ORAL ARGUMENT SCHEDULED FOR OCTOBER 24, 2013

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

No. 10-1371 (consolidated with Nos. 10-1378 and 13-1112)

NATURAL RESOURCES DEFENSE COUNCIL,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY
AND GINA McCARTHY,

Respondents.

ON PETITIONS FOR REVIEW OF RULES OF THE
ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF *AMICI CURIAE* SSM COALITION AND CONCRETE AND MASONRY RELATED ASSOCIATIONS IN SUPPORT OF RESPONDENTS

Richard G. Stoll
Foley & Lardner LLP
3000 K Street, N.W.
Washington, D.C. 20007-5109
(202) 295-4021
Counsel for Concrete and Masonry Related Associations

Russell S. Frye
FryeLaw PLLC
1101 30th Street, N.W., Suite 220
Washington, DC 20007-5108
(202) 572-8267
Counsel for SSM Coalition

Dated: July 29, 2013

RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF SSM COALITION

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 Fuel and Petrochemical Manufacturers, American Iron and Steel Institute, American Petroleum Institute, American Wood Council, Brick Industry Association, Council of Industrial Boiler Owners, Florida Sugar Industry, National Association of Manufacturers, North American Insulation Manufacturers 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). Each of SSM Coalition's 14 members also meets the definition of a "trade association" under Circuit Rule 26.1(b).

Dated: July 29, 2013

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
Counsel for SSM Coalition

RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF CONCRETE AND MASONRY RELATED ASSOCIATIONS

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, counsel for Concrete and Masonry Related Associations (CAMRA) certifies as follows:

CAMRA is an ad hoc, informal organization of trade associations formed to fund and conduct joint advocacy and litigation concerning regulation under the Clean Air Act of emissions from stationary sources and to address other matters of common interest. 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 CAMRA.

Although not required to be disclosed because CAMRA is a "trade association" within the meaning of Circuit Rule 26.1(b), current members of CAMRA include: American Concrete Pavement Association; American Concrete Pipe Association; American Society of Concrete Contractors; Brick Industry Association; Concrete Reinforcing Steel Institute; Concrete Sawing & Drilling Association, Inc.; Cast Stone Institute; Expanded Shale, Clay and Slate Institute; Interlocking Concrete Pavement Institute; International Concrete Repair Institute; National Concrete Masonry Association; National Precast Concrete Association; National Ready Mixed Concrete Association;

Precast/Prestressed Concrete Institute; Slag Cement Association; and Tilt-up Concrete Association.

Each member of CAMRA is also considered a "trade association" within the meaning of Circuit Rule 26.1(b) and has no parent company, subsidiaries or affiliates. No member issues publicly traded stock. No publicly held corporation owns 10% or more of stock in any of these trade associations.

Dated: July 29, 2013

Respectfully submitted,

/s/ Richard G. Stoll
Richard G. Stoll
Foley & Lardner LLP
3000 K Street, N.W.
Washington, D.C. 20007-5109
(202) 295-4021
Counsel for Concrete and Masonry Related Associations

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GLOSSARY

the affirmative defense provision	40 C.F.R. § 63.1344, 78 Fed. Reg. 10,006, 10,039 (Feb. 12, 2013)
CAA	Clean Air Act, 42 U.S.C. § 7401 *et seq*.
CAMRA	*Amicus curiae* Concrete and Masonry Related Associations
the "Cement NESHAP Rule"	75 Fed. Reg. 54,970 (Sept. 9, 2010), amended 78 Fed. Reg. 10,006 (Feb. 12, 2013) codified at 40 C.F.R. pt. 63 subpt. LLLL
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 Natural Resources Defense Council, *et al*.
Rep. Br.	Response brief of Environmental Protection Agency and Gina McCarthy
SSM	Startup, shutdown, and malfunction
SSMC	*Amicus curiae* SSM Coalition

INTERESTS OF *AMICI CURIAE*[1]

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 and business organizations involved in a wide range of manufacturing activities, encompassing the agricultural products, building products, chemical, forest products, petroleum, rubber, and steel sectors, among others. *See* pp. i-ii, *supra*.

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[2], for the Portland Cement Manufacturing Industry, codified at 40 C.F.R. pt. 63 subpt. LLLL (the "Cement NESHAP Rule"). In particular, SSMC is interested in Petitioners'

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[1] No party or any other person other than the members of SSM Coalition and Concrete and Masonry Related Associations ("CAMRA") contributed to the funding for the preparation or filing of this brief. No party's counsel authored the portion of the brief prepared by SSM Coalition (Parts I-III) in whole or in part. The undersigned counsel for CAMRA entered an appearance for one of the respondent-intervenors (collectively, Lafarge Corporation) in the cases involving the 2010 version of the EPA rule which is no longer under review (Nos. 10-1301 and 10-1378). These 2010 cases are, however, consolidated with the instant case involving the 2013 Cement NESHAP Rule (No. 13-1112).

[2] Parallel U.S.C. citations for subsequent citations to CAA are in Table of Authorities.

assertion that it was unlawful and arbitrary and capricious for EPA to include in the Cement NESHAP Rule an "affirmative defense" for excess emissions associated with certain malfunctions. *See* 75 Fed. Reg. 54,970, 55,053 (Sept. 9, 2010), amended 78 Fed. Reg. 10,006, 10,039 (Feb. 12, 2013), codified at 40 C.F.R. § 63.1344 (the "affirmative defense provision"). Members of the trade associations and business organizations that constitute SSMC (hereafter, "SSMC members") are subject to various other NESHAPs in which EPA has included, or proposed to include, language similar to the affirmative defense provision. SSMC members have a strong interest in ensuring that the CAA is interpreted to give EPA the flexibility to promulgate NESHAPs that appropriately take into account the potential for malfunctions of processes regulated under, and the pollution control equipment used to comply with, the NESHAP.

