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

PORTLAND CEMENT ASSOCIATION, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	No. 07-1046 Consolidated with Nos. 07-1048, 07-1049, and 07-1052

RESPONDENTS' MOTION TO GOVERN

On April 5, 2007, the Court granted Respondents' (hereinafter "EPA") unopposed motion to hold these consolidated cases in abeyance, based on an ongoing administrative proceeding to reconsider the agency action which Petitioners seek to challenge. EPA moves the Court to continue to hold these cases in abeyance, with status reports due from EPA at 90 day intervals.[1/] In support of this motion, EPA states as follows:

1. These consolidated petitions for review challenge a final rule under the Clean Air Act ("CAA"), establishing emission standards for hazardous air pollutants emitted from new and existing Portland cement kilns. 71 Fed. Reg. 76,518 (Dec. 20, 2006) ("2006 Rule"). EPA issued the 2006 Rule to resolve a petition for mandamus brought by Sierra Club to compel EPA to act

[1/] This motion to govern is filed in response to the Court's January 25, 2008, Order extending until February 20, 2008, the deadline to file motions to govern further proceedings. Although the Order refers to "motions" to govern in the plural, the various petitioners, after consulting with the Clerk's office, intend to file memoranda either in opposition to or in support of this motion, rather than each filing a separate motion.

on a remand in *National Lime Ass'n v. EPA*, 233 F.3d 625 (D.C. Cir. 2000). *See In re Sierra Club*, No. 04-1370. That petition for mandamus has been dismissed.

2. The 2006 Rule establishes standards for emissions of mercury and total hydrocarbons (as a surrogate for certain organic hazardous air pollutants) from new and existing Portland cement kilns. 71 Fed. Reg. at 76,550, 76,551. The 2006 Rule does not establish further controls for hydrogen chloride ("HCl") emissions because EPA concluded, pursuant to CAA section 112(d)(4), 42 U.S.C. § 7412(d)(4), that present controls on Portland cement kilns' emissions of HCl are already protective of human health with an ample margin of safety. 71 Fed. Reg. at 76,527-529.

3. Contemporaneously with the 2006 Rule, EPA initiated an administrative proceeding to reconsider the emission standards for mercury and total hydrocarbons emissions from new kilns, and announced its intent to complete reconsideration of these issues by December 20, 2007. 71 Fed. Reg. 76,553, 76,554 (Dec. 20, 2006). In addition, in March 2007 EPA granted Sierra Club's administrative petition to reconsider the same standards for existing kilns. EPA stated that it intended to complete that process by the same date, *i.e.*, December 20, 2007. However, numerous developments have delayed EPA's completion of its reconsideration of these standards.

4. First, EPA required the five existing kilns that are equipped with wet scrubber emission control devices to test all kiln inputs in order to determine their mercury content, and to test the mercury output in the kilns' stack emissions. *See* Declaration of Peter Tsirigotis ("Tsirigotis Decl.") ¶ 2 (attached as Ex. A). EPA and the affected companies began developing a test protocol for these purposes in January 2007, but the normal test method could not be used

due to the physical characteristics at the scrubber inlets. *Id.* A new test method was developed, which delayed the tests until July 2007. *Id.* ¶¶ 2, 3. These tests were completed in December 2007, and the last test report was submitted to EPA on February 15, 2008. *Id.* ¶ 3.

5. EPA also sent information requests to nine cement kiln companies pursuant to its information-gathering authority in 42 U.S.C. § 7414(a). Tsirigotis Decl. ¶ 5. These information requests, sent in May 2007, required the companies to submit 30 days worth of data on the mercury content of all kiln inputs, the results of any mercury tests that had been performed on their cement kilns at any time, and details on their specific kiln type, configuration, and mercury emissions controls. *Id.* In addition, these information requests required the companies to submit 30 days worth of data on the total hydrocarbon concentration of kiln feed materials, as well as the results of any total hydrocarbon tests that had been performed on their cement kilns at any time, and details on their total hydrocarbon emissions controls. *Id.* ¶ 7.

