BEFORE THE ENVIRONMENTAL APPEALS BOARD

U.S. ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In re: ESSROC Cement Corporation	)	
	)	Appeal No. RCRA 13-03
RCRA Permit No. IND 005 081 542	)	

CEMENT KILN RECYCLING COALITION'S
AMICUS BRIEF ON BEHALF OF PETITIONER

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INTEREST OF AMICUS

Amicus Cement Kiln Recycling Coalition ("CKRC") was formed in 1990. CKRC represents U.S. cement manufacturers that recover energy from hazardous and non-hazardous secondary materials by using them as alternative fuels in portland cement kilns. These alternative fuels are used as substitutes for coal, the principal fossil fuel used in cement kilns worldwide. In EPA's regulatory parlance, cement kilns that utilize hazardous waste fuel ("HWF") are known as hazardous waste combustors ("HWCs").

Since 1991, the process of combusting HWF in cement kilns has been comprehensively regulated by EPA through an evolving series of regulations and policies under both the Resource Conservation & Recovery Act ("RCRA"), 42 U.S.C. §§ 6901, *et seq*., and the Clean Air Act (CAA), 42 U.S.C. §§ 7401, *et seq*. As the years have passed, the regulations have become increasingly stringent. At every stage of EPA's HWC regulatory and policy evolution, CKRC has participated as an advocate on behalf of its members. For a summary of the RCRA and CAA regulatory/policy evolution for HWCs, see *CKRC v. EPA*, 493 F.3d 207, 211-214 (D.C. Cir. 2007) ("*CKRC II*"). *See also CKRC v. EPA*, 255 F. 3d 855 (D.C. Cir. 2001) ("*CKRC I*"). As is obvious from the *CKRC II* opinion cited above, CKRC has expended substantial efforts on issues involving EPA's regulations and policies for site-specific risk assessments ("SSRAs") under RCRA.

Petitioner ESSROC Cement Corporation ("ESSROC") is a longstanding member of CKRC. In the proceedings below, EPA Region V (the "Region") issued a RCRA permit (the "Permit") to ESSROC. Petitioner is challenging a key provision of the Permit (the annual mercury feedrate limitation) that is purportedly based on EPA's SSRA regulations and policies. CKRC believes that if the SSRA positions and actions on which the Region based the Permit are

allowed to stand, all of CKRC's members could be significantly adversely affected. CKRC accordingly files this Amicus Brief to support ESSROC in its pending Petition.

PRELIMINARY STATEMENT

EPA issued "MACT" regulations under CAA §112 for HWC cement kilns in 2005 that included standards for mercury. *Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II*), 70 Fed. Reg. 59402 (Oct. 12, 2005). In issuing these standards, EPA emphasized repeatedly in its final rule preamble that it had found them "generally protective" of human health and the environment. *E.g.*, *id*. at 59504. As explained in ESSROC's Petition, the annual mercury feedrate limit that would be applicable to ESSROC's facility under these MACT standards would be 1,793.4 lb/year. Pet. 7. Yet through its use of the SSRA regulations and polices, the Region imposed a mercury limit of 87.91 lb/year. *Id.* at 8. To CKRC's knowledge (and we have surveyed our members) this 87.91 lb/year limit (less than 5% of the amount allowed under the "generally protective" MACT standard) is at a level that is wholly unprecedented and unnecessarily stringent for cement kiln HWCs.

As we explain below, we believe the EAB should grant the Petition for all of the reasons set forth in ESSROC's initial Petition and its Reply. In this Amicus Brief, we focus on three principal points:

(1) EPA's regulations prohibit the Region from requiring or performing a new SSRA because ESSROC had already performed one for its 2003 RCRA permit and there have been no subsequent changes in conditions likely to affect risk (40 C.F.R. §270.10(l)(1)(viii));

(2) the "particularly heavy burden" on Petitioner in this appeal (alleged by the Region in its August 7, 2013 Response to the Petition) is neutralized by EPA regulations and policies

making SSRAs the exception rather than the rule – especially in situations where an SSRA has previously been performed; and

(3) the annual mercury feedrate of 87.91 lb/year – which will impose very costly burdens on ESSROC – is premised on assumptions about human fish consumption in the vicinity of ESSROC's facility that are so preposterous that the Permit "represents a classic case" of arbitrary and capricious decision-making.

ARGUMENT

I. EPA'S REGULATIONS PROHIBIT THE REGION FROM REQUIRING OR PERFORMING A NEW SSRA

A. The Evolution of 40 C.F.R. §270.10(l) -- CKRC's Rulemaking Petition Followed by D.C. Circuit 2007 *CKRC II* Opinion

A key element of ESSROC's Petition is the point that the Region violated 40 C.F.R. §270.10(l) (hereafter, simply §270.10(l)) by requiring ESSROC to undergo a second SSRA process after it had already been required to undergo an SSRA process several years earlier. Pet. 9-11. We endorse ESSROC's arguments on this point, and believe the Board may benefit by this additional perspective from CKRC. For as we show below, EPA crafted and interpreted §270.10(l) – and the D.C. Circuit has interpreted §270.10(l) – in direct response to CKRC's advocacy.