Petitioners also challenge the compliance date for the revised NESHAP for cement plants that EPA included in revisions to the Cement NESHAP Rule published February 12, 2013, 78 Fed. Reg. 10,006. SSMC members are subject to NESHAPs for various other source categories that will be reviewed and may be revised by EPA, and so they have a strong interest in ensuring that the CAA is interpreted to give EPA the flexibility to set compliance deadlines for revised standards that reflect the planning, procurement, installation, and startup activities required.

Amicus curiae Concrete and Masonry Related Associations ("CAMRA") is an *ad hoc*, informal organization of trade associations formed to fund and conduct advocacy and litigation concerning regulation under the CAA of emissions from stationary sources and to address other matters of common interest to companies in the concrete and masonry industries, which are highly dependent upon a steady supply of portland cement to make their products and sell their services. CAMRA is unincorporated and comprised of several trade associations identified in its Rule 26.1 Disclosure Statement, *supra* pp. iii-iv.

CAMRA has a particular interest in the instant petitions for review of the Cement NESHAP Rule. That rule establishes a September 9, 2015, compliance date to meet the new emission standards, which CAMRA supports. 78 Fed. Reg. at 10,014. Petitioners seek vacatur of that 2015 compliance date and ask the Court to establish a highly impracticable September 2013 compliance date. This would cause great damage to the portland cement industry, and resolution of this issue directly impacts CAMRA and its members, which are highly dependent on the portland cement industry.

All parties consented to SSMC and CAMRA filing a brief as *amici curiae* in support of Respondents, pursuant to Circuit Rule 29(b), provided that *amici*

submit a single, joint brief. SSMC joins in Parts I, II, and III of this brief. CAMRA joins in Parts III and IV of this brief.

ARGUMENT

I. NESHAPs Must Account for Limitations of Technology.

Although Petitioners' arguments primarily address the form in which EPA provided for malfunctions in the Cement NESHAP Rule, the import of Petitioners' claim is that EPA should set Maximum Achievable Control Technology ("MACT") standards under CAA section 112(d) that EPA knows regulated sources, including the best-performing sources on which those MACT standards are based, will be unable to meet at times despite their proper design, operation, and maintenance, *see* 75 Fed. Reg. at 54,993, such that those sources will be liable for civil penalties for events beyond their control. The statute and relevant case law neither require nor allow that.

Ever since Congress gave EPA authority to issue MACT standards in 1990, EPA has interpreted the statutory mandate—that the standards reflect "the average emission limitation achieved by the" best-performing existing sources (in the case of standards based on the MACT "floor") or "the maximum degree of reduction in emissions" that, taking into consideration cost and other factors, "is achievable… through application of measures, processes, methods, systems

or techniques" (for "beyond-the-floor" standards)—to require standards that account for the fact that even the "best performers" or facilities using the best technology achievable cannot meet limitations reflective of normal, steady-state operations during unavoidable periods of malfunction. *See*, *e.g.*, *Sierra Club v. EPA*, 551 F.3d 1019, 1022 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1735 (2010).[3] That long-standing and contemporaneous EPA interpretation of CAA section 112 is entitled to deference. *See*, *e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1509 (2009) (deferring to history of EPA interpreting statute not to require use of technology whose cost wholly exceeds benefits, despite statute's silence on that point); *id*. at 1514-15 (Breyer, J., concurring); *Barnett v. Weinberger*, 818 F.2d 953, 960-61 (D.C. Cir. 1987) (weight of agency's interpretation of statute "depends crucially upon whether it was promulgated contemporaneously with enactment of the statute and has been adhered to consistently over time.") (footnotes omitted).

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[3] For many years, EPA addressed malfunctions in MACT standards both through references to "General Provisions" that provided a malfunction exemption, *see* 551 F.3d at 1022, and through malfunction provisions incorporated into individual categorical MACT standards, *see*, *e.g.*, 40 C.F.R. § 63.695(e)(6)(i) (for Off-Site Waste and Recovery Operations, excursions from specified limitations during startup, shutdown or malfunction are not violations if the facility is operated during such period in accordance with the facility's SSM plan). For the past three years, since *Sierra Club*, 551 F.3d 1019, EPA has accommodated malfunctions through an affirmative defense provision in individual NESHAPs. *See*, *e.g.*, 75 Fed. Reg. at 54,993; 78 Fed. Reg. at 10,1013.

