ORAL ARGUMENT SCHEDULED FOR OCTOBER 11, 2011

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

NO. 10-1358 (and consolidated cases)

PORTLAND CEMENT ASSOCIATION, *ET AL.*,

PETITIONERS,

V.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF FINAL AGENCY ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND LISA JACKSON, ADMINISTRATOR

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GLOSSARY

APA	Administrative Procedure Act
CAA	Clean Air Act
CEMS	Continuous Emission Monitoring System
EPA	United States Environmental Protection Agency
JA	Joint Appendix
NESHAP	National Emissions Standards for Hazardous Air Pollutants
NSPS	New Source Performance Standards
PCA	Portland Cement Association, Ash Grove Cement Co., CEMEX, Inc., Eagle Materials Inc., Holcim (US) Inc., Lafarge North America Inc., Lafarge Midwest, Inc., Lafarge Building Materials Inc., Lehigh Cement Company, Riverside Cement Company, and TXI Operations, LP.
PM	Particulate Matter
SJA	Supplemental Joint Appendix
UPL	Upper Prediction Limit

STATEMENT OF THE CASE

The United States Environmental Protection Agency ("EPA") granted in part and denied in part PCA's[1] petitions for administrative reconsideration of several aspects of the new source performance standards for the portland cement industry ("Final NSPS"), issued pursuant to Section 111 of the Clean Air Act ("CAA"), 42 U.S.C. § 7411, and PCA's petitions for an administrative stay of the Final NSPS. 76 Fed. Reg. 28,318 (May 17, 2011) (JA1308). PCA filed a petition for review, which the Court consolidated with PCA's pending challenge to the Final NSPS. The Court also ordered supplemental briefing.

SUMMARY OF ARGUMENT

The only agency actions under review in this additional case are (1) EPA's denial of reconsideration of the particulate matter ("PM") limit in the Final NSPS based on PCA's claim that EPA failed to provide proper notice of the limit or methodology for the final PM standard, and (2) EPA's denial of PCA's request for an administrative stay of the Final NSPS pending reconsideration on one issue. In both instances, EPA's denial was reasonable and supported by the record before the Agency.

[1] "PCA" collectively refers to Portland Cement Association, Ash Grove Cement Co., CEMEX, Inc., Eagle Materials Inc., Holcim (US) Inc., Lafarge North America Inc., Lafarge Midwest, Inc., Lafarge Building Materials Inc., Lehigh Cement Company, Riverside Cement Company, and TXI Operations, LP.

First, EPA provided ample notice and opportunity to comment on the limit and methodology for the PM NSPS and PCA did, in fact, raise objections on *all* of the issues for which it now claims lack of notice. Because PCA merely sought to rehash its prior comments, EPA rightly denied reconsideration.

Second, EPA properly declined to administratively stay the Final NSPS. Contrary to PCA's assertion, EPA's decision to reconsider the PM NSPS for modified sources does not and cannot alone justify a stay, and PCA offered no grounds at all to stay any of the other standards. EPA's resulting denial was therefore proper.

STANDARD OF REVIEW

Section 307(d)(7)(B) of the CAA provides that EPA "shall convene a proceeding for reconsideration of [a] rule" only if a person raising an objection can show, *first*, that it was impracticable to raise such objection during the public comment period or that the grounds for such objection arose after the public comment period, and, *second*, that such objection is "of central relevance to the outcome of the rule …." 42 U.S.C. § 7607(d)(7)(B). If EPA declines reconsideration pursuant to this provision, the objector may seek review of that decision under the narrow and deferential "arbitrary or capricious" standard of review. Id. § 7607(d)(9)(A).

ARGUMENT

I. EPA PROPERLY DECLINED TO RECONSIDER THE PM NSPS.

PCA provides no basis upon which this Court should find EPA's denial of reconsideration of the PM NSPS arbitrary or capricious. Indeed, PCA cannot even establish the first prong of the reconsideration standard: that it was impracticable to raise PCA's objection during the public comment period or that the grounds for such objection arose after the public comment period.