1. Before 1999 MACT Standards: SSRA for *Every* HWC

As explained in the *CKRC II* opinion cited above (at pages 212-214), EPA first began regulating cement kiln HWC emissions through the so-called Boiler and Industrial Furnace ("BIF") Rules under RCRA in 1991. Because EPA concluded that the emission standards required under the BIF Rules might be inadequate to protect human health and the environment, EPA established a policy in 1994 that required *every* HWC to go through an SSRA process when seeking a RCRA permit. The inquiry of the SSRA process would be to determine if more

stringent limits (than the BIF rule emission limits) would be necessary to protect human health and the environment. *CKRC II*, 493 F.3d at 212. The requirements to conduct SSRAs, as well as the methods and procedures for conducting SSRAs, were not set forth in regulations but rather in "guidance" documents. *Id*. At this point, §270.10(l) did not exist in any form and no other regulatory provision said anything about SSRAs.

2. After 1999 MACT Standards: SSRA When There Is "Some Reason" To Want One

As further explained by the D.C. Circuit, in the late 1990s EPA began a process of issuing more stringent CAA MACT emission limitations for HWCs – first with final standards issued in 1999, followed up with new "interim" standards in 2002, and then followed with even tighter new final MACT standards in 2005. *Id*. at 213. Throughout this period, CKRC was actively engaged in advocacy regarding the SSRAs.

When EPA issued its 1999 CAA MACT standards, EPA recognized (partially in response to repeated urging by CKRC) that because the MACT standards were more stringent than the 1991 BIF Rules, the 1994 policy of requiring an SSRA for *every* RCRA permit or permit renewal might be unnecessary. EPA accordingly revised its policy to recommend that RCRA permit writers consider on a case-by-case basis whether SSRAs should be required. EPA's policy was quite vague and provided no detail, however. As EPA summarized the policy in 1994:

> We further stated that while SSRAs are not anticipated to be necessary for every facility, they should be conducted where there is *some reason to believe* that operation in accordance with the MACT standards alone may not be protective of human health and the environment.

Proposed Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II), 69 Fed. Reg. 21198, 21325 (April 20, 2004)

(emphasis added). At this point, EPA's regulations still contained no provisions relating to SSRAs.

Throughout the late 1990s and early 2000s RCRA permit writers continued to require cement kiln HWCs to undergo the SSRA process in every instance. The EPA regions always seemed to find "some reason," and in effect it was open season for requiring SSRAs. CKRC members' experience with the SSRAs was frustrating, extraordinarily time-consuming, and very expensive. CKRC and its members believed that with the evolution of much tighter national emission standards under the CAA, there was no further need to require SSRAs to assure protection of health and the environment. CKRC also believed that to provide more uniformity and regulatory certainty, whatever program EPA might retain for a limited use of SSRAs should be set forth in regulations through the rulemaking process – not simply in "guidance" documents. CKRC hoped that regulatory provisions might at least end the "open season" on SSRAs by providing limits on when an SSRA might be required for a facility in the future.

3. CKRC's 2002 Rulemaking Petition

Accordingly, on February 28, 2002, CKRC filed a rulemaking petition with EPA. *See* 69 Fed. Reg. at 21328 (where EPA first notices and seeks comment on the petition). In that petition CKRC first argued that in light of the ever-increasing stringency of CAA regulations that had already been issued (and would soon be tightened further), the SSRA program no longer served any legitimate purpose and should be repealed. CKRC argued in the alternative that if EPA refused to repeal the program outright, EPA should at least establish the program through regulations – not simply guidance. More particularly, CKRC argued that the following elements of the program should be set forth in regulations: (a) the criteria for determining, during a RCRA permit process, whether an SSRA should be required for a facility; and (b) the methods and procedures for conducting an SSRA. *Id.*

In arguing for specific regulatory provisions for determining whether an SSRA is needed, CKRC was seeking to limit permit writers' discretion more tightly than the open-ended and arbitrary "some reason" test. As further explained below, this plea from CKRC ultimately produced §270.10(l) in its current form.

4. EPA's 2004 Proposed Response to CKRC Petition – §270.10(l) "Short Form"

In its 2004 rulemaking proposal for tighter HWC MACT standards, EPA noticed CKRC's petition for public comment, and offered EPA's proposed response. *Id.* at 21328-31. EPA rejected outright CKRC's arguments that the SSRA program should be repealed and that (in the alternative) the methods and procedures for conducting an SSRA should be set forth in regulations rather than guidance. But EPA stated its willingness to provide some regulatory language for determining whether an SSRA would be needed for a particular facility: "we are proposing to grant CKRC's request in part by promulgating an explicit authority to require SSRAs on a site-specific basis using notice and comment rulemaking procedures." *Id.* at 21329.

As for specific regulatory language, EPA proposed to add the new paragraph (l) to §270.10 as follows:

> (l) If the Director concludes that there is reason to believe that compliance with the standards in 40 CFR part 63, subpart EEE alone may not be protective of human health or the environment, the Director shall require additional information or assessment(s) that the Director determines are necessary to ensure protection of human health and the environment. The Director also may require a permittee or an applicant to provide information necessary to determine whether such an assessment(s) should be required.