EPA's position that malfunctions must be accounted-for in MACT standards is not based simply on a policy preference (*cf.* Pet. Br. 59-60); rather, it reflects the statutory language that requires MACT standards to reflect what facilities are actually achieving or are capable of achieving, as well as judicial interpretations of the CAA. The courts have long recognized that a "technology based standard discards its fundamental premise when it ignores the limits inherent in technology." *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 208 (D.C. Cir. 1988). For example, in *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 432 (D.C. Cir. 1973), *cert. denied* 416 U.S. 969 (1974), reviewing standards for new sources that must be based on demonstrated control technology under CAA section 111, the Court held that SSM provisions are "necessary to preserve the reasonableness of the standards as a whole." *Id.* at 433; *accord*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 398 (D.C. 1973). In *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980), another case reviewing emission standards promulgated under CAA section 111, the Court held that the CAA requirement that NSPS be "achievable" means that the standards must be capable of being met "on a regular basis," including "under

most adverse circumstances which can reasonably be expected to recur," including during periods of SSM.[4]

The same principle applies to technology-based standards of CAA section 112. See *Sierra Club v. EPA,* 167 F.3d 658, 665 (D.C. Cir. 1999) (MACT standards based upon the performance of the best-performing facilities are supposed to represent "the emissions control that is achieved in practice" by the best performers, which means that the best-performing facilities will not violate the standards, which "only results if 'achieved in practice' is interpreted to mean 'achieved under the worst foreseeable circumstances.'"). *Cf. Mossville Environmental Action Now v. EPA*, 370 F.3d 1232, 1242 (D.C. Cir. 2004)

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[4] 627 F.2d at 431 n.46. This case law has not been undermined by intervening case law or the 1977 Clean Air Act Amendments (*see* Pet. Br. 52 n.12) and is not "at odds with the plain meaning of Clean Air Act §§112 and 302 as interpreted by this Court in *Sierra Club-SSM*" (Pet. Br. 58), and *Essex Chemical* is still good law after "changes to the language of the" CAA (Resp. Br. 49). As noted below, the *Sierra Club* court recognized that the addition of "on a continuous basis" to section 302(k) in the 1977 CAA amendments was meant to preclude intermittent controls, not require that the same limitation be met at all times. *See* 551 F.3d at 1020, 1027; *see also Nat'l Lime*, 627 F.2d at 434 n.54 ("The 'intermittent' controls that concerned Congress were any of those which entailed temporary reductions in emissions when weather conditions were poor."). Congress should be presumed to have been aware of EPA's policy of imposing different requirements during SSM periods, as well as court decisions requiring that, and the 1977 amendments should not be interpreted to have prohibited that practice, by adding "on a continuous basis" to the definition of "emission limitation," without any mention of that intent. *See Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 127-128 & n. 18 (1985); *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932).

(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.").[5] Petitioners' brief fails to mention any of those opinions.

Contrary to Petitioners' assertion, specifying operational measures that a facility must take in lieu of meeting numerical emission limitations during malfunctions does not "circumvent" this Court's decision in *Sierra Club*, 551 F.3d 1019. *See* Pet. Br. 56. *Sierra Club* rejected an outright exemption[6] from MACT standards for malfunctions, because that exemption was not derived pursuant to the criteria in CAA section 112, with the result that sources were not subject to "continuous section 112-compliant [emission] standards." 551 F.3d at 1027-28; *id*. at 1030 (Randolph, J., dissenting). In contrast, EPA included the affirmative defense provision in the Cement NESHAP Rule so that the rule

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[5] *See also Sierra Club v. EPA*, 479 F.3d 875, 884-85 (D.C. Cir. 2007) (Williams, J., concurring) (pointing out that even beyond-the-floor MACT standards must be "'achievable,' taking into account a variety of factors including cost," and noting that the Court could reject a literal interpretation of the statute if it "produced a result so 'demonstrably at odds with the intention of its drafters'" as to impose limitations not achievable in practice. *Id*. at 885, citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).).

[6] *See* 551 F.3d at 1027-28, 1030 (noting that EPA was not claiming that the General Provisions SSM exemption that the Court struck down was either an emission standard under CAA section 112(d), including a "requirement relating to the operation or maintenance of a source to assure continuous emission reduction," or a design, equipment, work practice, or operational standard under section 112(h)).

would comply with the mandates of section 112, and EPA specified practices that a facility would have to meet to satisfy section 112.

Sierra Club does not preclude EPA from applying different requirements during SSM events than apply during normal operations. In fact, the opinion acknowledges that CAA section 302(k)'s "inclusion of [the] broad phrase" "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction" in the definition of "emission standard" suggests that EPA can establish MACT standards consistent with CAA section 112 "without necessarily continuously applying a single standard." 551 F.3d at 1027. "Indeed, this reading is supported by the legislative history of section 302(k)." *Id*. *See also id*. at 1021 ("accepting that 'continuous' for purposes of the definition of 'emission standards' under CAA section 302(k) does not mean unchanging"). Thus, it was fully consistent with *Sierra Club* for EPA to use a "requirement relating to the operation or maintenance of a source to assure continuous emission reduction" or "any "design, equipment, work practice or operational standard" as the emission standard that applies during such events to resolve the "tension" between requiring continuous compliance and recognizing the limitations of control technology. *See* 78 Fed. Reg. at 10,014; CAA § 302(k); 551 F.3d at 1027.

II. Petitioners Have Not Shown the Affirmative Defense Provision To Be Contrary to Statutory Directives or Congressional Intent.

Petitioners sidestep what should be the central question concerning the affirmative defense provision: whether it was lawful and reasonable for EPA to interpret the Clean Air Act as allowing, indeed requiring, that MACT standards recognize the limitations of process and control technology inherent in setting standards that are based on what emissions have been achieved in practice by the "best performers." Instead, Petitioners offer a nonsensical version of the CAA, not set out in any judicial decision or legislative history, in which enforcement and citizen suit provisions dictate what standards must be achieved.