6. Although the cement kiln companies used their best efforts to collect and analyze the mercury and total hydrocarbon data in response to these information requests, their responses were delayed because some kilns were shut down for maintenance and because there was a nationwide shortage of available laboratories to analyze the large number of required samples. Tsirigotis Decl. ¶ 8.

7. EPA received responses to the information requests from mid-July through mid-August 2007. Tsirigotis Decl. ¶ 8. However, there were errors in some of the responses, as well as numerous inconsistencies in the way the information in the responses was presented, due to the unique circumstances of each kilns' raw materials and fuels. *Id.* ¶¶ 9, 11. EPA sent most of the companies a series of clarifying questions, the last response to which EPA received this

month. *Id.* ¶ 9. Some companies also claimed that much of the submitted data was confidential business information, which required EPA to initiate certain procedures to assure that the confidential data will not be disclosed or disseminated. *Id.* ¶ 11.

8. EPA must enter all of the information it receives into a useable database. Tsirigotis Decl. ¶¶ 10, 12. EPA estimates that this process will be completed and the agency will begin data analysis by the end of this month. *Id.* ¶ 12.

9. EPA anticipates that it will take until mid-September, 2008, to analyze the data, determine floor levels for emission limitations, determine whether to propose more stringent, beyond-the-floor emission limitations, and issue a proposed rule for public comment. Tsirigotis Decl. ¶¶ 13-18.

10. After a proposed rule is issued, EPA estimates it will need nine to twelve additional months to receive and analyze comments and promulgate a final rule, although more time may be required depending upon the number and content of the comments it receives. Tsirigotis Decl. ¶ 19.

11. On August 10, 2007, EPA filed a status report informing the Court and the parties that EPA's efforts to obtain the data and information described above were taking longer than anticipated, and that as a result, EPA no longer believed it could complete the reconsideration process by December 20, 2007.

12. In early February 2008 EPA discussed with representatives of the environmental, state, and industry petitioner groups the possibility of a further extension of time in which to file a motion to govern further proceedings, but the parties were not able to reach an agreement.

13. EPA anticipates that Sierra Club, *et al.*, petitioners in No. 07-1048, intend to oppose this motion and seek a court-ordered deadline by which EPA must complete its administrative reconsideration. The States who are petitioners in No. 07-1052 will also likely oppose this motion. The Portland Cement Association, petitioner in No. 07-1046, and Ash Grove Cement Company, petitioner in No. 07-1049, will likely support this motion.

14. If any petitioner believes that EPA's administrative process is taking too long, it may seek a writ of mandamus. *See NRDC v. EPA*, 489 F.3d 1364, 1375 (D.C. Cir. 2007) (declining to set time limit on EPA proceedings because "mandamus affords a remedy for undue delay"). Mandamus has not been sought, nor would it be appropriate here in light of the data-gathering that EPA has done to date and the agency's plan to complete the reconsideration within a reasonable time.

15. The 2006 Rule remains in effect during EPA's reconsideration, and sources are required to comply with the 2006 Rule's emission standards for mercury and for total hydrocarbons.

16. Additional parties not currently before the Court may seek judicial review of the final rule to be promulgated after EPA's reconsideration is completed. Interested parties will have 60 days after promulgation in which to file petitions for judicial review, 42 U.S.C. § 7607(b)(1), and within 30 days thereafter, the parties should be able to evaluate procedural issues such as the timing for certification of the administrative record, motion practice if any, and a proposed schedule for briefing the merits.

Therefore, EPA moves to continue to hold these cases in abeyance, with status reports due from EPA at 90 day intervals. In addition, EPA moves for an order requiring the parties to

file a joint motion to govern within 90 days after EPA completes its reconsideration and promulgates a final rule.

