

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

Respondents

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure and Circuit Rule 29(b), SSM Coalition respectfully moves for leave to participate in these proceedings as *amicus curiae* and to file an *amicus* brief under Fed. R. App. P. 29 and Circuit Rule 29 in the above-captioned consolidated petitions for judicial review. In support of this motion, SSM Coalition states the following:

Introduction and Background

SSM Coalition is a broad-based, *ad hoc* unincorporated organization devoted to advancing the interests of industry in reasonable, achievable emission standards under the Clean Air Act, including appropriate treatment of the special circumstances often present during startup, shutdown, or malfunction of process equipment or pollution control equipment. The membership of SSM Coalition consists of national trade associations and business organizations whose members are involved in a broad range of manufacturing activities. SSM Coalition's members include organizations that advocate the interests of businesses that operate in a variety of industry sectors, such as the National Association of Manufacturers, as well as numerous national trade associations that represent companies in particular sectors, including agricultural products, brick, chemical, food, forest products, petroleum, rubber, steel, and waste management sectors, among others, such as the American Forest & Paper Association and the National Petrochemical & Refiners Association.

Undersigned counsel, consistent with Circuit Rule 29(b), contacted counsel for the parties in the above-captioned consolidated cases, seeking their consent to SSM Coalition's participation as an *amicus*. Counsel for all of the industry parties have consented to the SSM Coalition's participation as an

amicus. Counsel for the environmental advocacy group petitioners and for respondent have not responded to the request for their consent.

Although the Court now has before it consolidated petitions for review challenging two EPA rules governing emissions at Portland Cement plants, SSM Coalition’s particular interest is in the petitions for review of the rule establishing national emission standards for hazardous air pollutants (“NESHAPs”) under Clean Air Act (“CAA”) section 112, “National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry,” 75 Fed. Reg. 54,970 (Sept. 9, 2010) (the “Cement NESHAP Rule”). Petitions for review of that rule were consolidated under Case No. 10-1359.

The Cement NESHAP Rule was promulgated in part in response to a remand order that this Court issued in a case reviewing a previous version of NESHAPs for cement plants, *National Lime Ass’n v. EPA*, 233 F. 3d 625 (D.C. Cir. 2000). *See* 75 Fed. Reg. at 54,972-73. In addition to responding to issues addressed in that case, however, the Cement NESHAP Rule also contains revisions to the NESHAPs for cement plants that EPA initiated because it believed those revisions were allowed or required in response to decisions of this Court interpreting CAA section 112 in other industries. *Id.* This includes new language addressing emissions during startup, shutdown, and malfunction

(“SSM”) events, which EPA asserts is required by or consistent with this Court’s decision reviewing SSM provisions in EPA’s NESHAP General Provisions regulation, *Sierra Club v. EPA*, 551 F.3d 1019 (2008), *cert. denied*, 130 S. Ct. 1735 (2010). *See* 75 Fed. Reg. at 54,973, 54,991-93.

Interest of the Proposed *Amicus*

SSM Coalition has a direct and immediate interest in the regulations and EPA interpretations at issue in this case and would provide the Court with a unique and relevant perspective regarding the proper disposition of this case. SSM Coalition members represent companies that presently are subject to NESHAPs for numerous source categories (other than Portland Cement manufacturing), as well as companies that will be subject to upcoming NESHAPs for additional types of sources that EPA is developing. Also, EPA has committed to considering revised and expanded NESHAPs for numerous source categories that encompass companies represented by members of SSM Coalition. *See* 75 Fed. Reg. 40,827 (July 14, 2010) (describing proposed consent decree that would establish schedules for EPA to revise NESHAPs for, among others, various types of chemical plants, pulp and paper mills, steel pickling operations, and wood furniture manufacturing).

As a result, the industries represented by SSM Coalition's members will be affected directly by the new approaches EPA has employed to establish NESHAPs and the novel interpretations of CAA section 112 and of this Court's decisions that EPA has adopted in the Cement NESHAP Rule. The SSM Coalition has a vital interest in the Court's review of whether EPA's approaches to establishing NESHAPs and EPA's interpretations of the CAA and applicable precedent are authorized and reasonable. Many of SSM Coalition's members have evidenced an interest in these issues previously by, *inter alia*, commenting on the proposed Cement NESHAP Rule, and participating as intervenors in the *Sierra Club v. EPA* case concerning SSM provisions discussed above.

