis. All indications are to the contrary. *See*, *e.g.*, H.R. Rep. 101-490 Part I, at 328 (1990) ("MACT is not intended to… drive sources to the brink of shutdown"); As Judge Williams noted in his concurrence in the *Brick MACT* decision, floor standards more costly than achievable, beyond-the-floor standards would be inconsistent with "common sense and the reasonable meaning of the statute." *Sierra Club v. EPA*, 479 F.3d

875, 885 (D.C. Cir. 2007) (Williams, J., concurring). EPA does not have discretion to choose an interpretation of CAA section 112(d) that results in standards, supposedly based on what has been "achieved" in practice, that are not "achievable."

EPA claims that finding the best-controlled similar sources overall, rather than identifying the best performers for each HAP, would produce a MACT floor reflecting emissions from the worst or mediocre performers. 75 Fed. Reg. at 54,999, 55,000. But there is no inherent reason that would result: As EPA notes, *id*. at 55,001, one piece of well-designed and -operated emission control technology often effectively reduces numerous HAPs, and in fact EPA's analysis of a MACT floor based on simultaneous achievability of all HAP standards shows that would not be the case here. *Id*. at 54,999 (mercury limits would be stricter than the performance of about 75% of facilities, for example). In any event, EPA can address this concern by, *inter alia*, using its discretion in (1) defining what are the "best" performers, *id*. at 55,003 ("a straight emissions approach may not be mandated"), and (2) adopting beyond-the-floor controls, if justified by available technology, cost, and other statutory factors.

Finally, EPA relies on one decision (and attempts to distinguish other relevant cases) to support its pollutant-by-pollutant approach. *Id*. at 55,000. But that case is inapposite for many reasons. First, it involved a Clean Water Act

provision relating to "achievable" standards, rather than standards that have been "achieved in practice." *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177 (5th Cir. 1989). Secondly, the Agency used a "model technology" process to set the standards, not an "achieved-in-practice" method. *Id*. at 238. Additionally, EPA identified a source that would meet all standards, but for an upset at the time of testing. *Id.* Ultimately the Fifth Circuit deferred to EPA's approach to setting "achievable" standards because the statute and legislative history did not indicate otherwise – which again is unlike the present case.

II. Emission Limitations that Apply Uniformly Even During Malfunctions Do Not Represent the MACT Floor.

EPA's treatment of malfunctions is another striking example of how EPA's erroneous interpretation of the MACT floor provisions – ignoring what is being "achieved" by actual "sources" – resulted in unreasonable emission standards in the Cement NESHAP Rule. *Cf*. Pet. Br. Secs. II, III.B.

In the original NESHAP for cement plants, EPA determined that the emission limitations established for normal operations should not apply during periods where the cement-making process or associated air pollution control equipment malfunctions.[4] 40 C.F.R. pt. 63 subpt. LLL Table 1 (2010),

[4] "Malfunction" here means not just any deviation, but an upset or failure of a manufacturing process or pollution control technology that is "sudden, unexpected, and not reasonably preventable." *See* 75 Fed. Reg. at 54,992, *citing*

incorporating by reference 40 C.F.R. §§ 63.6(f)(1) and (h)(1) (2010) of the NESHAP General Provisions (emission standards apply at all times except during startup, shutdown or malfunction). This was consistent with EPA's long-standing recognition that some provision must be made for malfunctions to make performance standards reasonable.[5]

In the Cement NESHAP Rule, EPA noted that the effect of this Court's vacatur of 40 C.F.R. §§ 63.6(f)(1) and (h)(1) in *Sierra Club*, 551 F.3d at 1028, was to remove the exemption from compliance with the Portland Cement NESHAP during SSM periods. 75 Fed. Reg. at 55,492. In response, EPA promulgated alternative emission standards that apply during startup and shutdown, but refused to establish separate standards for, or otherwise accommodate potential exceedances related to, malfunctions. *Id*.

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40 C.F.R. § 63.2 (2010). Many industrial processes can experience upset conditions, which are caused by factors unrelated to proper operation and maintenance of the facility, and which can exceed the capacity of emission control equipment or require bypassing such equipment to avoid fire or explosion. *See, e.g.*, 71 Fed. Reg. 39,259, 39,264 (April 21, 2008) (flares at refineries perform an essential safety function that may prevent compliance with emission limitations during malfunctions).

[5] *See* 40 C.F.R. § 60.8(c) (2010) (malfunction exemption in New Source Performance Standards under CAA § 111, 42 U.S.C. § 7411 ("NSPS")); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973) (SSM provisions are "necessary to preserve the reasonableness of the [NSPS] as a whole."); *National Lime Ass'n v. EPA*, 627 F.2d 416, 431 n.46 (D.C. Cir. 1980) (NSPS must be achievable "under most adverse circumstances which can reasonably be expected to recur," such as during SSM).

