ORAL ARGUMENT NOT YET SCHEDULED

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

Downwinders at Risk, *et al.*, Petitioners, **v.** **United States Environmental Protection Agency, *et al.*,** Respondents.	Case No. 18-1260

On Petition for Review of Final Action of the United States Environmental Protection Agency

UNOPPOSED MOTION OF THE STATES OF CALIFORNIA AND ILLINOIS FOR LEAVE TO INTERVENE AS PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(D.C. Circuit Rules 27(a)(4) & 28(a)(1))

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1), the States of California and Illinois submit this provisional certificate of parties, rulings, and related cases:

(A) Parties and Proposed Intervenors. The parties to this petition for review are as follows:

Petitioners: Downwinders at Risk and Sierra Club (collectively, "Petitioners").

Respondents: The United States Environmental Protection Agency and Andrew Wheeler, Acting Administrator, United States Environmental Protection Agency (collectively, "EPA").

Proposed Intervenors: The States of California and Illinois (collectively, "State Intervenors").

(B) Rulings Under Review. Petitioners seek review of the final action of respondent United States Environmental Protection Agency published in the Federal Register at 83 Fed. Reg. 35,122, *et seq*., (July 25, 2018), and titled "National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry Residual Risk and Technology Review; Final Rule."

(C) To the best of the State Intervenors' knowledge, this case was not previously before this Court or any other court. Counsel for State Intervenors are also unaware of any related cases

Dated: October 22, 2018 Respectfully Submitted,

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Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 15(b), the States of California (by and through Xavier Becerra), and Illinois (collectively, "State Intervenors") hereby move for leave to intervene in support of Petitioners (Downwinders at Risk and Sierra Club) for the reasons set forth below.

I. THE FINAL RULE.

Petitioners are seeking this Court's review of EPA's final action, published in the Federal Register at 83 Fed. Reg. 35,122, *et seq*., (July 25, 2018), and titled "National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry Residual Risk and Technology Review; Final Rule" ("Final Rule"). EPA's Final Rule is the result of EPA's obligation to periodically revisit and review its industry-specific emissions standards for hazardous air pollutants, which are non-conventional pollutants that are also known as air toxics. 42 U.S.C. § 7412(d)(6). EPA promulgated its initial air toxics emissions standards for cement kilns on June 14, 1999. 64 Fed. Reg. 31,898 (June 14, 1999). The Final Rule is the product of EPA's first review of its emissions standards for air toxics from cement kilns. 83 Fed. Reg. at 35,124-25.

In this "risk and technology review" process, EPA must consider developments in pollution control technology and evaluate the residual risk

to public health risk of its technology-based emissions standards to ensure that those standards provide an "ample margin of safety" to the public. *Id*. Despite the passage of more than a decade, EPA's risk and technology review yielded no improvement to EPA's existing air toxics emissions standards for cement kilns. 83 Fed. Reg. at 35,126 ("[W]e determined that there are no developments in practices, processes, and control technologies that warrant revisions to the [emissions] standards for this source category. . . Therefore, we are not requiring additional control under [Clean Air Act] section 112(d)(6).").

Rather than improve pollution controls for cement kilns, the Final Rule weakens *pre-existing* compliance requirements for this category of pollution sources. Bowing to pressure from the cement kiln industry, EPA introduced a six-month grace period to demonstrate compliance with EPA's air toxics emissions standards whenever cement kilns idle. 82 Fed. Reg. 44,254, 44,279 (Sept. 21, 2017) (National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry Residual Risk and Technology Review; Proposed Rule ("Proposed Rule")). EPA attempted to justify its six-month compliance grace period in its Proposed Rule, as follows:

> When sources are brought back on line [after a shutdown], they must immediately comply with [air toxics emissions standards] and other [Clean Air Act] requirements for existing facilities. The stakeholder asserts that this *mandatory compliance requirement* does not account for the fact that owners or operators must start the facilities back up and run them for periods of time to determine whether any measures must be taken to *come into compliance* with updated [air toxics emissions standards] or other standards.

Id. (emphasis added). Despite public comments criticizing the proposal as creating a six-month "compliance holiday" for cement kilns whenever they idle, the Final Rule adopted language that went even further than the Proposed Rule by explaining that the six-month grace period would begin to run "after coming out of the idle period" rather than after the original compliance deadline, as provided in the Proposed Rule. 83 Fed. Reg. at 35,130.

The Final Rule does not define the term "idle." This means that any cement kiln shutdown, no matter how brief, could qualify as an "idling" event, and trigger a six-month compliance exemption. Put another way, two idling events in a year could eviscerate federal air toxics compliance reporting for any kiln owner choosing to take full advantage of the Final Rule.