Id. at 21383.

CKRC was disappointed with EPA's proposed response to CKRC's 2002 rulemaking petition, and submitted extensive comments for the record. Among other issues CKRC raised,

CKRC strongly criticized the proposed form of §270.10(l) quoted immediately above as being wholly insufficient to restrain permit-writers' discretion.

5. EPA's Final (2005) Response to CKRC's Petition (2005): An Expanded §270.10(l)

EPA's final response to CKRC's petition was included with the final new HWC MACT standards in the October 12, 2005 Federal Register. *See* 70 Fed. Reg. at 59510-16 ("*What Are EPA's Responses to the Cement Kiln Recycling Coalition's Comments on the Proposal and What is EPA's Final Decision on CKRC's Petition?"*). For the most part EPA continued to reject CKRC's arguments.

EPA did make an effort, however, to satisfy CKRC in one limited (but key) respect: EPA added a great deal more language to §270.10(l) than it had proposed, including the two subparagraphs that are at issue in Petitioner's first argument: §270.10(l)(viii) and §270.10(l)(ix). As EPA stated "While it does not provide exactly what CKRC requested . . . EPA has revised §270.10(l) to provide more detail." *Id*. at 59514.

6. D.C. Circuit Judicial Review of EPA's Final Response (Concluded 2007)

CKRC sought judicial review of EPA's final disposition of CKRC's petition in the D.C. Circuit. *CKRC II*, 493 F.3d 207. CKRC raised the same points before the Court that it had been raising before the agency, including the argument that if there were to be an SSRA program, the methods and procedures for conducting SSRAs should be set forth in regulations, not guidance. On this point, CKRC lost. *Id*. at 226-28.

CKRC also argued that §270.10(l) – even as expanded from its proposed "short form" – was still impermissibly vague and failed adequately to curb permit writers' discretion. On this point, although the Court refused to vacate or remand §270.10(l) as requested, *the Court's ruling speaks directly to the issues raised by Petitioner in part 1 of its Petition and strongly affirms*

Petitioner's arguments. For as the Petitioner explains in some detail, the Court ruled that (1) the "most important" of the nine factors specified in §270.1(l) is the eighth; (2) the eighth factor meaningfully "cabins" permit writers' ability to require followup SSRAs; and (3) the ninth item ("other factors as may be appropriate") does not expand upon the eighth (or any of the other factors). *Id.* at 221.

B. EPA's Regulations, Preamble Statements, Background Document Statements, and the D.C. Circuit *CKRC II* Decision All Show That the Region Erred in Requiring a Second SSRA for ESSROC

The foregoing shows that even though CKRC was unsuccessful in obtaining most of the relief it originally sought in its 2002 Rulemaking Petition, it was at least successful in securing two principal points from EPA and the D.C. Circuit that are directly relevant to the Petition now before the EAB:

1. Under §270.10(l)(1)(viii), a facility that has undergone one SSRA cannot be required to undergo a second unless there are changed circumstances relating to the facility's operations or receptors of concern; and

2. The "such other factors as may be appropriate" language in §270.10(l)(1)(ix) cannot be construed to undercut the prohibition of §270.10(l)(1)(viii).

The Region's approach below – and the Region's arguments in its Response before this Board – would eviscerate even these limited gains CKRC worked so hard for so long to secure. While we need not duplicate or repeat the points made by Petitioner which show the Region's position to be unfounded, we add several points for the Board to consider.

First, EPA's October 12, 2005 preamble says repeatedly that not all facilities will have to undergo an SSRA.[1] While EPA is somewhat vague on this point and continues to leave much discretion for permit writers generally, on one point EPA is quite clear (again repeatedly): because of §270.10(l)(1)(viii), facilities that have already undergone the process of an SSRA will not have to undergo it again except in these limited circumstances: "unless a facility significantly changes its operations or if receptors change such that an increase in risk is anticipated as a result." 70 Fed. Reg. at 59507.

The Region argues that EPA somehow did not mean what it said in the preamble quote directly above. The Region argues that the language in §270.10(l)(1)(viii) referring to "conditions" is not limited to facility operations or receptors, but includes changes "in the science that supported the original risk assessment." Resp. at 11. Despite the fact that this interpretation directly contradicts EPA's preamble statement quoted above and other EPA statements in the final rulemaking documents (described immediately below), this interpretation would grossly undercut EPA's commitment – repeated virtually *ad nauseum* in the final rule preamble and background documents – that very few (if any) facilities would be required to undergo a *second* SSRA.[2]

The science that supports risk assessments is constantly evolving. EPA stressed this point innumerable times in rejecting CKRC's contention that EPA should issue regulations (not

[1] *See e.g.,* 70 Fed. Reg. at 59506 (stating "that there are combustion units for which an SSRA will not be necessary); *id.* at 59510 (stating SSRAs "will…be necessary at *some* facilities") (emphasis added).