SSM Coalition has reviewed the issues statements filed in this case, as well as the petition for administrative reconsideration and supplement thereto filed with EPA by Portland Cement Association. Those documents confirm that briefing in this case likely will involve numerous novel approaches to establishing NESHAPs and new interpretations of CAA section 112 and judicial precedent that will affect businesses represented by SSM Coalition. In addition to the issue of standards that apply during SSM events, discussed above, this case raises questions about the proper approach to establishing the Maximum Achievable Control Technology ("MACT") "floor" (*see* 75 Fed. Reg. at 54,974-

75, 54,980, 54,987), addressing variability in emissions, including variability associated with variable raw material composition (*see id.* at 54,974-77), subcategorization (*see id.* at 54,978-80), and establishing risk-based standards for “threshold pollutants” under CAA section 112(d)(4) (*see id.* at 54,984-87).

SSM Coalition’s participation in this case as an *amicus curiae* would bring a much broader perspective on the EPA approaches to standard-setting and interpretations of the CAA reflected in the Cement NESHAP Rule, because SSM Coalition represents a much larger group of industry categories, each with their own operational constraints and subject to a variety of differing standards promulgated under CAA section 112. Also, judging from the issues statements filed in this case and Portland Cement Association’s petition for EPA reconsideration of the Cement NESHAP Rule, SSM Coalition will bring to the case some different perspectives on the appropriate interpretation of CAA provisions and on the reasonableness of EPA’s new approach to setting MACT standards. For these reasons, SSM Coalition’s *amicus* brief is desirable and relevant to the disposition of this case. *See* Fed. R. App. P. 29(b)(2).

Granting SSM Coalition’s Motion Will Not Prejudice the Parties

Granting SSM Coalition leave to file an *amicus curiae* brief will not cause prejudice to any party, nor will it delay the proceedings. This motion for leave to

participate as an *amicus curiae* is timely filed under Fed. R. App. P. 29(e) and Circuit Rule 29(b). No briefing order has been issued in this case.

SSM Coalition is aware of Industry Petitioners' December 20, 2010 Motion to Expedite the Cases. SSM Coalition could file its *amicus* brief by the time proposed in that motion for petitioners' opening briefs (February 4, 2011). SSM Coalition requests, however, that, if the Court establishes an expedited briefing schedule, all *amicus* briefs supporting petitioners be due seven or more days after petitioners' opening briefs, in order to avoid repetition of facts or legal arguments made in the principal briefs and focus on points not made or adequately elaborated upon in the principal briefs, consistent with Circuit Rule 29(a).

Conclusion

Therefore, SSM Coalition respectfully requests that this Court grant its motion to participate in the above-captioned case as an *amicus curiae* and to file

an *amicus curiae* brief, as authorized by Fed. R. App. P. 29 and Circuit Rule 29.

Dated: January 4, 2011

Respectfully submitted,

/s/ Russell S. Frye

FryeLaw PLLC

1101 30th Street, N.W. Suite 220

Washington, DC 20007-3769

(202) 572-8267

Fax: (866) 850-5198

rfrye@fryelaw.com

Attorney for Movant SSM Coalition

ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 27(a)(4) and 29(b), undersigned counsel certifies the following information pursuant to Circuit Rule 28(a)(1) on behalf of movant SSM Coalition:

1. Parties and *Amici*

The requirement in Circuit Rule 28(a)(1)(A) to identify parties, intervenors, and *amici curiae* that appeared below is inapplicable because this case involves direct review of agency rulemaking.

The parties that appear in the cases before this Court are the following:

1. Industry petitioners are the Portland Cement Association (No. 10-1359); Ash Grove Cement Co. (No. 10-1364); CEMEX, Inc. (No. 10-1368); Eagle Materials Inc. (No. 10-1372); Holcim (US) Inc. (No. 10-1375); Lafarge North America Inc., Lafarge Midwest, Inc., and Lafarge Building Materials Inc. (No. 10-1370); and Riverside Cement Company and TXI Operations, LP (No. 10-1365).
2. Environmental petitioners are Natural Resources Defense Council (10-1371); and Sierra Club, Desert Citizens Against Pollution, Downwinders

At Risk, Friends of Hudson, Huron Environmental Activist League, and Montanans Against Toxic Burning (10-1378).

