

**ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA, DELAWARE,
NEW YORK, OREGON, VERMONT, AND WASHINGTON, AND
THE COMMONWEALTH OF MASSACHUSETTS**

September 30, 2008

VIA ELECTRONIC SUBMISSION

EPA Docket Center (6102T)
Standards of Performance (NSPS) for
Portland Cement Plants Docket
Docket ID No. EPA-HQ-OAR-2007-0877
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: *Comments on Proposed Rule*

To Whom It May Concern:

The Attorneys General of the States of California, Delaware, New York, Oregon, Vermont, and Washington, and the Commonwealth of Massachusetts, submit these comments on the United States Environmental Protection Agency's (EPA's) proposed rule amending the current standards of performance for Portland cement plants, published at 73 Fed. Reg. 34072 (June 16, 2008). The proposed rule does not propose any new source performance standards (NSPS) for greenhouse gas (GHG) emissions from Portland cement plants. It has been almost a year and a half since *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438 (2007), confirmed that GHGs are air pollutants subject to regulation under the Clean Air Act. While this should have triggered EPA to propose new source performance standards for GHG emissions from a variety of sources, including Portland cement plants, EPA has not proposed any such standards for any source. Instead, EPA has issued an Advance Notice of Proposed Rulemaking (ANPR) that seeks public comment on whether to regulate GHG emissions under the Clean Air Act at all. (73 Fed. Reg. 44354 (July 30, 2008).) We protest this course of action, and request that EPA revise the proposed rule to include new source performance standards for GHG emissions.

EPA's proposed rule is the first review of the standards of performance for Portland cement plants in nearly twenty years. There are 108 Portland cement plants in 36 states, and nearly 80% of those plants used coal, coke or some combination of the two as kiln fuel. (EPA, *Sector Strategies Program, Cement*, accessed at <http://www.epa.gov/ispd/cement/>.) Given the prevalence of coal and coke as fuel, carbon dioxide is one of the primary emissions from the manufacture of Portland cement, along with particulate matter, nitrogen oxides, sulfur dioxide, and carbon monoxide. (*Id.*) The cement industry is the second largest industrial source of carbon dioxide emissions in the United States, behind only the iron and steel industry. (EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2006*, Table 2-6 (2008).) In 2006,

the cement industry emitted 45.7 million metric tons of carbon dioxide, which was 30.6% of the total emissions from the industrial process sector. (*See id.*) Given these facts, and the established link between GHG emissions and climate change, the Portland cement industry is a significant contributor to climate change in the United States and the rest of the world.

The Clean Air Act is a critical, and as yet unused, means of regulating GHG emissions that contribute to climate change. In *Massachusetts v. EPA*, the Supreme Court confirmed that GHGs are air pollutants subject to regulation under the Clean Air Act, if EPA determines that those pollutants may endanger public health or welfare. (549 U.S. 497, 127 S.Ct. 1438 (2007).) The Supreme Court reached this decision in the context of regulation of GHG emissions from new motor vehicles, but the decision also extends logically to regulation of GHG emissions from stationary sources. As applied here, *Massachusetts v. EPA* requires EPA to determine whether Portland cement plants “cause[], or contribute[] significantly to,” GHG emissions, and whether those emissions “may reasonably be anticipated to endanger public health or welfare.” (42 U.S.C. § 7411(b)(1).) If so, EPA must propose new source performance standards for GHG emissions from those cement plants. (*Id.*)

Unfortunately, EPA does not fulfill these obligations in the proposed rule. The proposed rule does not even include an endangerment determination for GHG emissions from Portland cement plants, much less propose any new source performance standards for such emissions. Instead, EPA states tersely that “for the reasons recently explained in the petroleum refineries NSPS final rule signed on April 30, 2008, we believe that it is appropriate to consider issues related to the regulation of GHGs under the CAA through the advance notice of proposed rulemaking announced by the Administrator on March 27, 2008.” (73 Fed. Reg. at 34084.) The referenced petroleum refineries rule asserts that “the regulation of GHG emissions raises numerous issues that are not well suited to initial resolution in a rulemaking directed at an individual source category,” and that an ANPR is necessary to “lay[] the foundation for a comprehensive path forward with respect to regulation of all GHG.” (73 Fed. Reg. 35838, 35859 (June 24, 2008).) The referenced ANPR, which EPA issued in July 2008, requests public comment on dozens of questions and concerns about all potential regulation of GHG emissions. It does not commit EPA to a path of regulation of even one GHG source, and is at most a notice of potential future rulemaking. (*P & V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (an advance notice of proposed rulemaking is merely a “preparatory step, antecedent to a potential future rulemaking”).) Even that potential appears limited, as EPA Administrator Stephen Johnson prefaced the ANPR’s release with remarks that the Clean Air Act is “ill-suited for the task of regulating global greenhouse gases” and “the wrong tool for the job.” (73 Fed. Reg. at 44355; Press Conference Call Regarding Advance Notice of Proposed Rulemaking (July 11, 2008).¹

¹See <http://yosemite.epa.gov/opa/admpress.nsf/Speeches%20-%20By%20Date?OpenView>.