An agency must have a reasoned basis on the record for changing a prior factual determination or interpretation of its standard-setting authority. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Automobile Ins. Co.*, 463 U.S. 29, 56-57 (1983); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). EPA offers no reasonable justification for departing from the view it has long held that standards representing the performance of the best available technology must include allowances for potential higher emissions resulting from malfunctions.

As Petitioners correctly explained, the MACT floor is not some theoretical construct; it is Congress' attempt to make sure that the section 112 standards for HAPs at a minimum reflect what is actually being achieved by the best-performing sources. Pet. Br. Secs. II.A.,C. But those best-performing sources still experience malfunctions, even though their process and air pollution control equipment is properly designed, maintain, and operated. EPA acknowledges that. *See* 75 Fed. Reg. at 54,993.

EPA simply asserts that it has changed its mind and decided that malfunctions are not a "distinct operating mode" – as if calling malfunctions part of a source's normal operating mode somehow justifies setting standards that ignore emissions occurring during the malfunctions that are inevitable even

at the best-performing plants.[6] *See* 75 Fed. Reg. at 54,992. EPA also fails to provide any explanation for reversing its prior conclusion that malfunctions were a distinct operating mode. *See id.* That alone requires vacatur and remand. *See Florida Municipal Power Agency v. FERC*, 602 F.3d 454, 458-59 (D.C. Cir. 2010).

EPA suggests that best-performing plants should be operating in a way to avoid malfunctions. *Id*. at 54,993. Yet malfunctions occur even at well-designed and -operated plants, as EPA admits. *Id*. Emission limitations that are based solely on emissions data from normal operations – i.e., excluding malfunction events – but apply during malfunction periods do not reflect the performance actually achieved by the best performers. In contrast to pollutant-by-pollutant floor-setting, pp. 2-3, *supra*, EPA cannot even speculate that any combination of technologies could be installed to avoid harsh penalties under 42 U.S.C. § 7413 when malfunctions occur.[7]

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[6] *Cf. Mossville Environmental Action Now v. EPA*, 370 F.3d 1232, 1242 (D.C. Cir. 2004) (upholding MACT limits higher than those achieved during normal operations because "even the best performing sources occasionally have spikes, and…each facility must meet the [MACT floor] standard every day and under all operating conditions.").

[7] *See* 75 Fed. Reg. at 54,993. Rather than address this problem in the emission standards themselves, EPA says it will "determine an appropriate response" in light of the source's efforts to comply, *id*., and EPA offers an "affirmative defense" – to civil penalties only – if a malfunction meets numerous criteria. 75 Fed. Reg. at 55,053 (to be codified at 40 C.F.R. § 63.1344). But, as this Court observed with respect to similar, technology-based, NSPS under CAA section

EPA says it now is imposing emission limitations that apply even during malfunctions "[i]n light of the *Sierra Club* decision…." 75 Fed. Reg. at 54,991. But that decision does not compel this result in any way. In *Sierra Club* the Court vacated a generic exemption that applied to all categorical NESHAPs, because it did not represent a standard developed pursuant to the criteria in CAA section 112, and therefore EPA was not meeting Congress' intent that HAP emissions be covered by standards developed pursuant to section 112 at all times. *Sierra Club* at 1027, 1028. It said nothing about whether a standard based on the MACT floor under section 112(d) can ignore emissions that occur during unavoidable malfunctions.

Indeed, EPA clearly does not believe *Sierra Club* prevents it from adopting different emission standards for SSM periods, since it did so in the Cement NESHAP Rule, for startups and shutdowns. *See* 75 Fed. Reg. at 55,052 (to be codified at 40 C.F.R. § 63.1343); *see also id*. at 54,991-92. EPA also believes it has discretion to set MACT floor limitations that reflect the

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111, relying on "enforcement discretion" to address unavoidable excess emissions during malfunctions "defer[s] the question of 'available' technology to the enforcement stage, an approach not contemplated by section 111." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 399 n.91 (D.C. Cir. 1973); *see also National Lime*, 627 F.2d at 431 n.46, (enforcement flexibility "will not render 'achievable' a standard which cannot be achieved on a regular basis" because of, e.g., SSM events); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1273-74 (9th Cir. 1977) (same for Clean Water Act Best Available Technology limits).

variability of the best-performers including malfunction events; it just chooses not to do so in this rule. *Id*. at 54,992 (citing *Mossville*).

