

**ORAL ARGUMENT NOT YET SCHEDULED**

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

PORTLAND CEMENT	)	
ASSOCIATION,	)	
	)	
Petitioner,	)	
v.	)	Case No. 10-1359
	)	(and consolidated cases)
U.S. ENVIRONMENTAL	)	
PROTECTION AGENCY, <i>et al.</i> ,	)	
	)	
Respondents.	)	

**JOINT MOTION OF ENVIRONMENTAL PETITIONERS TO  
INTERVENE ON BEHALF OF RESPONDENTS**

Sierra Club, Desert Citizens Against Pollution, Downwinders At Risk, Huron Environmental Activist League, Friends of Hudson, and Montanans Against Toxic Burning (collectively, “Sierra Club et al.”), petitioners in case No. 10-1378, and Natural Resources Defense Council (“NRDC”), petitioner in case No. 10-1371, (collectively, “Environmental Petitioners”) hereby move for leave to intervene on behalf of respondents (“EPA”) in case Nos. 10-1359, 10-1364, 10-1365, 10-1368, 10-1370, 10-1372, and 10-1375. Counsel for petitioners in case Nos. 10-1359, 10-1364, 10-1365, 10-1368, 10-1370, 10-1372, and 10-1375 have stated that they do not oppose this motion. Counsel for respondents has stated that they take no position on it. In support of their motion, Environmental Petitioners state as follows:

1. The present consolidated cases seek review of the final action (including the promulgation of regulations) taken by EPA in setting National Emission Standards for Hazardous Air Pollutants (“NESHAPs”) from the Portland cement manufacturing industry, to be codified in 40 C.F.R. Part 63. EPA took this action at 75 Fed. Reg. 54,970 (Sept. 9, 2010), titled “National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants; Final Rule.”

2. NRDC is petitioner in No. 10-1371; and Sierra Club et al. are petitioners in No. 10-1378. The other petitions in this consolidated proceeding were initiated by individual cement companies and a trade association (collectively, “Industry Petitioners”): petitioner in No. 10-1359, filed November 5, 2010, is Portland Cement Association; petitioner in No. 10-1364, filed November 8, 2010, is Ash Grove Cement Company; petitioners in No. 10-1365, filed November 8, 2010, are Riverside Cement Company and TXI Operations, LP; petitioner in No. 10-1368, filed November 8, 2010, is CEMEX, Inc.; petitioners in No. 10-1370, filed November 8, 2010, are Lafarge North America Inc. et al.; petitioner in No. 10-1372, filed November 8, 2010, is Eagle Materials Inc.; and petitioner in No. 10-1375, filed November 8, 2010, is Holcim (US) Inc.

3. Sierra Club et al. are national and local groups that work to protect human health and the environment, and have long-standing interests and

involvement in reducing hazardous pollutants emitted by cement plants. For example, Sierra Club et al. challenged EPA's 2006 NESHAP, *Sierra Club et al. v. EPA*, No. 07-1048 (D.C. Cir. 2007) (consolidated by this Court under *Portland Cement Ass'n v. EPA*, No. 07-1046), and participated in the rulemaking that produced the regulations challenged here, *see Comments of Sierra Club, Downwinders At Risk, Huron Environmental Activist League, Montanans Against Toxic Burning, Friends of Hudson, and Earthjustice* (EPA-HQ-OAR-2002-0051-2911.1, Sept. 4, 2009); Reporter's Transcript of EPA Hearing on EPA's Proposed Revisions to the National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, in Los Angeles, California, at 82-89 (EPA-HQ-OAR-2002-0051-3248.1, June 16, 2009) (testimony of Jane Williams, Executive Dir., Desert Citizens Against Pollution) [hereinafter Transcript of Los Angeles Hearing].

4. NRDC is a national non-profit environmental organization with approximately 400,000 members nationwide. NRDC uses law, science, and the support of its members to ensure a safe and healthy environment for all living things. NRDC's priorities including reducing air pollution and promoting public health. *See Lopez Decl.* ¶¶ 3-4, 6. NRDC has a strong interest in reducing hazardous air pollution emitted by cement plants. NRDC representatives testified at the public hearings conducted by EPA when revisions to the cement kiln

NESHAPs were first proposed, and filed comments during the notice and comment period for the rule. *See* Transcript of Los Angeles Hearing, *supra*, at 33-35 (testimony of NRDC representative Miriam Rotkin-Ellman); Reporter's Transcript of EPA Hearing on EPA's Proposed Revisions to the National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, in Arlington, Virginia, at 66-70 (EPA-HQ-OAR-2002-0051-3250.1, June 18, 2009) (testimony of NRDC representative Colin O'Brien); *Comments of Natural Resources Defense Council et al.* (EPA-HQ-OAR-2002-0051-2898.1, Sept. 4, 2009).