PCA mistakenly argues that EPA used an analysis from the national emissions standards for hazardous air pollutants ("NESHAP") rulemaking to set the PM NSPS without providing any notice that EPA might do so. PCA Supp. Br. 4. It is true that EPA simultaneously considered PM standards for both the NSPS and NESHAP rulemakings, but EPA stated as much when proposing the NSPS. 73 Fed. Reg. 34,072, 34,083 (June 16, 2008) (explaining that the proposed PM NSPS had implications for the PM NESHAP limit and thus EPA would "consider whether or not [it] should address the PM standard in the NESHAP as part of the ongoing reconsideration") (JA547). Furthermore, as explained in EPA's principal merits brief, EPA did not blindly adopt the NESHAP PM limit as the NSPS PM limit; rather, EPA lawfully set the PM NSPS according to the statutory factors mandated by Section 111(a)(1) of the CAA. See EPA Br. 18-28. That EPA also found the same limit appropriate for the PM NESHAP is of no legal consequence.

PCA also contends that it lacked notice of the final 0.01 lb/ton of clinker numerical limit for PM. PCA Supp. Br. 4-5. The notice provisions of the CAA, however, "do not require EPA to select a final rule from among the precise proposals under consideration during the comment period." Sierra Club v. Costle, 657 F.2d 298, 352-53 (D.C. Cir. 1981). Notably, PCA itself suggested a different PM limit from that which was proposed *and* submitted the additional data supporting that different PM limit. PCA Comments on NSPS (Sept. 30, 2008) (EPA-HQ-OAR-2007-0877-0064), at 5, 9-10 (JA625, 629-30); Husqvarna AB v. EPA, 254 F.3d 195, 203 (D.C. Cir. 2001) (provisions of final rule were logical outgrowths of proposal even though they were partly based on comments received during comment period).

Additionally, EPA provided ample notice of its final standard requiring sources to monitor for PM compliance with a continuous emission monitoring system ("CEMS"), 73 Fed. Reg. at 34,082-83 (JA546-47), and PCA commented on this very issue, "agree[ing] that PM CEMS should be an option" but not a requirement. PCA Comments on NSPS at 21 (JA641). Importantly, PCA's comments also reveal that it knew any requirement subject to CEMS monitoring would be expressed and calculated as a 30-day rolling average. See PCA Comments on NSPS at 17, Exhibit A at 1 (JA637, 646); see also 73 Fed. Reg. at

34,078 ("Most of the emission limits and test data are 30 day averages based on data from continuous emissions monitors.") (JA542).

EPA likewise provided ample notice of the upper prediction limit ("UPL") statistical formula that EPA used in setting the final PM NSPS. The proposed standard used a similar statistical formula to estimate variability. 73 Fed. Reg. at 34,077 (JA541). Moreover, EPA proposed the UPL in the parallel NESHAP rulemaking, explaining in great detail how the UPL is used, and specifically stated that, under the formula, "if 30-day averages are used to determine compliance (m=30), the variability based 30-day average is much lower than the variability of the daily measurements in the data base, which results in a lower UPL for the 30-day average." 74 Fed. Reg. 21,136, 21,141-42 (May 6, 2009) (JA772-73). PCA was fully aware of this UPL equation, and in fact commented on it extensively during the NESHAP comment period. See PCA Comments on NESHAP (Sept. 4, 2009) (EPA-HQ-OAR-2002-0051-2922.2), Appendix 1 at 1-3 – 1-10 (JA879-86). Indeed, PCA representatives engaged with EPA in an iterative dialogue regarding the UPL throughout and following the public comment period. See Memo to Docket (EPA-HQ-OAR-2002-0051-3461) (Aug. 6, 2010) (SJA010-029); Documentation of the Data and Calculations for the Development of the MACT Floors for Mercury and PM Provided to the Portland Cement Association and Consulting Statistician (EPA-HQ-OAR-2002-0051-3355) (Aug. 6, 2010),

Attachment 1 at 1-7 (SJA001-007). EPA gave careful consideration to these comments and changed the UPL equation used in both the NESHAP *and* NSPS based on PCA's criticisms. 75 Fed. Reg. 54,970, 54,975 (Sept. 9, 2010) (JA1103).

PCA thus had adequate notice that EPA might address the PM limits for the NESHAP and NSPS together; it commented on both the PM numerical limit and the PM compliance method; it acknowledged that EPA might adopt a CEMS-based PM standard; it knew that, if EPA did so, the standard would be a 30-day average based on use of the UPL equation; and it knew that such a standard would be numerically lower than a one-day average standard. Given all of this, PCA fails to demonstrate that it lacked opportunity to raise its objections to EPA during the rulemaking,[2] and EPA rightly denied the petitions to reconsider the PM NSPS.