[2] *See* 70 Fed. Reg. at 59504 ("the Agency generally does not expect that facilities that have conducted risk assessments will have to repeat them"); *id.* at 59507 ("SSRA's generally represent a *one-time* cost…") (emphasis added); *id.* at 59511, n. 241 ("[W]e expect that facilities that have previously conducted an SSRA will not need to conduct another in consideration of today's final standards.").

just guidance) for the methods and procedures for conducting SSRAs. For just one representative sample, EPA made the following points in the October 2005 preamble in response to CKRC's petition:

> As we previously explained, risk assessment – especially multi-pathway, indirect exposure assessment – is a highly technical and evolving field. Any regulatory approach EPA might codify in this area is likely to become outdated, or at least artificially constraining, shortly after promulgation in ways that EPA cannot anticipate now.
>
> . . .
>
> Today, however, risk assessments are more complex due to the necessary inclusion of multi-pathway and indirect exposure routes. Given the complexity of multi-pathway and indirect exposure assessments and the *fact that risk science is continuously evolving*, it would be difficult and again, overly constraining, to codify risk parameters today.

70 Fed. Reg. at 59512 (emphasis added).

EPA made the same representation to the D.C. Circuit in convincing the Court to uphold EPA's position that rulemaking for the methods and procedures would be inappropriate. As the D.C. Circuit ruled in *CKRC II*:

> Moreover, these statements are fully in accord with EPA's explanation of why this is an area that is uniquely fitted for a guidance approach, rather than regulation: risk assessors must have the flexibility to make adjustments for the specific conditions present at the source, and should be free to use the most recent assessment tools available rather than be limited to those that may be out-of-date because a regulation has not been revised.

493 F. 3d at 227 (in part quoting approvingly from EPA's preamble, internal quotes and brackets omitted).

Thus under the Region's interpretation that "change in science" is a "condition" contemplated by §270.10(l)(1)(viii), a permit writer could *always* justify a second SSRA for *every* facility. We would be back to the "open season" on SSRAs CKRC has worked for so

many years to curtail. The D.C. Circuit's ruling in *CKRC II* that §270.10(l) sufficiently "cabins" EPA regions' discretion would be rendered inoperative. 493 F. 3d at 221. And ironically, it would become inoperative with regard to the one condition (§270.10(l)(1)(viii)) that both EPA's final rule and the D.C. Circuit opinion state with most repetition and clarity limits the Region's discretion.

Moreover, in addition to the many preamble and D.C. Circuit quotes included in the Petition that show how the Region's interpretation is erroneous, we note that EPA's Response to Comment ("RTC") document also flatly contradicts the Region. In response to a comment from the Department of Defense regarding chemical demilitarization facilities, EPA stated:

> In response to the third point, we maintain our assumption that SSRAs generally represent a one-time cost unless a facility significantly changes *operations*.

Revised Response to Comments on April 20, 2004 HWC MACT Proposed Rule, Volume V, at 29, Docket No. EPA-HQ-OAR-2004-0022-0438.

We also note that EPA in its preamble and in the RTC several times provides examples of what it means by the regulatory language "changed conditions" in §270.10(l)(1)(viii). The Petition quotes several of these examples. Pet. 9-10. All of EPA's numerous examples refer to changes in operations or receptors; EPA never breathes a word about changes in science.

We should also call the Board's attention to representations EPA's counsel made to the Court during the *CKRC II* oral argument. As pointed out by the Petition, the D.C. Circuit opinion relies on EPA counsel's representations to support the Court's holding that §270.10(l) – and particularly §270.10(l)(1)(viii) – operates to "cabin" regions' discretion to require followup SSRAs. *E.g.*, *CKRC II*, 493 F.3d at 221.

The transcript of the oral argument (excerpts attached as Attachment A) reinforces and illuminates our points quite strongly. For instance EPA counsel's primary theme in arguing that

CKRC's case was not "ripe" for judicial review was, citing §§270.10(l)(1)(viii), that CKRC's members may never be required to undergo an SSRA again because all of their facilities had already conducted one. In his oral argument on April 16, 2007, EPA's counsel (David J. Kaplan of the U.S. Department of Justice) stated the following near the very opening of his presentation:

> Secondly, I should point out, Your Honor, that the regulation that EPA did promulgate identifies the kind of situation that we have here, Section 270.10(l), this is item number eight talks about adequacy of any previously conducted risk assessment given any subsequent changes in conditions likely to affect risk.
>
> So, what we have here is a situation in which it's not even likely that another whole risk assessment is going to be required at these facilities. They're using this lawsuit to say well, let's make sure of that, that's what this lawsuit's designed to do, to preclude the inquiry of whether changed circumstances have occurred in the last 10 years, perhaps, to see if a supplemental risk assessment information is necessary and additional terms required.

Tr. 43-44 (Apr. 16, 2007).