Cement kiln "idling" is far from unusual. Apart from extended annual maintenance shutdowns, cement kilns also experience shorter shutdowns for

a variety of other planned and/or unplanned reasons throughout the year. *See, e.g.*, Exhibits A-C to accompanying Declaration of Suma Peesapati in Support of States' Request for Judicial Notice. Given the apparent frequency of cement kiln idling events, the Final Rule risks extended, industry-wide noncompliance with EPA's air toxics emissions standards. If permitted here, EPA could extend its novel, six-month idling exemption to other industries in the future.

II. THE FINAL RULE EXACERBATES ENVIRONMENTAL INJUSTICE.

The resulting delay of the cement industry's deadline to "come into compliance" with Clean Air Act's air toxics requirements carries serious public health risks to communities that surround these major industrial sources of hazardous air pollution. 82 Fed. Reg. at 44,279. Because California's nine cement kilns are disproportionately located in or near low-income communities and communities of color, the Final Rule threatens to exacerbate environmental injustice in the State. In particular, according to California Environmental Protection Agency's Office of Environmental Health Hazard Assessment ("OEHHA"), fifty-six percent of California's

cement plants are located within, or within a half-mile of, communities designated by the State as "disadvantaged" under California law.[1]

The California Environmental Protection Agency ("CalEPA") evaluates a community's "disadvantage" based on geographic, socioeconomic, public health, and environmental hazard criteria. Cal. Health and Saf. Code § 39711. "Disadvantaged communities" may include, but are not limited to: 1) Areas disproportionately affected by environmental pollution and other hazards that can lead to negative public health effects, exposure, or environmental degradation; and 2) Areas with concentrations of people that are of low income, high unemployment, low levels of home ownership, high rent burden, sensitive populations, or low levels of educational attainment. *Id*. at § 39711 (a), (b).

According to EPA's own analysis, this trend is not limited to California. Communities of color and children bear a disproportionate pollution burden from Portland Cement kilns across the nation. 82 Fed. Reg. 44,254, 44,275-76 (Sept. 21, 2017) (stating the demographics of people

[1] OEHHA, *Tracking and Evaluation of Benefits and Impacts of Greenhouse Gas Limits in Disadvantaged Communities: Initial Report*, (February 2017), at p.16 (Available at: https://oehha.ca.gov/media/downloads/environmental-justice/report/oehhaab32report020217.pdf)

impacted by cement kiln emissions compared to the national percentage as follows: Native American (1.6 percent compared to 0.8 percent nationally), Hispanic or Latino (24 percent compared to 18 percent nationally) and children aged 0 to 17 (32 percent compared to 23 percent nationally)). Children are particularly susceptible to the ill-effects of air toxics. *See* accompanying Declaration of Dr. John Budroe, ("Budroe Decl.") at 3: ¶7. This is because "early-life exposures to air toxics contribute to an increased lifetime risk of developing cancer, or other adverse health effects, compared to exposures that occur in adulthood." *Id.* In short, because cement kilns disproportionately harm communities of color and other pollution-burdened or vulnerable populations, the Final Rule's six-month compliance exemption raises serious environmental justice concerns.

III. CALIFORNIA HAS STANDING TO CHALLENGE THE FINAL RULE.

Apart from the localized environmental justice considerations discussed above, California is challenging the Final Rule's six-month compliance exemption to abate the associated increase in air toxics, which carry environmental and health-related cost burdens to the State. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (requiring injury-in fact, causation and redressability to support Article III standing). These concrete

harms support California's standing to protect its sovereign and proprietary interests in this case. *Mass. v. EPA, 549 U.S.* 497, 520 (2007); *accord Air Alliance Houston, et al. v. EPA*, *et al*., No. 17-1155, 2018 WL 4000490, at *6 (D.C. Cir. Aug. 17, 2018) ("'[T]here is no difficulty in recognizing [a state's] standing to protect proprietary interests or sovereign interests.'") (quoting 13B Wright & Miller, Fed. Prac. & Proc. § 3531.11.1, Government Standing – States (3d. ed.)).

A. California Has Standing to Protect its Quasi- Sovereign Interests.

"States are not normal litigants" for purposes of standing. *Mass. v. EPA*, 549 U.S. at 518. This is particularly true when, as here, a state challenges an EPA rulemaking under the Clean Air Act. *Id.* at 519-20. As explained by Supreme Court, Congress created the Clean Air Act to force EPA to protect states from excessive air pollution and to provides states with the concomitant procedural right to challenge EPA's failure to live up to that obligation. *Id*. For these reasons, coupled with California's "stake in protecting its quasi-sovereign interests," California is "entitled to special solicitude" in the Court's standing analysis in this case. *Id*.