In effect, Petitioners' real complaint is that the affirmative defense provision EPA included in the Cement NESHAP Rule prevents them from seeking penalties for violations of the unachievable standards that they believe EPA should have promulgated. As demonstrated above, it is entirely appropriate for EPA to recognize, in technology-based standards, including MACT standards, that compliance with numerical limitations reflecting normal operations may be impossible or infeasible during malfunction events.

While SSMC believes it would be lawful and more appropriate for EPA to state the criteria for allowing departures from numerical emission limitations in the sections of the Cement NESHAP Rule where those limitations are set out

(40 C.F.R. §§ 63.1343 and 63.1345), as EPA has done in some previous NESHAPs, instead of putting those criteria in a separate section of the Cement NESHAP Rule (40 C.F.R. § 63.1344) and labeling those criteria an affirmative defense provision[7], the form in which EPA accommodates the limitations of technology when issuing technology-based standards such as NESHAPs does not render the affirmative defense unlawful.[8]

Petitioners' arguments that the affirmative defense provision is inconsistent with the CAA because it limits the circumstances under which a penalty or other sanction may be imposed under the enforcement section of the CAA, section 113, conflate establishment of an emission limitation with

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[7] *Cf. National Lime*, 627 F.2d at 431 n.46 (promise of enforcement flexibility "will not render 'achievable' a standard which cannot be achieved on a regular basis" because of, e.g., malfunction events)

[8] EPA's brief disavows statements EPA made, when it adopted the affirmative defense provision, that the provision is part of the MACT "standard," claiming now that the affirmative defense provision instead is "an ancillary provision related to implementation which is codified… along with the emission standards." Resp. Br. at 52. It is unclear why EPA's counsel wants to make this semantic distinction, but in any event the description is not accurate: as noted above, CAA section 302(k)'s broad definition of "emission standard" encompasses not only limitations on the quantity or concentration of pollutants themselves, but also "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under" the Act. Clearly, a provision that specifies actions the source operator must take before, during, and after a malfunction, to minimize the magnitude and duration of higher emissions associated with that and future malfunctions, falls within that definition.

enforcement of that limitation.[9] Writing emission limitations in a particular way (e.g., so as not to penalize excess emissions associated with unavoidable malfunction events) does not interfere with enforcement, because the enforcement authority in the statute only applies to whatever emission limitations have been established. *See* CAA § 113(b)(2). Indeed, as discussed above, many emission standards that EPA issues under the CAA include (and in fact, courts have held they must include) special accommodations for excess emissions associated with SSM events.

Under Petitioners' view, a court could decide to impose a penalty, based on statutory criteria used to determine civil penalty amounts, e.g. the size of the violator, CAA section 113(e)(1), even in circumstances where EPA has concluded that an exceedance was unavoidable. *See*, *e.g.*, Pet. Br. at 51. Petitioners' claim of an enforcement justification for rejecting emission

[9] For example, Petitioners' argue that the affirmative defense provision conflicts with the CAA's enforcement authority because it does not apply the same factors specified in CAA section 113(e) in deciding whether a malfunction event should be penalized. Pet Br. at 47-48. To the contrary, the section 113(e) factors apply only once a violation has been proven, rather than specifying what conduct constitutes a violation. *See id.*; *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 229 (4th Cir. 1997) (§ 113(e) criteria apply at penalty phase, rather than liability phase). Nothing in the affirmative defense provision prevents the district court from applying the factors in section 113(e) to determine the size of the civil penalty, if any, if the source operator cannot demonstrate its actions were consistent with the affirmative defense criteria in 40 C.F.R. § 63.1344.

standards that recognize the technological limitations on achieving, at all times, limitations reflecting normal operations is circular and misplaced.[10]

The same is true with respect to Petitioners' assertion that the affirmative defense provision interferes with citizen suits under CAA section 304: citizen suits are only authorized for violation of the particular requirements established in emission standards. *See* CAA § 304(a)(1)(A). The availability of citizen suits under the statute as a supplement for government enforcement in no way authorizes or proscribes any particular legislative rules. Moreover, Petitioners' arguments about the importance of not limiting the scope of citizen-suit enforcement are inconsistent with the role that citizen suits play as a

[10] Note that Petitioners incorrectly assume the affirmative defense provision only affects judicial enforcement, not assessment of administrative penalties by EPA. *See* Pet. Br. 49 n.10 ("Administrative penalties are not at issue here."), 50 (attempting to distinguish EPA's explicit ability to adjust "any administrative penalty" from the district court's discretion in imposing penalties that supposedly would be limited by the affirmative defense provision); 57 (implying affirmative defense does not concern EPA's statutory duties). In fact, as an integral part of the Cement NESHAP Rule, EPA intends the affirmative defense provision to apply to administrative penalties, as well. *See* 75 Fed. Reg. at 54,993 (Administrator may require source operator to prove it met all the requirements of the affirmative defense "[i]n any judicial or administrative proceeding."); 78 Fed. Reg. at 10,013 (merits of affirmative defense will be "evaluated in a judicial or administrative" "enforcement proceeding"). In this context "civil" is clearly intended merely to indicate that conduct satisfying the criteria of the affirmative defense provision of the Cement NESHAP Rule might still be subject to criminal enforcement or injunctive relief. *See*, *e.g.*, 40 C.F.R. § 63.1344; CAA § 113(d) (referring to "[a]dministrative assessment of civil penalties")

supplement to state and federal enforcement. *See*, *e.g.*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60-61 (1987) ("the citizen suit is meant to supplement rather than to supplant governmental action"; citizens cannot sue, months or years later, to impose penalties that EPA or the state, in its discretion, chose to forgo).