Respectfully submitted,

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February 20, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO GOVERN was served this 20th day of February, 2008, by U.S. mail, postage prepaid, to the following counsel:

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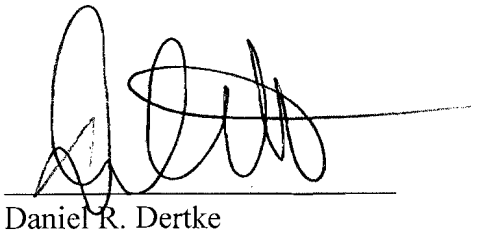

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DECLARATION OF PETER TSIRIGOTIS

I am Peter Tsirigotis, the Director of the Sector Policies and Programs Division of EPA, within EPA's Office of Air Quality Planning and Standards. My Division develops virtually all standards implementing section 112 (d) (MACT) of the Clean Air Act. The reconsideration of EPA's 2006 amendments to the Portland Cement NESHAP falls within my Division's responsibility and is being conducted under my supervision.

1. For the Portland Cement NESHAP, EPA announced that it would reconsider standards for mercury and for total hydrocarbons emitted by new Portland cement plants on December 20, 2006. 71 Fed. Reg. 76553.

2. With regard to the mercury standard in the 2006 NESHAP, EPA announced in that same notice that it would initiate a campaign resulting in testing of emissions of mercury at all five cement kilns equipped with wet scrubber emission control devices in order to verify if such devices removed mercury from cement kiln emissions, and if so, to what degree of efficiency. Both inlet (mercury in the exhaust gas fed to the scrubber) and outlet (mercury in stack emissions) testing is required for this purpose. Between January and April 2007, EPA and the five affected cement kilns developed a testing protocol for this purpose. It turned out, however, that the test method normally specified for speciated mercury testing could not be used due to the physical characteristics at the scrubber inlets which precluded obtaining samples for analysis. Therefore, the testing protocol required the use of a new test method that was not available until May 2007, and this delayed the completion of the testing protocol until June 2007.

3. Mercury testing at these scrubber-equipped Portland cement kilns commenced in July 2007. Despite the best efforts of EPA and the industry, this testing was not

completed until December 2007, and the last test report was submitted to EPA on February 15, 2008. (The test reports document not only test results, but also the precise conditions of the stack testing and of the laboratory analysis.)

4. EPA has also obtained additional data from which cement kiln mercury emissions can be calculated. For cement kilns not equipped with wet scrubbers, the chief factor influencing the amount of mercury emitted is likely to be the amount of mercury fed to the kiln (especially in fossil fuels and raw material inputs). Consequently, EPA took steps to characterize mercury loadings in cement kiln inputs.

5. On May 8, 2007, EPA mailed letters to nine cement kiln companies pursuant to its information-gathering authority in section 114 of the Clean Air Act. This action was separate from the mercury testing discussed in items 2 and 3, and was not taken until May because it was not until after March 2007 that EPA decided to reexamine the mercury limits for existing sources. Once this decision was made it was apparent we did not have the appropriate data on which to base an existing source mercury (or THC) standard, or to determine if wet scrubber-equipped kilns were actually the best performing sources for mercury.

   These section 114 letters required that each kiln obtain and submit the following information to EPA:

   - Thirty days of data on mercury content of all kiln inputs and amounts of each input (which required each kiln owner to sample all inputs for mercury content for 30 days);
   - all mercury tests performed on their cement kilns at any time;
   - specific kiln type, configuration, and emissions controls information.

6. I have attached one of the nine section 114 letters (which are identical except for company name) to this declaration. The due date for submitting information was approximately July 25, 2007, depending on the actual date the company received the letter.

7. EPA is also reconsidering the standards for total hydrocarbons in the 2006 NESHAP. 71 Fed. Reg. at 76544. To better estimate the extent to which hydrocarbon content of raw materials influence hydrocarbon emissions, EPA also required in the May 2007 section 114 letters that cement kilns submit information regarding total hydrocarbon inputs in raw materials. Specifically, EPA required that cement kilns submit thirty days of data on total organic carbon concentration of kiln feed materials (necessitating 30 days of sampling), all total hydrocarbon tests performed on their cement kilns at any time, and description of specific kiln type, configuration, and emissions controls information.

8. Cement kilns used their best efforts to collect and analyze the mercury and total hydrocarbon data in response to the section 114 requests, although collection and analysis took somewhat longer than EPA had anticipated. The main reasons for delay were kilns being shut down for maintenance and the fact that so many samples had to be analyzed that there was a nationwide shortage of available laboratories. EPA thus began receiving submittals of the information in mid-July through mid-August 2007.