EPA's failure to propose new source performance standards for GHGs in the proposed rule violates the Section 111 of the Clean Air Act. (42 U.S.C. § 7411.) Section 111 requires EPA to determine whether GHG emissions emitted by cement plants may endanger public health or welfare, and to promulgate new source performance standards for each air pollutant emitted by cement plants that contributes significantly to global warming pollution. The plain language of Section 111 requires EPA to determine whether a listed source category emits any air pollutant – including an air pollutant not already subject to NSPS – that causes or significantly contributes to air pollution that may reasonably be anticipated to endanger public health or welfare. As the D.C. Circuit Court of Appeals held in *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 783 (D.C. Cir. 1976), Section 111(b)(1) “obviously contemplates an evaluation by the Administrator of the risk that certain types of air pollution will ‘endanger’ public health and welfare, and the risk that allowing construction of new stationary sources, even subject to existing state and local regulation, will contribute ‘significantly’ to that air pollution.”

EPA errs in failing to evaluate the risk that GHG emissions from Portland cement plants will endanger public health and welfare. As noted above, the cement industry is the second-largest industrial source of carbon dioxide emissions in the United States, and emitted 45.7 million metric tons of carbon dioxide in 2006, according to EPA's own data. (*See supra* at 1-2.) Thus, the cement industry contributes significantly to GHG emissions, and there can be no serious dispute that GHG emissions endanger public health and/or welfare. (*See* Intergovernmental Panel of Climate Change, *Climate Change 2007: The Physical Science Basis, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) at 5 (“Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level.”).)

Indeed, EPA's own ANPR contains more than enough information to determine that GHG emissions from Portland cement plants may reasonably be anticipated to endanger public health and welfare. The ANPR acknowledges that “there is compelling and robust evidence that observed climate change can be attributed to the heating effect caused by global anthropogenic GHG emissions.” (73 Fed. Reg. at 44427.) In addition, the ANPR contains a long list of observed and projected adverse effects of global warming, including rising sea levels, more frequent and severe heat waves, increased flooding and erosion, increased fire risk, and declining air quality, among others. (*Id.* at 44425-27.) Virtually all of these adverse effects pose human health risks, especially among sensitive populations “such as the elderly, young, asthmatics, the frail and the poor.” (*Id.* at 44427.) EPA has also acknowledged elsewhere that global warming from GHG emissions poses a danger to public health, including “likely increases in mortality and morbidity, especially among the elderly, young, and frail.” (73 Fed. Reg. 12156, 12167 (Mar. 6, 2008); *see also* Climate Change Science Program, *Scientific Assessment of the Effects of Global Change on the United States* 8 (May 2008) (acknowledging that it is very likely that climate change is already affecting U.S. water resources, agriculture, land resources, biodiversity, and human health and will continue to have significant effects for decades).)

Given these circumstances, EPA should have determined that GHG emissions from Portland cement plants may reasonably be anticipated to endanger public health or welfare, and promulgated new source performance standards for such emissions. The ANPR that EPA issued instead is no substitute for those actions. The ANPR does not commit to regulating GHG emissions from any source, and Administrator Johnson has already indicated that it will not lead to any such regulation during his leadership. He did so by prefacing the ANPR's release with remarks that the Clean Air Act is "ill-suited" and the "wrong tool for the job" of regulating GHGs. Administrator Johnson's remarks indicate that he has already decided not to regulate GHGs under the Clean Air Act, and had done so even before he received the first public comment on the ANPR. This demonstrates that the ANPR process is a pro forma exercise, and a wholly deficient substitute for proposing actual new source performance standards for GHG emissions.

In light of Administrator Johnson's remarks, EPA's explanation in the petroleum refineries rule of why EPA chose the ANPR process rings hollow. Moreover, EPA's explanation is unpersuasive even apart from Administrator Johnson's comments. Particularly unpersuasive is EPA's assertion that it does not have to propose new source performance standards for air pollutants that were not subject to performance standards before, because EPA must only review standards of performance every eight years and revise "such standards." (73 Fed. Reg. at 35858-59.) Neither law nor logic supports EPA's circular assertion, which in this case would allow EPA to limit the list of air pollutants subject to new source performance standards to what it was almost twenty years ago. Section 111(b)(1)(B) of the Clean Air Act requires that, as part of EPA's eight-year review, the agency "shall" review, and if appropriate, revise, the NSPS for the source category. (42 U.S.C. § 7411(b)(1)(B).) EPA erroneously claims that its eight-year review is limited to a review of previously promulgated standards and does not require promulgation of new standards of performance. However, a thorough review and revision of NSPS for a source category cannot be limited to merely making changes to existing standards. Rather, the entire regulatory structure of the Clean Air Act demonstrates Congress' intent to require EPA to enact more stringent air pollution requirements as circumstances change, as new information becomes available regarding the adverse public health and welfare effects of air pollutants, and as new technologies become available to control emissions of such pollutants.