The determination of what factors characterize an acceptable excursion from otherwise-applicable emission limitations–because they reflect the performance of available technology even when properly designed and operated–as well as what "requirement[s] relating to the operation or maintenance of a source" are appropriate to minimize emissions on a continuous basis before, during, and after the malfunction event (*see* CAA section 302(k)) are inherently highly technical judgments, involving knowledge of both the regulatory requirements and the technical aspects of the source and its emissions. These determinations clearly are appropriately delegated to the experts of the regulatory agency, not to the district courts or citizen-suit plaintiffs.[11]

[11] Moreover, citizen-suit plaintiffs may not even have a statutory claim, or may lack constitutional standing to bring a claim, related to a malfunction, because a malfunction event often, if not always, will be a unique circumstance that does not constitute an ongoing or repeated violation. *Cf.* CAA § 304(a)(1) (violation must be ongoing or have been repeated); 40 C.F.R. §§ 63.2 (definition of "malfunction"), 63.1344(a)(1) (78 Fed. Reg. at 10,039); *Gwaltney,* 484 U.S. at 57; *Steel Co. v Citizens for a Better Environment*, 523 U.S. 83 (1998).

III. It Is Not Reasonable To Interpret the CAA To Preclude EPA from Adjusting MACT Compliance Deadlines When EPA Revises MACT Standards.

Petitioners' claim that it was unlawful or unreasonable for EPA to adjust the compliance deadline when EPA revised the Cement NESHAP Rule, in response to this Court's remand in *Portland Cement Ass'n v. EPA*, 665 F.3d 177 (D.C. Cir. 2011), because, they allege, the new deadline did not require compliance "as expeditiously as practicable," as required by CAA section 112(i)(3)(A). Pet. Br. 37-41. Because that is a factual question dependent upon an administrative record with which *amici* are not familiar, *amici* do not take a position on that question, other than to note that it is the type of technical question to which the Court generally defers to EPA.

Petitioners also assert, however, that EPA lacks statutory authority to adjust the compliance deadline when it modifies MACT standards, regardless of whether the revised deadline is as expeditious as practicable, at least when EPA is "voluntary weakening its emissions standards." Pet. Br. at 41-45. Besides the fact that revising standards in response to the Court's remand can hardly be described as "voluntary," Petitioners can point to nothing in the statute that explicitly supports the unusual notion that the Agency cannot include a new compliance deadline when it revises emission standards, voluntarily or not. In the absence of statutory language clearly imposing that anomalous result, the

Court should defer to EPA's interpretation[12] and should avoid adopting an interpretation of the Act that would be hugely unfair to regulated sources, if not unconstitutional.

When Congress provided that sources could have up to three years and, in some cases, more to comply with MACT standards, it recognized that the design, acquisition, installation, and start up of pollution control equipment or modified processes needed to meet those MACT standards could take years. *See* CAA § 112(i). EPA acknowledged this reality as well in the revised standards at issue here. 78 Fed. Reg. at 10,023. An interpretation of the CAA as not allowing EPA to adjust the compliance deadline when EPA revises MACT standards only months before compliance with the original standard was due ignores that reality and congressional intent.

If Petitioners' view of the CAA were adopted, regulated facilities effectively would be stripped of their right to petition for reconsideration of an EPA regulation under CAA section 307(b)(1) and petition for review under section 307(d)(7)(B). As the Court is aware from its experience with CAA

[12] EPA's interpretation here is consistent with EPA's past interpretations of section 112(i) in connection with its revision of numerous other NESHAPs, as allowing EPA to revise the existing-source initial compliance deadline when a section 112 regulation "has been substantially amended." *See* 67 Fed. Reg. 38,200, 38,201 (Jun. 3, 2002) (pesticide NESHAP); 65 Fed. Reg. 52,588, 52,590 (Aug. 29, 2000) (pharmaceuticals NESHAP).

cases, it generally takes EPA at least a year or two to take final action in response to a petition for reconsideration, and it typically takes a year or more for a petition for review of a CAA regulation to be resolved by the Court. Moreover, those periods often run consecutively, because the Court has interpreted section 307 to require an affected facility first to petition EPA for reconsideration in many cases, even if the Agency plainly made a mistake in the final rule or adopted new requirements without following statutory procedures. *See*, *e.g.*, *Medical Waste Institute and Energy Recovery Council v. EPA*, 645 F.3d 420, 428 (D.C. Cir. 2011) (Court will not consider petition for review of an emission standard that was adopted without notice-and-comment where the petitioner failed first to ask EPA for reconsideration).