9. EPA staff reviewed the information data on mercury contents of kiln inputs upon receipt. However, because each cement facility has unique circumstances regarding the raw materials and fuels used, there were numerous inconsistencies in the way the information was presented to EPA. Therefore, we had to prepare a series of clarifying questions to most of the kilns which had submitted information. For most of the submissions, this process took several months. The last response to these written questions was received by EPA this month.

10. Once we clarified the information we entered it into a data base. Entering this information into a data base is critical to our analysis for several reasons. First, it allows us to develop means of ranking kiln performance by emissions; second, it allows us to examine the impact of different assumptions for mercury emission levels when the amount of mercury in the raw material was less than the analytic detection level; and third, it allows us to perform statistical analyses of the data to estimate data variability.

11. As previously mentioned, data were not reported consistently because each facility has a different mixture of feed materials. Also, in our initial review of the data we found inadvertent errors in some of the initial submissions, and it was necessary to contact the facilities to get the errors corrected. Finally, a number of cement kiln facilities claimed that much of the data submitted was confidential businesses information (CBI). Such a claim requires EPA to initiate certain procedures to assure that the data will not be disclosed or disseminated, which procedures increase the time and effort required to enter the data and to obtain needed clarifications to the submitted information.

12. As a result it is going to take until the end of February 2008 for EPA to obtain all the information needed, enter it into the data base, perform quality assurance checks, and begin data analysis. EPA will integrate the information obtained from input/stack output testing for mercury at wet scrubber-equipped kilns as part of this effort.

13. Our next step will be to develop kiln emissions rankings to determine MACT floors for mercury and total hydrocarbons under section 112 (d) (3) of the Clean Air Act.

14. Once we have established floors for mercury and total hydrocarbons, we will have to determine the control strategies necessary for the regulated sources to meet the floor level of control. This is necessary to establish a baseline from which costs and environmental impacts can be calculated in order to assess whether to adopt so-called beyond-the-floor standards pursuant to section 112 (d) (2) of the Clean Air Act.

Information on cost is also needed in order for EPA to comply with Executive Order 12866 which requires that EPA evaluate costs, benefits, and other significant impacts of major rules.

15. Determining control strategies is complicated by the fact that the controls for total hydrocarbons and mercury are limited, and the performance of the available controls has not been well established. This will require additional analyses to try and establish control performance, potentially including consultations with industry and control device vendors. Information from the wet scrubber-equipped kiln sampling effort will be relevant to these determinations.

16. Once we have completed these analyses, established floors and impacts, and determined internally the appropriate range of regulatory options, EPA will determine which option to propose. This involves explanatory briefings with various levels of EPA officials, up to and including the Assistant Administrator for Air (and possibly the EPA Administrator).

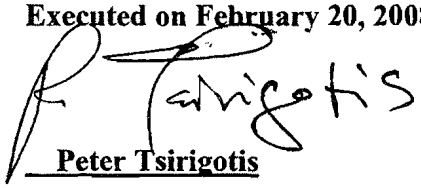
17. Once EPA decision makers have decided upon an approach, EPA staff will prepare a draft preamble and proposed rule language (as well as various technical support documents) reflecting that approach. These drafts will also be reviewed by the same decisionmakers.

18. Based on the work that remains to be completed, as outlined above, I currently anticipate that the proposed rule would be signed in mid-September 2008.

19. After proposal we intend to promulgate a final rule within 9 to 12 months. Time is needed to compile, read, and analyze all comments, to develop options for EPA decision makers, draft final preamble, rule, comment responses, and technical support documents, plus go through the same internal and inter-agency review steps mentioned above. My estimate is consistent with time necessary to develop other final major rules under expedited schedules. My estimate for rule completion is necessarily contingent on the number and content of comments we receive on a proposed rule. If the comments raise new issues that require more data gathering, it may take longer to promulgate a final rule.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 20, 2008.



Peter Tsirigotis

Sector Policies and Programs Division