

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FOREST & PAPER)	
ASSOCIATION, et al.,)	
)	
Petitioners,)	
)	
v.)	Docket No. 11-1125
)	(and consolidated cases)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
)	
Respondents.)	

**RESPONDENTS' MOTION TO HOLD CASE
IN ABEYANCE**

Respondents United States Environmental Protection Agency and Lisa P. Jackson, Administrator, (collectively "EPA") hereby move to hold this case in abeyance until EPA completes the pending process for reconsideration of the rule under review. The undersigned counsel has attempted to contact counsel for the parties to determine if they intend to oppose this motion. Counsel for Cement Kiln Recycling Coalition, Portland Cement Association, Ash Grove Cement Company, and Sierra Club, et al., have not provided their position on the motion. Counsel for all other parties have indicated that they either take no position on or do not oppose

the motion with the understanding that they would be able to move the court to lift the abeyance, including the right to file procedural and dispositive motions, such as a motion for a judicial stay.

The petitions in this case seek review of an EPA rule titled “Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units,” published at 76 Fed. Reg. 15,704 (March 21, 2011).^{1/} Simultaneously with promulgation of the rule EPA announced that it would be proposing to reconsider aspects of the final rule. 76 Fed. Reg. 15,267 (March 21, 2011). EPA also received a number of administrative petitions for reconsideration of the final rule. On May 18, 2011, EPA extended the effective date of the rule until the earlier of the date on which

^{1/} The petitions are American Forest & Paper Products Ass’n v. EPA, No. 11-1125; American Chemistry Council v. EPA, No. 11-1140; Coalition for Responsible Waste Incineration v. EPA, No. 11-1144; Waste Management, Inc. v. EPA, No. 11-1149; American Foundry Society, Inc. v. EPA, No. 11-1153; Cement Kiln Recycling Coalition v. EPA, No. 11-1154; Portland Cement Ass’n v. EPA, No. 11-1155; Council of Industrial Boiler Owners v. EPA, No. 11-1161; Auto Industry Forum v. EPA, No. 11-1163; Eastman Chemical Co. v. EPA, No. 11-1171; Ash Grove Cement Co. v. EPA, No. 11-1171; Edison Mission Energy v. EPA, No. 11-1175; JELD-WEN, Inc. v. EPA, No. 11-1176; Northern States Power Co. v. EPA, No. 11-1178; American Petroleum Institute v. EPA, No. 11-1180; Sierra Club v. EPA, No. 11-1183; ARIPPA v. EPA, No. 11-1186; and Rhodia, Inc. v. EPA, No. 11-1188. Nos. 11-1125, 11-1144, and 11-1161 have been consolidated by the Court. Nos. 11-1153, 11-1154, 11-1163, 11-1173, 11-1183, and 11-1186 are identified as pending consolidation. No. 11-1140 is erroneously identified in the docket as challenging an EPA action at 75 (rather than 76) Fed. Reg. 15704.

the Agency's reconsideration process is completed or the petitions for judicial review are completed. 76 Fed. Reg. 28,662 (May 18, 2011).

Thus, EPA is currently conducting its own self-initiated process of reconsideration. In addition, EPA is reviewing the submitted administrative petitions to determine whether administrative action may be required for additional provisions of the rule pursuant to 42 U.S.C. § 7607(d)(7)(B). If EPA denies the reconsideration petitions, petitions for judicial review of those denials may be filed with this Court, and consolidation of such petitions with the instant litigation may be warranted.

The issues raised in both EPA's review and the administrative petitions overlap with the issues EPA anticipates will be raised in this litigation. Given EPA's ongoing review, with the concomitant possibility that the rule might be altered once the review is complete, EPA believes it appropriate to hold this litigation in abeyance while EPA completes its reconsideration process and its review of the administrative petitions for reconsideration. This Court has long recognized that it is appropriate to hold judicial review proceedings in abeyance where the agency has undertaken to reconsider the action under review. See B.J. Alan Co., Inc. v. ICC, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (“[a]dministrative reconsideration is a more expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts,” quoting Commonwealth of

Pennsylvania v. ICC, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). To do otherwise risks wasting judicial resources in reviewing an agency decision that may be altered or reversed.

If the Court grants this motion, EPA will notify the Court of the result of its reconsideration process and of its determination to grant or deny the administrative petitions for reconsideration. If EPA denies the petitions and additional petitions for judicial review of those decisions are filed with this Court, EPA will recommend to the Court whether consolidation of such petitions with the instant litigation is appropriate.

Respectfully submitted,

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June 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2011, I caused a copy of the foregoing document to be served by the Court's CM/ECF system on all counsel of record in this matter.

/S/ Norman L. Rave, Jr.
Norman L. Rave, Jr.