In interpreting CAA section 112(i), the Court must consider the realities of the time often needed for a source to come into compliance with a new requirement and the time required for EPA to revise emission standards upon reconsideration or remand. The result of Petitioners' view of the CAA is that a facility often as a practical matter would be forced to comply with a MACT standard as originally issued, even if the facility could convince EPA, through a petition for administrative reconsideration or on remand after a successful petition for review, that the standard contained a mistake or was contrary to evidence never considered by the Agency. It would be unreasonable to

conclude that Congress intended that result, even if the statute literally required that EPA not adjust the compliance deadline (as it clearly does not).[13]

Contrary to Petitioners' suggestion, Pet. Br. 46-47, a revised compliance date may be needed not only for the particular emission limitations that EPA revises, but also for other limitations, where EPA determines that the compliance measures a source may use to meet the revised limit also affect emissions of other regulated pollutants. In such circumstances, it may be impossible or unreasonably costly for the regulated plant to install technology to meet some of the limits without knowing the limits that will apply to all the regulated pollutants. EPA concluded that was the case when it revised particulate matter limitations in the Cement NESHAP Rule. 78 Fed. Reg. at 10,023. This is a technical judgment within EPA's expertise, to which the Court should defer. *See*, *e.g.*, *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 377 (1989). Not only may a single piece of control equipment reduce

[13] This Court has found that EPA could extend even unambiguous statutory deadlines in similar situations, *e.g.*, where the subject of a regulation cannot comply with a deadline due to EPA's administrative action (or inaction). *See Natural Resources Defense Council, Inc. v. EPA*, 22 F.3d 1125, 1135 (D.C. Cir. 1994) (for CAA state implementation plan deadline, "extension is warranted. . . . if Congress would have intended that the deadline be extended to provide a party the full statutory time for acting on agency guidance"); *Natural Resources Defense Council, Inc. v. Thomas,* 805 F.2d 410, 434-37 (D.C. Cir. 1986) (motor vehicle emissions compliance date extended, in part, because EPA did not meet statutory timetable to develop standards).

emissions of more than one pollutant, but compliance measures may involve averaging pollutants among several sources, adopting process changes that affect emissions and emission points for several pollutants, and the like. *See*, *e.g.*, 63 Fed. Reg. 18,503, 18,523 (April 15, 1998) (explaining why alternative emission limitations are appropriate if pulp mills decide to comply with MACT standards by changing their manufacturing processes to use "clean condensate").

Even if the emission limitation that EPA revises will be met through new pollution control equipment or process changes entirely separate from the equipment or process changes needed to comply with other emission limitations in a MACT standard, it still may be reasonable for EPA to determine that it is appropriate to adjust the compliance deadline for all of the emission limitations when EPA changes one of the limitations. One such situation is where the source owner must decide whether to make the capital expenditures necessary to comply with a new or revised MACT standard, or instead cease the activity subject to the MACT standard. In situations where MACT compliance costs are so great as potentially to force plant closure, it would be unreasonable to ask source owners to invest large amounts of money to design, procure, and install equipment to comply with some emission limitations before the owner knew what expenditures would be required to meet all of the limitations. This is not just a theoretical concern: *see*, *e.g.*, 68 Fed. Reg. 18,008, 18,022-23 (April 14,

2003) (two of 13 merchant coke plants may close rather than meet MACT standards for Coke Ovens); 76 Fed. Reg. 15,608, 15,647 (March 21, 2011) (cost to comply with MACT standards for boilers could exceed a plant's annual profits).

Thus, it was reasonable for EPA to interpret CAA section 112 to give it flexibility to adjust compliance deadlines, where appropriate, when EPA revises MACT standards. Indeed, failure to do so would be contrary to congressional intent that those standards allow time needed for compliance and not impose excessive costs. *See* CAA §§ 112(d)(2), 112(i)(3). The Court should defer to that reasonable EPA interpretation.

IV. The Compliance Date Sought by Petitioners Would Adversely Affect the Concrete, Masonry, and Construction Industries as Well as the Overall Economy.

Petitioners are asking this Court to vacate EPA's establishment of a September 9, 2015 compliance date and instead establish a September 9, 2013 compliance date for the portland cement industry for the new NESHAP rules EPA issued in February 2013.

CAMRA agrees with EPA and Intervenor Portland Cement Association (PCA) that the September 2015 compliance date for EPA's new standards is fully warranted by the record in this case and fully authorized by CAA section

112(i)(3)(A). For these points, CAMRA adopts and endorses the arguments addressing the compliance date contained in EPA's July 22, 2013 brief and Intervenor PCA's May 2, 2013 opposition to Petitioners' motion for stay pending judicial review ("PCA Stay Opposition"), as well as the arguments set forth in Part III of this joint *amicus* brief.

CAMRA joins this brief as *amicus* because it wants to impress upon the Court the serious adverse effects that could be created if the Court were to grant the relief Petitioners seek regarding the compliance date. Mandating a September 9, 2013 compliance date would undermine the viability and economic health not only of the portland cement industry, but also of the concrete, masonry, and construction industries at a time when these industries have just begun growing and recovering from the recent, prolonged financial crisis. Moreover, as the construction industry is such a significant component of the national economy (5% of GDP in 2012, down from more than 9% in 2007) and the federal government is relying on new construction to help guide the nation out of recession, the national economy would also be adversely affected.

A. A September 9, 2013 Compliance Date Would Force Many Portland Cement Manufacturing Facilities into Immediate Non-Compliance with the Clean Air Act Unless They Shut Down Their Operations.

As outlined in PCA's Stay Opposition (#1434149), a September 9, 2013 compliance date would significantly harm portland cement companies. *Id.* at 18-19. In its Stay Opposition, PCA showed that if this Court imposed a September 2013 deadline in May 2013—with only four months left to go at that time—the deadline would be virtually impossible for many, if not most, plants to meet. Compared to May 2013, the situation now would be even more dire. The Court's ruling would be issued after September 2013 and granting Petitioners' requested relief would in effect retroactively place many cement kilns immediately in violation of the law.