EPA's contrary interpretation of its obligations under Section 111 conflicts with this regulatory structure. Furthermore, EPA's interpretation is inconsistent with EPA's own practices. As EPA admitted in the petroleum refineries rule, "EPA has promulgated new performance standards for pollutants not previously covered" concurrent with its eight-year reviews under Section 111 of the Clean Air Act. (73 Fed. Reg. at 35859.) In fact, EPA did so in the petroleum refineries rule itself, (*id.*), and EPA also proposes to do the same thing in the Portland cement plant proposed rule. (73 Fed. Reg. at 34078-34082 (proposing new source performance standards for NO_x and SO₂, which are not regulated under the current standards).)

In the petroleum refineries final rule, EPA attempts to use the legislative history of the Clean Air Act to justify its refusal to determine whether GHGs endanger public health or welfare. EPA asserts that by deleting the word "any" from the definition of "standard of

performance” in the 1990 amendments, Congress signaled its intent to allow EPA to pick and choose which air pollutants to regulate. (73 Fed. Reg. at 35859.) This amendment does not assist EPA because EPA is not being asked to set standards of performance for all air pollutants emitted from a source category. Rather, Section 111 of the Clean Air Act requires EPA to set NSPS for air pollutants emitted by a source category that cause or significantly contribute to that source’s endangerment of public health or welfare, and for which there is technology available that can effectively and efficiently reduce emissions of such air pollutants. Congress’ removal of the word “any” from the definition of “standard of performance” does not relieve the agency of the obligation to set NSPS for such air pollutants.

Section 111(f) of the Clean Air Act further undercuts EPA’s interpretation of its NSPS obligations. (42 U.S.C. § 7411(f).) Congress promulgated Section 111(f) of the Clean Air Act in response to EPA’s delays in establishing NSPS for certain categories of major stationary sources. Section 111(f)(2) specifically directs EPA to determine the quantity of air pollutant emissions emitted by each source category and the extent to which each such pollutant may reasonably be anticipated to endanger public health and welfare. Thus, Section 111(f) confirms EPA’s obligation to examine all of the air pollutants emitted by a source category under review to determine the contribution of those pollutants to a source’s endangerment of public health and welfare.

Available technology can effectively and efficiently reduce carbon dioxide emissions from Portland cement plants. Thus, EPA cannot invoke the language in Section 111(b)(1)(B) that allows the Administrator to decline to review a standard if such review is not appropriate in light of readily available information on the efficacy of such standard. The technologies that can be mandated in an NSPS include “design, equipment, work practice or operational standards.” (42 U.S.C. § 7411(h)(1); *see generally New York v. Reilly*, 969 F.2d 1147 (D.C. Cir. 1992) (upholding in part and vacating in part on other grounds proposed NSPS for municipal incinerators that would have required operators to separate out certain batteries and other types of waste before incineration).) Similarly, in the debates concerning the Clean Air Act Amendments of 1990, Congress noted that the stricter emission levels considered could be achieved through a variety of means. The Senate report notes that “[p]ollution can be reduced by (1) improving overall efficiency; (2) changing or cleansing fuels; (3) adopting alternative combustion technologies; (4) installing flue gas cleansing devices; or (5) establishing end-use conservation programs.” (S. Rep. No. 228, 101st Cong., 1st Sess. at 291.) Thus, EPA is not limited to consideration of end-of-pipe controls. Accordingly, EPA cannot rely on its ability to avoid setting an NSPS for a category of sources where EPA determines that it “is not appropriate in light of readily available information on the efficacy of such standard.” (42 U.S.C. § 7411(b)(1)(B).)

Lastly, the ANPR itself, in contrast to Administrator Johnson’s remarks prefacing its release, acknowledges that new source performance standards allow “significant flexibility in regulation” of air pollutants. (73 Fed. Reg. at 44486.) The ANPR itself also discusses at length how such standards could be used effectively to regulate GHGs. (*Id.* at 44486-93.) EPA’s acknowledgment of its ability to regulate GHGs using new source performance standards makes

EPA's failure to propose such standards for GHG emissions from Portland cement plants all the more improper. We request that EPA remedy this failure immediately, by revising the proposed rule to include such new source performance standards.

Please contact California Deputy Attorney General Thomas G. Heller at (213) 897-2628 if you have any questions about these comments.

Sincerely,

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