5. Portland cement kilns emit mercury, cadmium, lead, dioxins, polycyclic organic matter, hydrogen chloride, total hydrocarbons, and other hazardous air pollutants listed in Clean Air Act § 112(b)(1), 42 U.S.C. § 7412(b)(1). 75 Fed. Reg. at 54,970; 64 Fed. Reg. 31,898, 31,898 (June 14, 1999); *see also* 75 Fed. Reg. at 54,974 (stating that total hydrocarbons are a surrogate for polycyclic organic matter and polychlorinated biphenyls ("PCBs") and that particulate matter is a surrogate for various hazardous air pollutant metals). Environmental Petitioners' members live, work, and recreate near Portland cement kilns, and are exposed to these toxic pollutants. *See* Exhibit 1(declarations). As a result, Environmental Petitioners' members' health is threatened, and their enjoyment of recreational activities is diminished. *See id.*

6. Under Fed. R. App. P. 15(d), a motion to intervene need only make “a concise statement of the interest of the moving party and the grounds for intervention.” This Court has noted that “in the intervention area the interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (internal quotation marks removed) (reversing denial of intervention under Fed. R. Civ. P. 24(a)).

7. Environmental Petitioners have a strong interest in preventing the weakening of the NESHAPs that are at issue in the consolidated cases. Industry Petitioners are or represent companies that own and operate Portland cement kilns. If Industry Petitioners were successful in their challenge, the challenged rule could be vacated or EPA could be compelled to make its regulations less stringent or otherwise less effective in reducing hazardous air pollutant emissions from Portland cement kilns. Because that result would further prolong and increase the exposure of Environmental Petitioners’ members to toxic pollution from Portland cement kilns, the resulting hazard to their health, and the diminishment of their enjoyment of activities in the environment in which they live and recreate, Environmental Petitioners have an interest in intervening on behalf of the respondents in the present case. Fed. R. App. P. 15(d). Environmental Petitioners’ interests are especially strong in this instance because the Clean Air Act grants this

Court exclusive jurisdiction to review the challenged rules. 42 U.S.C. § 7607(b)(1), (e). Environmental Petitioners' interest in preventing weakening of the rules will be prejudiced if they are not allowed to intervene.

8. Environmental Petitioners' interests will not be adequately represented in the absence of intervention. As matters now stand, the Court will hear only EPA's arguments against weakening the challenged rules. This Court "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003); *see also Natural Res. Def. Council v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977) (holding that industry intervenors' interests may not be adequately represented by EPA and that intervention as a matter of right is thus justified). That is especially true here, where Environmental Petitioners have disagreed with—and challenged in rulemaking comments and court proceedings—EPA's actions and inaction under the Clean Air Act. *E.g., Nat'l Lime Ass'n v. EPA*, 233 F.3d 625 (D.C. Cir. 2000) (deciding also *Sierra Club v. EPA*, No. 99-1326); *Sierra Club et al. v. EPA*, No. 07-1048 (D.C. Cir. 2007) (challenge, consolidated by this Court under *Portland Cement Ass'n v. EPA*, No. 07-1046, by Sierra Club et al. to earlier cement kilns rule); *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009) (resolving challenge by NRDC to rule issued pursuant to Clean Air Act); *Comments of Sierra Club, Downwinders At Risk, Huron Environmental Activist*

*League, Montanans Against Toxic Burning, Friends of Hudson, and Earthjustice, supra; Comments of Natural Resources Defense Council et al., supra; Transcript of Los Angeles Hearing, supra, at 82-89 (testimony of Jane Williams, Executive Dir., Desert Citizens Against Pollution); id. at 33-35 (testimony of NRDC representative Miriam Rotkin-Ellman).* Environmental Petitioners simply cannot rely on EPA to present the full range of legitimate arguments available to oppose weakening of the rules.

9. Moreover, Environmental Petitioners views on the arguments advanced by Industry Petitioners will be of assistance to the Court. As citizens' organizations, Environmental Petitioners can offer a perspective different from that which the EPA is likely to provide.

10. Environmental Petitioners' participation as intervenors on behalf of EPA will not delay the proceedings or prejudice any party. The motion to intervene is being timely filed within the thirty-day period allowed under Fed. R. App. P. 15(d). The Court has not scheduled oral argument, and a briefing schedule has not yet been established. Environmental Petitioners stand ready to cooperate with the other parties and the Court to ensure efficient and timely adjudication of the present case.

11. In short, Environmental Petitioners have met the requirements for intervention: They each have an interest relating to the subject matter of this action

that may be impaired by disposition in their absence, and that interest is not adequately represented by the existing parties. *See* Fed. R. App. P. 15(d).<sup>1</sup>

Moreover, the motion to intervene is being timely filed. For all of the foregoing reasons, Environmental Petitioners respectfully request leave to intervene in case Nos. 10-1359, 10-1364, 10-1365, 10-1368, 10-1370, 10-1372, and 10-1375.

DATED: December 6, 2010

Respectfully submitted,

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<sup>1</sup> Indeed, for reasons shown above, Environmental Petitioners' showing would even meet the more detailed requirements governing intervention of right in a district court proceeding, Fed. R. Civ. P. 24(a)(2), as well as the lesser prerequisites for permissive intervention in such a proceeding, Fed. R. Civ. P. 24(b)(1)(B).



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### **CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing **Joint Motion Of Environmental Petitioners To Intervene On Behalf Of Respondents and Environmental Petitioners' Certificate As To Parties, Rulings, And Related Cases**, on respondents either through the court's electronic filing system (ECF) or by U.S. Mail, as indicated below:

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**DATED:** December 6, 2010

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**Exhibit 1**

**Declarations**