And the examples EPA's counsel gave in several passages consistently describe the "changes in conditions" language in §270.10(l)(1)(viii) in terms of operations or new emissions or receptors. Mr. Kaplan never breathed a word about "changed science" to the Court:

> EPA in the preamble stated it doubts that additional risk assessments will be needed, that they won't need to be repeated by facilities that already have them unless there is certain circumstances, for example, maybe since those 10 years have passed another source has moved in the area, a power plant was put down the road from a cement kiln that the Petitioner represents. Well, you need Site Specific Risk Assessment, maybe you'll need Site Specific Risk Assessment to look at that, it's a changed circumstance.

Tr. 44.

In response to a question from Judge Garland (the author of the *CKRC II* opinion) regarding whether §270.10(l) "cabins" the discretion of the regions, Mr. Kaplan again used an

example relating to site-specific conditions, not changed science, when referring to the "changed circumstance" provision of §270.10(l)(1)(viii):

> It cabins the areas of, for which Site Specific Risk Assessment information can be requested. I really can't do it without an example. Suppose you've got a changed circumstance, again, my example of a new facility having been built down the road over the last 10 years, then that cabins the focus of the inquiry, that's the concern we've got.

Tr. 72-73.

Finally, we stress our agreement with the Petition that §270.10(l)(1)(ix) cannot allow the Region to tear down the §270.10(l)(1)(viii) cabin. This is a key portion of the D.C. Circuit's *CKRC II* holding, 493 F.3d at 221. And again, if §270.10(l)(1)(ix) were to be read in the manner the Region would like, all of the numerous statements EPA made regarding second SSRAs being the clear exception would be flatly contradicted.

One final quote from EPA counsel's representations to the D.C. Circuit ties our points regarding §270.10(l)(1)(viii) and §270.10(l)(1)(ix) together quite nicely:

> JUDGE GARLAND: So, you're saying that the factors one through eight put a limit on the more broad description of information required under (l)?
>
> MR. KAPLAN: Exactly, Your Honor. And in the case that we've got before us, 14 facilities about to go through new permit, are going to have to go through new permit renewal process, that's the one that's going to be most pertinent to them. And the question there in that circumstance is going to be well, are there changed circumstances? Has a new facility moved next door, such that we've got not just, for example, the cadmium coming from your plant, but now the cadmium coming from another plant that we need to now go ahead and assess. And it's a very site specific type of inquiry. And so, in that inquiry – and so, EPA didn't try to list every species of information that would be required, it couldn't. And so, you have to have these kind of general types of factors and standard, and then in that context they'll say all right, consideration here is this new plant down the road, or it could be that there used to be only farm fields that surrounded the area, or forest, but now there's a thriving suburban metropolis. Well, you know, there's got

> to be another, maybe there has to be a supplemental risk assessment inquiry.

Tr. 60-61.

II. THE "PARTICULARLY HEAVY BURDEN" IN THIS CASE RESTS WITH THE REGION, NOT WITH THE PETITIONER

Citing "deference" case law the government always cites in its briefs, the Region states that Petitioner has a "particularly heavy burden" in this case in seeking EAB review. Resp. 8. We respectfully submit that the opposite is true in this case. When the issue is whether an SSRA should be required, EPA's regulations and policies are quite clear that the "onus" is on the Region to justify the need – *especially (as in this case) when a facility has already undergone an earlier SSRA.*

We believe this point is already demonstrated through all the discussion in Part I above and in ESSROC's Petition. Pet. 11-13. We would only add the following additional points. First, EPA states quite clearly and pointedly in the 2005 final HWC MACT rule preamble, in response to CKRC's comments: "Moreover, the language of §270.10(l) makes clear that the onus initially falls on the permitting authority to identify the basis for its conclusion that the MACT standards may not be sufficiently protective." 70 Fed. Reg. at 59514. EPA emphasized earlier in the same response that "the onus falls on the permitting authority to identify the basis for its determination." *Id*.

Second, we note that EPA's 2005 final rule preamble refers to an April 10, 2003 memorandum to the regions from OSWER Assistant Administrator Marianne Lamont Horinko for "additional clarification on the appropriate use of the SSRA policy." 70 Fed. Reg. at 59508, n. 240 (Attachment B). As stated on page 3 of the Horinko Memorandum (emphasis added): "Where the permitting authority concludes that a risk assessment is necessary for a particular combustor, the need should be *substantiated* in each case."

These agency policy statements about the "onus" and the need for "substantiation" apply to the basic, general issue of whether *any* SSRA must be performed. When one considers the language of §270.10(l)(1)(viii) and the numerous statements in EPA's final rulemaking preamble and the *CKRC II* opinion, one can easily see that the Region – not the Petitioner – has the burden when the issue is whether a *second* SSRA must be performed. And for all the reasons articulated in the Petition, the Region has failed to meet that burden.

III. THE REGION'S INSISTENCE UPON USING PREPOSTEROUS FISH CONSUMPTION ASSUMPTIONS RENDERS ITS DECISION ARBITRARY AND CAPRICIOUS

As explained in the Petition, the major driver in taking the MACT-derived mercury limit of 1,793.4 lb/year down to the unprecedented 87.91 lb/year limit was EPA's refusal to depart from a "default screening" number derived from EPA "guidance" (not a regulation, but "guidance"). Pet. 15-18. As further explained in the Petition, the Region assumed there is at least one adult who will be fishing on a continuous basis for twelve months a year, and continuously for the next thirty years, from one particular small lake near the ESSROC facility. Moreover, the fish that adult catches from that single lake will comprise the majority of that adult's diet for all of those thirty years. More specifically, that adult will eat the fish caught from that one lake for 212 of the adult's meals per year, or approximately 18 times each month (again, continuously for thirty years). *Id.* at 16.