II. PURSUANT TO THE APA AND CAA, EPA APPROPRIATELY DID NOT STAY THE FINAL NSPS.

PCA next asserts that EPA abused its discretion in denying PCA's request to stay the PM standard for modified sources pending reconsideration. PCA Supp. Br. 6. But this argument does not withstand scrutiny. Although EPA granted PCA's petition to reconsider the PM standard for modified sources, the mere grant of that petition does not mean EPA has concluded that the standard is wrong, and it

[2] The ample notice EPA provided to PCA and PCA's opportunity to comment on these issues are discussed in greater detail in EPA's principal merits brief filed in Case No. 10-1358 at pages 33-38.

does not mean PCA was *automatically* entitled to a stay of that standard. See 42 U.S.C. § 7607(d)(7)(B). Here, a stay simply was not appropriate.

First, Section 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, allows EPA to "postpone the effective date of action taken by it, pending judicial review"—but not when, as in this case, the effective date of the rule has already passed. See 76 Fed. Reg. at 28,326 (citing 76 Fed. Reg. 4,780, 4,800 (Jan. 26, 2011) ("[p]ostponing an effective date implies action before the effective date arrives")) (JA1316); see also Ysasi v. Rivkind, 856 F.2d 1520, 1527 (Fed. Cir. 1988) (reasoning that it would have been "pointless" for truck owner to petition INS pursuant to APA Section 705 for postponement of effective date of agency's action if INS had already transferred possession of truck to lienholder). PCA has not articulated why EPA's determination not to grant a stay was an abuse of EPA's discretion, given this limitation.

Second, PCA has not shown that EPA arbitrarily or capriciously declined to stay the Final NSPS under Section 307(d)(7)(B) of the CAA, which permits EPA to stay a rule's effectiveness for, at most, three months during reconsideration. 42 U.S.C. § 7607(d)(7)(B). PCA provided no grounds—either in its petition for reconsideration or in its supplemental brief—upon which EPA should have stayed the PM standard for modified sources. Instead, PCA only erroneously presumes that EPA's reconsideration of the PM standard for modified sources entitled PCA

to a stay of that standard. PCA Supp. Br. 6. However, EPA is not required to stay a standard whenever it decides to reconsider that standard, and this case presented no circumstances warranting such a stay. Indeed, PCA purports that the industry "will face the prospect of having to abide by an expensive PM standard for modifications that may be wholly unnecessary," PCA Supp. Br. 6, but, as EPA explained in its principal merits brief, PCA's claim of irreparable harm absent a stay is conclusory, especially where PCA can avoid triggering the modification provision in the first place. See EPA Br. 32-22 (citing ASARCO, Inc. v. EPA, 578 F.2d 319, 328-29 (D.C. Cir. 1978) (stating that "the operator of an existing facility can make any alterations he wishes in the facility without becoming subject to the NSPS as long as the level of emissions from the altered facility does not increase")). PCA, again, does not even attempt to explain why EPA was unjustified in this reasoning.

Having failed to show that EPA's action was arbitrary, capricious, or an abuse of discretion, PCA's challenges to EPA's decision denying a stay should be rejected, and the Court too should decline PCA's invitation to impose a stay pending completion of reconsideration.

CONCLUSION

For the reasons stated above and set forth in EPA's principal merits brief, the Court should deny the petitions for review of EPA's decision denying reconsideration of the Final NSPS and denying requests for an administrative stay of the Final NSPS.

Respectfully submitted,

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August 24, 2011

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

Pursuant to Federal Rule of Appellate Procedure 37(a)(7)(C) and the Court's July 25, 2011, Order establishing the word limits for the supplemental briefs filed in this case, I certify that the foregoing Supplemental Brief for Respondent EPA contains 1,950 words, exclusive of front matter and certificates, as counted by the "word count" feature of my Microsoft Office Word software.

/s/ T. Monique Peoples
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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of the foregoing Supplemental Brief for Respondent EPA via the Court's CM/ECF system on this 24th day of August, 2011.

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