Various representatives from the portland cement industry have shown that it will take many months at many plants to achieve compliance with EPA's February 2013 NESHAP standards. *See the following attachments to PCA's Stay Opposition:* EPA-HQ-OAR-2011-0817-0505 ("Comments of PCA") at 2 (Aug. 17, 2012); Detterline Decl. ¶ 9; Kelley Decl. ¶ 8; Morin Decl. ¶ 12; O'Hare Decl. ¶¶ 25-26.[14] Compliance will require major planning and engineering, capital investment and a significant amount of preparation. Kelley Decl. ¶ 3;

[14] All future references to declarations are those declarations attached to PCA's Stay Opposition.

Morin Decl. ¶ 11. Thus, if a September 2013 compliance deadline were imposed, a significant number of portland cement companies would immediately fall out of compliance with the CAA and they would remain out of compliance for many months (some perhaps up to two years) unless they shut down until compliance could be achieved.

PCA's Stay Opposition projections of plant closures are entirely credible because of the dire legal situation suddenly-non-complying plants would face. Under CAA section 113(b), civil fines of up to $25,000 ***per day*** could be imposed at any plant, for ***each individual*** violation, as long as it remained in violation. 42 U.S.C. § 7413(b). Adjusting this civil monetary penalty for inflation under the Federal Civil Penalties Inflation Adjustment Act, as amended by the Debt Collection Improvement Act, an owner or operator of a portland cement company could face up to $37,500 ***per day*** for each violation. *See* 28 U.S.C. § 2461 note; 31 U.S.C. § 3701 note; 40 C.F.R. § 19.4. As it could take many facilities until September 2015 to comply with the new rule, the companies could face astronomical fines. CAA section 113 would also authorize injunctive relief forcing a plant to shut down until it achieved compliance for violations.[15]

[15] "The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major

Even if EPA exercised enforcement discretion and decided not to seek shutdowns and/or penalties, citizens groups—such as the petitioners in this case—could use the "citizens suits" enforcement provisions of CAA section 304. *See* 42 U.S.C. § 7604(a)(1). The CAA has long provided that citizens groups can bring enforcement action in federal district court for violations of the CAA in situations where federal and state agencies are not "diligently prosecuting" their own suits.[16] In the situation of cement kilns that would fall out of compliance with the CAA by virtue of this Court's adverse ruling, citizens groups, such as Petitioners, could use CAA section 304 to seek injunctive relief and penalties.[17]

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stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction… ." 42 U.S.C. § 7413(b).

[16] "Any person may commence a civil action on his own behalf against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the [EPA] Administrator or a State with respect to such a standard or limitation… ." 42 U.S.C. § 7604(a)(1).

[17] For example, in 2009, Sierra Club—one of the petitioners in the instant case—settled with Shell Oil Co. for alleged violations under the CAA. Sierra Club brought a citizens suit against Shell in January 2008 regarding a refinery and chemical plant in Deer Park, Texas. The settlement included civil penalties that totaled nearly $6 million. *See Shell Agrees to Settle TX Refinery Pollution Suit*, http://www.reuters.com/article/2009/04/23/idUSN23350776.

The alternative to the civil penalties citizens groups could seek under CAA section 304 would be for cement plants to temporarily or permanently shut down facilities. Alesi Decl. ¶ 4; Detterline Decl. ¶ 13; Kelley Decl. ¶ 12; Morin Decl. ¶ 13; O'Hare Decl. ¶ 27.

B. A September 2013 Compliance Date Would Have Significant Adverse Effects on the Concrete and Masonry Industries that Are Vital to The Burgeoning Revivals of the Construction Industry and the Overall Economy.

Any significant cutbacks in the supply of portland cement would adversely affect the concrete and masonry industries, which overwhelming rely on cement as the key ingredient in the creation of their products. Portland cement comprises approximately 8% of the content in masonry and 15% in concrete and is the essential ingredient in both products. To the extent cement plants are forced to shutter their plants, supplies of cement to meet the needs of the masonry and concrete industries would be cut back. Kelley Decl. ¶ 12. The more the supply of portland cement is reduced, the more CAMRA members would have to curtail their operations, resulting in the loss of profits and jobs across many communities where these facilities are located. The concrete and masonry companies simply would have limited options—in terms of number and geography—for sources of cement to continue their operations.

If the concrete and masonry industries faced a domestic supply shortage because of U.S. cement plant shutdowns, the only alternative would be for these industries to import cement from outside the United States. Cement imports, however, are currently at historic minimums, and import spigots cannot be turned on instantaneously. Indeed, much of the cement import structure has atrophied during the recession and may never return. Furthermore, reliance on imports subjects the industry to further disruptions because of the uncertainties regarding the availability of foreign cement and ships used for importing cement. *North American Cement Industry Annual Yearbook: 2012* (PCA); *Economics of the U.S. Cement Industry* (http://www.cement.org/econ/industry.asp). Therefore, a domestic cement shortage would hit the concrete and masonry industries just as they are rebounding from the recent economic crisis.[18]

By harming the concrete and masonry industries, there would be further adverse impact on the construction industry, which is finally beginning to emerge and recover from the recent economic crisis. Currently, economists are

[18] For example, domestic ready mixed concrete production reached a climax in 2005 with over 450 million cubic yards. This number dropped to 250 million cubic yards in 2009, and the ready mixed concrete industry reported a production increase in 2011 for the first time since 2005. *U.S. Ready Mix Concrete Producers Continue to Lose Money* (http://concreteexecutive.com/2012/10/u-s-ready-mix-concrete-producers-continue-lose-money/).

citing recent growth in the intertwined construction and cement industries. PCA's May 10, 2013 *Cement Outlook Update* states that "PCA holds an optimistic medium term outlook for the economy, construction activity and cement consumption." (http://www.cement.org/econ/pdf/April2013_Forecastfinal.pdf). PCA projects cement consumption to be up 6% this year alone. *Id*. at 4.