EPA's assertion that it would be too difficult to establish standards that would apply during malfunctions, because of their unpredictability and variability (75 Fed. Reg. at 54,993), rings hollow as well: There is no indication that EPA considered adopting work practice standards to address malfunction events, in lieu of the numerical limitations EPA says are too difficult to derive. EPA has acknowledged, in another recent NESHAP rulemaking, that it has authority under CAA section 112 to use work practice standards for a subcategory of sources where the "unpredictable operation of this class of units makes emission testing for the suite of pollutants being regulated impracticable" and where EPA is "unable to establish the actual performance of the best performers" because of "technological limitations that render it impracticable to measure emissions." *See* 76 Fed. Reg. 15,608, 15,634, 15,638 (March 21, 2011). EPA also has used work practice standards to deal with startup and shutdown conditions because performance testing, and therefore enforcement of numeric emission limitations, is impracticable. *See id*. at 15,613.

The preamble to the Cement NESHAP Rule contains no attempt to explain why work practice standards could not be used to address the asserted

difficulty of deriving numerical limitations reflecting the best performers' emissions during malfunctions. It was unreasonable for EPA to not apply, nor even consider and reject, the approach it has long used for addressing deviations from normally achievable emission standards that may occur during periods of malfunction. *See*, *e.g.*, *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 816-18 (D.C.Cir.1983) (failure to consider reasonable alternatives rendered decision arbitrary and capricious).

III. It Was Arbitrary for EPA To Refuse To Account for Significant Variations in Limestone Constituents.

EPA was well aware that cement plants generally must use limestone quarried nearby and that cement plants with limestone supplies having higher naturally occurring concentrations of HAPs, particularly mercury, may find it difficult or impossible to achieve the same HAP emission rate, even with state-of-the-art controls, as plants with lower-concentration limestone supplies. *See* Pet Br. at 27-28, 32-33.

This problem is not unique to cement plants. There are many situations where an industrial facility necessarily must rely on a specific source or type of raw material that differs in composition from the raw material used by other plants on which EPA might base the MACT floor. Brick-making plants, for example, must rely on nearby sources of mined clay and shale. Pulp mills in

coastal areas process wood that has higher chloride levels, due to salt spray, than similar facilities in inland areas.

Congress was aware of the issue as well. EPA itself previously stated that Congress did not intend EPA to base any NESHAP on the use of a particular metal- or mineral-bearing raw material for sources engaged in mining, extraction, beneficiation, and processing of ores and minerals, citing the Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 101-952, at 339 (1990). *See Sierra Club*, 353 F.3d at 988 (D.C. Cir. 2004).[8] Senator Baucus, Conference Committee Chair, explained: "Unlike other industries, the mining, beneficiation and processing industry has limited if any flexibility in changing the composition of domestically mined resource-based feedstocks." 136 Cong. Rec. S16978 (daily ed. Oct. 27, 1990).

In setting other MACT standards, EPA has indicated that it is appropriate to consider creating a subcategory based on the nature of the raw materials that a facility uses. *See*, *e.g.*, *Natural Resources Defense Council v. EPA* , 489 F.3d 1364, 1375 (D.C. Cir. 2007) ("use of the same inputs to create its products – in particular, the same resins" was one of three criteria EPA used for deciding

[8] EPA implies that this Court determined that statement to be irrelevant in the *Brick MACT* case. 75 Fed. Reg. at 55,001. In fact, that decision never mentioned the legislative history concerning mined materials.

whether to subcategorize); 60 Fed. Reg. 30,801, 30,802 (June 12, 1995) ("Subcategorization was necessary to reflect…raw material usage…").

In the Cement NESHAP Rule, EPA knew that the cement plant with the most-effective pollution controls for mercury could not meet the supposed MACT floor for mercury, which was based instead on plants that happen to have limestone supplies with much lower mercury content. *See* 74 Fed. Reg. 21,136, 21,148 (May 6, 2009). Contrast that with the leather finishing MACT standards, where EPA created a "specialty leather finishing" subcategory in response to commenters' contentions that there was no suitable replacement for the solvents used in those operations, rendering the otherwise applicable MACT standard unachievable for these sources. 67 Fed. Reg. 9155, 9158 (Feb. 27, 2002).

Failure to provide sufficient justification for treating similar situations differently renders EPA's action arbitrary and capricious. *See Transactive Corp. v. United States*, 91 F.3d 232, 237, 239 (D.C. Cir. 1996). So does EPA's failure generally to explain why it should ignore such a fundamental characteristic of sources and decline to exercise its discretion under CAA section 112(d)(1) to subcategorize cement plants based on their limestone supply. *See Motor Vehicle Mfrs.*, 463 U.S. at 48-49.

CONCLUSION

The Court should vacate and remand the Cement NESHAP Rule for the foregoing reasons.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) and the Court's order in this case of April 18, 2011, because this brief contains 3232 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word with Times New Roman font and 14-point type.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of May 2011, I electronically filed SSM Coalition's *Amicus Curiae* Brief in Support of Petitioners with the Clerk of the Court using the Court's CM/ECF system. Copies of the brief therefore were served electronically through the Court's CM/ECF system on all registered counsel. The original and eight paper copies of the brief were also filed with the Clerk pursuant to Circuit Rule 31.

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