Included in California's sovereign interests are the health and welfare of the People of California. Continuous compliance with EPA's air toxics

emissions standards is crucial to the health of Californians. Those federal emissions standards thus invoke California's sovereign interests.

> Exposure to these [hazardous air pollutants from cement kilns] can cause reversible or irreversible health effects including carcinogenic, respiratory, nervous system, developmental, reproductive and/or dermal health effects.…The [1999] rule provides protection to the public by requiring portland cement manufacturing plants to meet emission standards reflecting the application of the maximum achievable control technology (MACT).

64 Fed. Reg. 31,898. (June 14, 1999) (National Emission Standards for Hazardous Air Pollutants for Source Categories; Portland Cement Manufacturing Industry; Final Rule).

EPA's technical support document for the Final Rule contains a lengthy list of toxic chemicals emitted by cement kilns. EPA-HQ-OAR-2016-0442-0222, at 35-36. That document also states that the air toxics "emitted in the largest quantities [from cement kilns] are hydrochloric acid, formaldehyde, acetaldehyde, benzene, xylene(s), toluene, naphthalene, and styrene." *Id.* at 5. With respect to persistent and bioaccumulative hazardous air pollutants, cement kilns emit "mercury compounds, lead compounds, arsenic compounds, cadmium compounds, and dioxins," among others. *Id*. EPA's own findings show that these toxic chemicals cause cancer as well as other diseases. *Id.*

California's analysis of cement kiln emissions confirms EPA's findings. As explained by Dr. John Budroe in his accompanying declaration ("Budroe Decl."), the Final Rule's compliance exemption risks increased emissions of inorganic metals, antimony, arsenic, beryllium, cadmium, carbonyl sulfide, chromium (III) and (VI), hydrochloric acid, cobalt, lead, manganese, mercury, nickel selenium, acetaldehyde, benzene, poly-chlorinated dibenzo-p-dioxins and dibenzofurans ("PDBDs/PDBFs"), formaldehyde, naphthalene, polyaromatic hydrocarbons ("PAHs"), styrene, toluene and xylenes. Budroe Decl. at 3-4: ¶ 8. Apart from cancer, the human health impacts from these chemicals include cardiovascular toxicity, dermal toxicity, developmental/reproductive toxicity, hematologic toxicity, hepatic toxicity, immune system toxicity, neurological toxicity, renal toxicity, and respiratory toxicity. *Id.* at 4: ¶ 9.

In its 1999 rulemaking establishing initial air toxics emissions standards for the industry, the EPA estimated that its rule would "reduce nationwide emissions of [hazardous air pollution] from portland cement manufacturing facilities by approximately . . . 90 tons per year (tpy), and particulate matter (PM) by approximately 5,200 tpy." 64 Fed. Reg. at 31,898. By providing cement kilns an additional six months to "come into compliance" with EPA's air toxics emissions standards whenever they

"idle," the Final Rule threatens to undo these purported environmental and public health gains. These harms go to the heart of California's quasi-sovereign interests and are thus sufficient to support California's standing in this case.

B. California Has Standing to Protect Its Proprietary Interests.

Increases in air toxics also carry costs to the State of California. For many, if not most, cement kilns in the State, EPA's air toxics emissions standards are the sole compliance mechanism for controlling hazardous air pollutants. *See* accompanying Declaration of Emily Wimberger ("Wimberger Decl.") at 5: ¶9. EPA's six-month compliance exemption therefore shifts regulatory and health care cost burdens to the State of California, creating "pocketbook" injuries to California that support proprietary standing in this case. *See Air Alliance Houston*, *supra*, 2018 WL 4000490, at *6 (D.C. Cir. Aug. 17, 2018).

More specifically, in order to avoid the health impacts of the Final Rule, California must commit significant staff time and resources to evaluate whether additional state regulations or permit requirements are necessary to ensure that emissions of hazardous air pollutants do not increase in the State. Wimberger Decl. at 5-6. The California Air Resources Board's resources are

already limited and it would either have to divert resources from other programs (detracting from those programs' public health benefits and goals) or secure more funding from the Legislature. *Id*. at 6: ¶11.

In addition, given the Final Rule's environmental justice impacts described above, the State carries a disproportionate risk of increased health-related costs, including increased emergency room visits, hospitalizations and ongoing care. *Id*. at 4-5. This is because populations with low socioeconomic standings are more susceptible to health problems from exposure to air pollution, and because these vulnerable populations are more likely to rely on Medi-Cal, which is a low-income health insurance program administered by the State. *Id*. In short, the Final Rule creates additional regulatory and public health costs to California. *Id.* at 4-6. These costs are sufficient to support California's standing in this case. *See Air Alliance Houston, supra*, 2018 WL 4000490, at *6.