Growth in 2013 cement consumption is predicted to be largely driven by gains in residential construction, which is projected to experience a 13.2% growth over last year with an accompanying 21.1% increase in portland cement consumption. *U.S. Forecast Tables: Spring 2013* at 2-3 (http://www.cement.org/econ/xls/Spring2013TablesExcel.xls); *see also May 2013 Construction at $874.9 Billion Annual Rate* (http://www.census.gov/const/C30/release.pdf).

The National Association of Home Builders is even more optimistic, predicting that total housing production will increase 20% in 2013 over 2012 levels. *2013 State of the Industry Report* (http://www.forconstructionpros.com/article/10825467/where-is-the-construction-market-headed-in-2013). And the PCA projects moderate growth for nonresidential construction during 2013. *Cement Outlook Update* at 7.

Furthermore, the Wells Fargo Equipment Finance, Inc.'s *2013 Construction Industry Forecast* states that the "Optimism Quotient" among construction executives is the third highest national optimism reading in the past 13 years (https://www.wellsfargo.com/downloads/pdf/com/finance/2013-construction-industry-forecast.pdf).

Finally, the American Institute of Architects' Architecture Billings Index (ABI) was at 54.2 in January 2013, which was the strongest billings growth since early 2008. *Strong Surge for Architecture Billings Index* (http://www.aia.org/press/AIAB097808). In this January report, all sectors of the construction industry showed growth. *Id*.

Any adverse impact on the construction industry would harm the overall health and vitality of the national economy. According to the U.S. Bureau of Economic Analysis, in 2011 construction accounted for roughly 5% of the United States' GDP; in 2005, this statistic was nearly 9%. *Construction as Percent of GDP, 2005-2011* (http://www.cepr.net/index.php/graphic-economics/graphic-economics/construction-as-percent-of-gdp-2005-2011).

Since the national economic downturn began in 2008, the Administration has stressed the importance of the construction industry in aiding the federal economy. For example, in February 2009, President Obama announced a number of steps to save the housing market—a key portion of the construction

industry—and assist struggling homeowners via the Troubled Asset Relief Program (TARP), including Making Home Affordable (MHA) and the Hardest Hit Fund (HHF). *See* http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/pages/default.aspx.

Similarly, the $787 billion federal stimulus package emphasized "shovel ready" projects in the construction industry that would revitalize the national economy. The Obama Administration billed the summer of 2010 as the "Recovery Summer" with 10,700 highway projects, 82,000 weatherized home projects, and 218 federal buildings under construction. *Obama Hopes 'Recovery Summer' Will Warm Voters to the Stimulus* ((http://www.nytimes.com/2010/06/19/us/19stimulus.html?_r=1&).

President Obama has in fact made construction and infrastructure projects a hallmark of his economic recovery plan. In this year's State of the Union Address, the President cited "an aging infrastructure badly in need of repair," and explained "Ask any CEO where they'd rather locate and hire: a country with deteriorating roads and bridges, or one with high-speed rail and internet; high-tech schools and self-healing power grids. The CEO of Siemens America—a company that brought hundreds of new jobs to North Carolina—has said that if we upgrade our infrastructure, they'll bring even more jobs." *See*

http://www.nytimes.com/2013/02/13/us/politics/obamas-2013-state-of-the-union-address.html?pagewanted=all&_r=0.

Thus, a multitude of indicators demonstrate that the construction industry is finally emerging from the economic doldrums for the first time since 2008. So any type of negative effect—like mandating a September 2013 portland cement compliance date that would curtail cement production for many months—would have a serious adverse impact on our nation's upward economic trajectory.

The September 2015 compliance date was well within EPA's discretion and strategically allows companies across the portland cement industry time to adequately prepare for the new pollution controls. CAMRA submits that his timeline should not change.

CONCLUSION

The Court should reject Petitioners' challenges to the compliance deadlines and affirmative defense for malfunctions provisions of the Cement NESHAP Rule, for the foregoing reasons.

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Respectfully submitted,

/s/ Russell S. Frye

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

/s/ Richard G. Stoll
Richard G. Stoll
Foley & Lardner LLP
3000 K Street, N.W.
Washington, D.C. 20007-5109
(202) 295-4021
Fax: (202) 672-5399
E-mail: rstoll@foley.com
Counsel for Concrete and Masonry Related Associations

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B), because this brief contains 6992 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.

/s/ Russell S. Frye
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
Counsel for SSM Coalition

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of July 2013, I electronically filed SSM Coalition's and Concrete and Masonry Related Association's joint *Amicus Curiae* Brief in Support of Respondent 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. Eight paper copies of the brief were also filed with the Clerk pursuant to Circuit Rule 31.

/s/ Russell S. Frye
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
Counsel for SSM Coalition