Based on the "indirect" risks of the Petitioner's emissions calculated to apply to this phantom individual, the Permit would impose extremely costly burdens on Petitioner. These extreme costs would have absolutely no rational relationship to health protection for real humans. As explained in the Petition (and in Petitioner's Reply), EPA never intended for the "screening" default assumptions in EPA's "guidance" to be used in the manner the Region has used them in this case. *Id*. at 15-17. The assumption is on its face preposterous, particularly in

light of the facts relating to the lake in question supplied to the Region during the permitting process.

The Region's refusal to consider the real world here is – we believe – a "classic case of arbitrary and capricious" decisionmaking. *CMA & CKRC v. EPA*, 217 F.3d 861, 865 (D.C. Cir. 2000). Certainly there is nothing "site-specific" about this site-specific risk assessment. If there is any person in the United States who could be eating that much fish caught from one small lake in a county park continuously for thirty years, certainly the facts brought before the Region were sufficient to show that person is not getting his or her fish from the small lake in question near Petitioner's facility.

The cases cited on pages 11 and 12 of the Petition show how this Board has – totally in synch with Supreme Court and D.C. Circuit precedent – required that regional permit decisions be based on "all relevant facts" in order to achieve a "reasoned" permit decision. We believe any reviewing court on this record would – and should – be shocked by the Permit decision in this case. The preposterous assumption driving the mercury limitation is based on an initial "screening" and "default" assumption derived from "guidance" (not even a regulation). The "relevant facts" were not allowed to influence the decision. It is hard to imagine a more "unreasoned" decision.

CONCLUSION

For all the foregoing reasons, we join Petitioner in urging the Board to grant review of the Petition and to remand the Permit to the Region.

Respectfully submitted,

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Dated: August 22, 2013

TABLE OF ATTACHMENTS

1. Attachment A – Excerpts from Oral Argument Transcript for *CKRC v. EPA*, 493 F. 3d 297 (D.C. Cir. 2007) (*CKRC II*).

2. Attachment B – Memorandum from Marianne Lamont Horinko, U.S. EPA OSWER Assistant Administrator, to Regional Administrators (April 10, 2003).

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Amicus Brief, including all relevant portions, contains less than 7,000 words.

Richard G. Stoll
Counsel for Amicus
Cement Kiln Recycling Coalition

Dated: August 22, 2013

CERTIFICATE OF SERVICE

Appeal No. RCRA 13-03
ESSROC Cement Corporation
Docket No. 005 081 542

I hereby certify, pursuant to the Rules of the Environmental Appeals Board of the U.S. Environmental Protection Agency, that I caused to be electronically filed the foregoing Amicus Brief on Behalf of Petitioner with the Environmental Appeals Board, and caused to be mailed (via e-mail and U.S. Mail) a true and correct copy to the Petitioner and Respondent, addressed as follows:

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Dated: August 22, 2013

ATTACHMENT A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CEMENT KILN RECYCLING COALITION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

No. 06-1005

Monday, April 16, 2007

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES HENDERSON, RANDOLPH AND GARLAND

APPEARANCES:

ON BEHALF OF THE PETITIONER:

RICHARD G. STOLL, ESQ.

ON BEHALF OF THE RESPONDENTS:

DAVID J. KAPLAN, ESQ.

water, or one particular problem of some other kind where they could do that.

MR. STOLL: I think there might in unique circumstances, but not in circumstances where they already have hundreds of thousands of pages of records about a certain activity, like ours.

JUDGE GARLAND: Okay.

JUDGE HENDERSON: Do you have any?

JUDGE RANDOLPH: No.

JUDGE HENDERSON: Okay. We'll give you some --

MR. STOLL: Thank you.

JUDGE HENDERSON: -- in rethought.

ORAL ARGUMENT OF DAVID J. KAPLAN, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. KAPLAN: May it please the Court, my name is David Kaplan representing EPA today. With me at counsel table is Laurel Celeste (phonetic sp.) with EPA's Office of General Counsel.

Before I address the threshold question of jurisdiction I want to put some context on this inquiry. Petitioners, Members are now going to be facing permit renewal processes, that's what this lawsuit's about, the permit renewal process. We've already heard there's 14 of such those facilities, they all have RCRA permits, they've already conducted Site Specific Risk Assessments in the past as part

of that process. What the Petitioner is here seeking is to dictate how that process will come. What they seek to do is to ensure that the result of that process are two things, first, that the 1991 RCRA regulations do not apply, that they get deferment; second, they're seeking to ensure that during that permit process EPA does not have the authority to request additional information if, for example, circumstances have changed since the last permit review, and if it gets that information and they see that there are additional risks EPA lacks the authority to impose additional terms. That's what's being sought in this particular context. It's an improper challenge.