3. Respondents are the United States Environmental Protection Agency and its Administrator Lisa Perez Jackson.
4. Movant-Intervenors for Respondent in Nos. 10-1359, 10-1364, 10-1365, 10-1368, 10-1372, 10-1370, and 10-1375 are the following: North Carolina Coastal Federation; Cape Fear River Watch; PenderWatch and Conservancy; Sierra Club; Desert Citizens Against Pollution; Downwinders At Risk; Huron Environmental Activist League; Friends of Hudson; Montanans Against Toxic Burning; and Natural Resources Defense Council.
5. Movant-Intervenors for Respondent in Nos. 10-1371 and 10-1378 are the following: Portland Cement Association; Ash Grove Cement Co.; CEMEX, Inc.; Eagle Materials Inc.; Holcim (US) Inc.; Lafarge North America Inc., Lafarge Midwest, Inc., and Lafarge Building Materials Inc.; Riverside Cement Company and TXI Operations, LP; and Lehigh Cement Company.
6. Utility Solid Waste Activities Group is a Movant-Intervenor for Respondent in No. 10-1359.

No other entity has yet indicated an intention to participate as an *amicus curiae*.

2. Ruling Under Review

This proceeding involves a petition for review, pursuant to 42 U.S.C. § 7607(b) and Fed. R. App. P. 15(a), of the United States Environmental Protection Agency's final action promulgating "National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry," 75 Fed. Reg. 54,970 (Sept. 9, 2010).

3. Related Cases

Movant SSM Coalition is aware of the following cases (other than the consolidated cases, all of which are listed above); these cases are related in the sense that they challenge a separate EPA final rule applicable to the Portland cement industry entitled "Standards of Performance for Portland Cement Plants," 75 Fed. Reg. 54,970 (Sept. 9, 2010), that was promulgated in the same Federal Register notice as the rule at issue here. These cases include the following:

10-1358: filed by Portland Cement Association, Nov. 5, 2010

10-1363: filed by Ash Grove Cement Company, Nov. 8, 2010

10-1366: filed by Riverside Cement Company, *et al.*, Nov. 8, 2010

10-1367: filed by CEMEX, Inc., Nov. 8, 2010

10-1369: filed by LaFarge North America, Inc., *et al.*, Nov. 8, 2010

10-1373: filed by Eagle Materials, Inc., Nov. 8, 2010

10-1375: filed by Holcim (US) Inc., Nov. 8, 2010

10-1376: filed by Sierra Club and NRDC, Nov. 8, 2010

10-1379: filed by Downwinders at Risk, *et al.*, Nov. 8, 2010

On November 19, 2010, the Court consolidated all of these cases under case 10-1358.

SSM Coalition is aware of two additional cases that challenge aspects of one or both of the EPA final rules at issue in Case Nos. 10-1358 and 10-1359: 10-1361 filed by Lehigh Cement Company on Nov. 5, 2010, and 10-1377 filed by Tile Council of North America, Inc. on Nov. 8, 2010. On November 19, 2010, the Court consolidated these cases together under 10-1361. A motion to sever and consolidate those cases with 10-1358 and 10-1359, respectively, is pending.

Finally, SSM Coalition is also aware of a related case, *Portland Cement Ass'n v. EPA*, No. 07-1046 (D.C. Cir. filed Feb. 16, 2007), involving a challenge to a previous EPA rule entitled “National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry,” 71 Fed. Reg.

76,518 (Dec. 20, 2006). That case is currently being held in abeyance by this Court.

Dated: January 4, 2011

Respectfully submitted,

/s/ Russell S. Frye
FryeLaw PLLC
1101 30th Street, N.W. Suite 220
Washington, DC 20007-3769
(202) 572-8267
Fax: (866) 850-5198
rfrye@fryelaw.com
Attorney for Movant SSM Coalition

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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

SSM Coalition is an *ad hoc*, informal organization of trade associations and business organizations formed to fund and conduct advocacy and litigation concerning regulation under the Clean Air Act of emissions from stationary sources, with particular emphasis on emission 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. SSM Coalition is a “trade association” within the meaning of Circuit Rule 26.1(b).

Dated: January 4, 2011

Respectfully submitted,

/s/ Russell S. Frye
FryeLaw PLLC
1101 30th Street, N.W. Suite 220
Washington, DC 20007-3769
(202) 572-8267
Fax: (866) 850-5198
rfrye@fryelaw.com
*Attorney for Movant SSM
Coalition*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was, on this 4th day of January, 2011, served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Russell S. Frye