IV. ILLINOIS' INTEREST IN CEMENT KILN AIR TOXICS REGULATION.

Illinois also has a vital interest in ensuring that federal regulations applying to air toxics from cement kilns are not revised to be less protective of health for the State's residents. The Final Rule's weakened compliance requirements will directly and immediately apply to emission sources within

Illinois, jeopardizing its residents' health. Furthermore, Illinois cannot exert its own regulatory authority to retain existing compliance requirements without expending substantial time and resources.

Illinois law directly incorporates federal air toxics regulations. The Illinois Environmental Protection Act states that the Clean Air Act's provisions "relating to the establishment of national emission standards for hazardous air pollutants are applicable in this State and are enforceable under this Act." 415 ILCS 5/9.1(b) (2016). When Illinois' legislature enacted this statutory provision, state regulators repealed rules that applied to hazardous air pollutants. 35 Ill. Adm. Code Part 231 (repealed, see "Board Note").

Consequently, the permits for cement kilns granted by the Illinois Environmental Protection Agency directly cite federal emission standards. *E.g.*, Illinois EPA, Operating Permit for Illinois Cement Company Facility in LaSalle, Illinois at 70 (April 25, 2018), *available at* https://external.epa.illinois.gov/DocumentExplorer/Documents/Index/170000105614; Illinois EPA, Construction Permit for Lafarge Midwest Facility in Grand Chain, Illinois (August 2, 2017), *available at* https://external.epa.illinois.gov/DocumentExplorer/Documents/Index/170000128270; Illinois EPA, Compliance Date Extension for St. Marys Cement

Facility in Dixon, Illinois (April 25, 2015), *available at* https://external.epa.illinois.gov/DocumentExplorer/Documents/Index/170000109344. Thus, the Final Rule's weaker protections would immediately apply in Illinois upon becoming effective.

Because the federal hazardous air pollutant regulations apply in Illinois by statute, legislation would be necessary to allow Illinois to retain existing protections. New implementing regulations would also likely be necessary. These steps would involve significant time and effort by entities throughout state government.

V. THE STATE INTERVENORS' INTERESTS ARE UNIQUE.

The Clean Air Act embodies "a cooperative state-federal scheme for improving the nation's air quality." *Vigil v. Leavitt*, 381 F.3d 826, 830 (9th Cir. 2004). The federal EPA establishes the national air quality standards and the states devise, adopt, and implement state-specific strategies to satisfy those standards. *Id*. States thus play a co-equal role in the Clean Air Act's implementation and success. State Intervenors' co-equal regulatory status under the Clean Air Act renders their interests separate from the private litigants in this case.

Moreover, as representatives of the interests of their citizens, State Intervenors have unique sovereign interests in limiting toxic pollution to

protect public health and welfare, and to limit regulatory and health-related costs borne by state government. *See Mass. v. EPA*, 549 U.S. at 521-23. These interests are not represented by the private, nonprofit environmental petitioners in this case. Finally, because State Intervenors are charged with implementing the Final Rule as part of their delegated permitting authority under Title V of the Clean Air Act, 42 U.S.C. §§ 7661–7661f, they have a unique interest in ensuring that those limitations can be implemented effectively and efficiently. For all of these reasons, the State Intervenors' interests may not be adequately represented by the other parties to this case.

VI. STATE INTERVENORS HAVE MET THEIR PROCEDURAL OBLIGATIONS.

This motion is timely under D.C. Circuit Rule 15(d) and Fed. R. App. P. 26(a), because it is filed within 30 days of the petition for review in Case No. 18-1260. This timely request will not unduly delay or prejudice the rights of any other party. This litigation is in its very early stages, and intervention will not interfere with any schedule set by the Court.

Before filing this motion, counsel for the State of California contacted the parties to these consolidated cases: Petitioners Downwinders at Risk and Sierra Club consented to this motion and Respondent EPA stated that it did not oppose California's intervention. The State of Illinois also contacted

Respondent EPA, which has not expressed a position as to Illinois' intervention in this case.

Counsel for the State of California represents, pursuant to D.C. Circuit Rule 32(a)(2), that the other parties listed in the signature blocks below consent to the filing of this motion.

For the foregoing reasons, State Intervenors respectfully request that this Court grant their motion to intervene.

Dated: October 22, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, the undersigned counsel for movants certifies that this motion:

(i) complies with the type-volume limitation Rule 27(d)(2) because it contains 2,767 words; and

(ii) complies with the typeface requirements of Rule 27(d)(1)(E) because it has been prepared using Microsoft Office Word 2016 and is set in Times New Roman font in a size equivalent to 14 point.

October 22, 2018 /s/ Suma Peesapati
Suma Peesapati

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Unopposed Motion for Leave to Intervene as Respondents was filed on October 22, 2018, using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Suma Peesapati
Suma Peesapati