First off, the deferment decision is inextricably linked with EPA's decision and finding that there needs to be authority to request Site Specific Risk Assessment information, and to impose additional terms. So, it's improper in that respect. Secondly, I should point out, Your Honor, that the regulation that EPA did promulgate identifies the kind of situation that we have here, Section 270.10(l), this is item number eight talks about adequacy of any previously conducted risk assessment given any subsequent changes in conditions likely to affect risk.

So, what we have here is a situation in which it's not even likely that another whole risk assessment is going to be required at these facilities. They're using this lawsuit

to say well, let's make sure of that, that's what this lawsuit's designed to do, to preclude the inquiry of whether changed circumstances have occurred in the last 10 years, perhaps, to see if a supplemental risk assessment information is necessary and additional terms required. They're using this lawsuit to try to dictate the outcome of what is necessarily as site specific permit inquiry. It's an inappropriate type of thing to do in a facial lawsuit like this.

And that's why, Your Honor, by and large we believe that this type of challenge is not ripe. The Court would be better situated to wait and see if in context there is a circumstance in which a risk assessment information is required of any of these facilities, and then to look at the context as to why to see if in fact it's an overly broad request, or if in fact it's improper under the statute. That important context is needed. EPA in the preamble stated it doubts that additional risk assessments will be needed, that they won't need to be repeated by facilities that already have them unless there is certain circumstances, for example, maybe since those 10 years have passed another source has moved in the area, a power plant was put down the road from a cement kiln that the Petitioner represents. Well, you need Site Specific Risk Assessment, maybe you'll need Site Specific Risk Assessment to look at that, it's a changed circumstance.

MR. KAPLAN: This Court has --

JUDGE RANDOLPH: -- amount of information?

MR. KAPLAN: -- and many courts have looked at situations where there's a list of factors, and there's a catchall at the end, the courts have considered that catchall has to be understood within the context of the limitations on all the, it's the void kind.

JUDGE GARLAND: It wouldn't make the things void on its face if there are any lawful applications, if the only problem is not, is the ninth one, then that one can be faced when it's necessary. Where is this argument about a change in circumstances? Where --

MR. KAPLAN: Well, if you go to addendum page 12 of my --

JUDGE GARLAND: I've got the C.F.R. Where was the section that you were --

MR. KAPLAN: It's 270.10(l)(1), you know, roman numeral eight.

JUDGE GARLAND: Subsequent changes. I see.

MR. KAPLAN: Yes. And --

JUDGE GARLAND: So, you're saying that the factors one through eight put a limit on the more broad description of information required under (l)?

MR. KAPLAN: Exactly, Your Honor. And in the case that we've got before us, 14 facilities about to go through

new permit, are going to have to go through new permit renewal process, that's the one that's going to be most pertinent to them. And the question there in that circumstance is going to be well, are there changed circumstances? Has a new facility moved next door, such that we've got not just, for example, the cadmium coming from your plant, but now the cadmium coming from another plant that we need to now go ahead and assess. And it's a very site specific type of inquiry. And so, in that inquiry -- and so, EPA didn't try to list every species of information that would be required, it couldn't. And so, you have to have these kind of general types of factors and standard, and then in that context they'll say all right, consideration here is this new plant down the road, or it could be that there used to be only farm fields that surrounded the area, or forest, but now there's a thriving suburban metropolis. Well, you know, there's got to be another, maybe there has to be a supplemental risk assessment inquiry.

JUDGE RANDOLPH: But all these factors are, this is a non-exhaustive list, it just simply says including, and then you've got nine factors, and the last one is, even expands the including, but it simply says, you know, whether it's protective of human health or environment you have to consider that, including as appropriate any of the following factors. So, this is a non-exhaustive list to begin with.

writer under the statute, and it's a substantive process.

JUDGE RANDOLPH: Are these regional EPA officers?

MR. KAPLAN: Yes. Yes. Yes, Your Honor.

JUDGE GARLAND: Are they appealable to the Administrator?

MR. KAPLAN: Yes, Your Honor, they are. They go through, it goes through the Environmental Appeals Board process, and then at the completion of that it can be challenged in the regional Courts of Appeals. And --

JUDGE GARLAND: Let me ask one more question. Just so I understand, this section L that we're talking about, in your view these one through eight, leaving aside nine, cabin the kinds of information that can be required in these permit applications?

MR. KAPLAN: Yes, Your Honor, they do.

JUDGE GARLAND: And the only remaining thing is the catchall, but this is not just a list of factors to decide whether to do an SSRA, but also of the kind of information that would be required.

MR. KAPLAN: It cabins the areas of, for which Site Specific Risk Assessment information can be requested. I really can't do it without an example. Suppose you've got a changed circumstance, again, my example of a new facility having been built down the road over the last 10 years, then that cabins the focus of the inquiry, that's the concern we've

got. Now, how to do a risk assessment. Well, then, you know, you can go to texts on risk assessment, there's plenty of text books, people go to school and get PhDs on how to do risk assessments, and you would do the risk assessment relative to the types of inquiries that are related to that particular facility at this site in the particular area. So, it cabins in it in that respect, it establishes the framework of the inquiry.

Now, the guidance itself, Your Honor, is just a compilation of, if you look at it, recommended statistical techniques, recommended data or information, a lot of it could be found elsewhere, it's a compilation, there's no requirement in the text that that be filed, that that guidance be followed. EPA purposely, in this context it purposely decided not to codify those provisions. So, you've got a circumstance where EPA chooses purposely not to codify a risk assessment type of a circumstance, and in certain situations like that I think that this Court's judgment and the, let me get the right cite for you, in the *Interstate Natural Gas* case is what controls. It also when EPA chooses to proceed through guidance instead of regulation, and I quote, it comes at a price to the Agency, in applying the policy it will not be able to simply stand on its duty to follow its rules.

And so, it just means that in the permitting context if somebody says this is how I want to do this risk assessment

regarding this exposure analysis, I want to use this coefficient of friction for this particular kind of particle to do this type of dispersion model, I want to use this -- it's all up for grabs, it's all subject to the administrative process, the permit writer has to justify its decision, anything that's raised in comment has to be responded to by the permit writer, and then it's subject to judicial review. And so, there's nothing binding about this guidance at all, nothing on its text, and certainly nothing in the way it would apply, and this Court has already said what the remedy is when that Agency chooses to go that way, the remedy is the Agency has to bear the burden in the future permitting context, and that's the burden that RCRA regulations apply.

Your Honor, I see my time is up.

JUDGE HENDERSON: Judge Randolph? Can I ask you one question that will probably --

MR. KAPLAN: Sure.

JUDGE HENDERSON: -- cause my colleagues to roll their eyes, but anyway, in 6925(b) have you give any thought to the language that it says each application shall contain such information as may be required under regulations rather than by regulations. I mean, it seems to me that you could read this to say well, this information is required under regulations.

MR. KAPLAN: Well, that is actually precisely our

ATTACHMENT B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 10 2003

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Use of the Site-Specific Risk Assessment Policy and Guidance for Hazardous Waste Combustion Facilities

FROM: Marianne Lamont Horinko
Assistant Administrator

TO: Regional Administrators
Regions 1 - 10

The purpose of this memorandum is to reiterate the appropriate use of the hazardous waste combustion site-specific risk assessment (SSRA) policy and technical guidance and the Resource Conservation and Recovery Act (RCRA) omnibus authority, as it relates to SSRAs.[1] We are also requesting that you review certain documents to determine if they contain misleading or incorrect information concerning the SSRA policy and technical guidance.

On February 28, 2002, the Administrator received a petition for rulemaking from the Cement Kiln Recycling Coalition (CKRC) regarding hazardous waste combustion SSRAs. In the petition, CKRC asserts that EPA has required and is continuing to require SSRAs in violation of the notice and comment rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§551, *et seq.* CKRC also requests that we repeal the SSRA policy and guidance and promulgate them under the APA if we continue to believe that SSRAs are necessary. We are evaluating this petition. In the meantime, we believe that it is important to reiterate the appropriate use of the SSRA policy and technical guidance and the RCRA omnibus authority, as it relates to SSRAs. Specifically, the SSRA policy and technical guidance convey information and recommendations; as with all guidance documents, they are not regulations or requirements and should not be used in a way that suggests they are binding.

In addition, we are requesting that you determine whether any regional memoranda,

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[1] Section 3005(c)(3) of RCRA, commonly referred to as the "omnibus authority" or "omnibus provision", provides that RCRA permits "shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment."

policy and guidance documents, including internal documents, as well as any correspondence, Memoranda of Agreement, and Grant Workplans with your states contain misleading or incorrect information regarding how the SSRA policy and technical guidance should or should not be applied to hazardous waste combustion facilities. If such misleading or incorrect information is found, we are also requesting that you take immediate measures to clarify or correct the information in consultation with our office or your Office of Regional Counsel. In the meantime, this memorandum clarifies that the SSRA policy and technical guidance are not binding on EPA, states, or the regulated community, regardless of any language in any earlier EPA documents that might be read to imply a binding effect.

Background

The Agency articulated the original version of the SSRA policy in the draft and final *Strategy for Hazardous Waste Minimization and Combustion* (commonly referred to as the Combustion Strategy).[2] EPA stated that "risk assessments should be completed prior to making final permit determinations." *Strategy for Hazardous Waste Minimization and Combustion* (Nov. 1994) at 23. On September 30, 1999, we revised and updated our national technical standards for incinerators, cement kilns and light-weight aggregate kilns in the Phase I National Emission Standards for Hazardous Air Pollutants (NESHAP) final rulemaking (see 64 FR 52828). Recognizing that these combustors were now required to comply with more stringent technical standards than previously, we also articulated a revision to our SSRA policy in the preamble to the Phase I NESHAP (see 64 FR 52839 - 52843). Specifically, we stated the following:

> We are recommending that for hazardous waste combustors subject to the Phase I final MACT standards, permitting authorities should evaluate the need for a SSRA on a case-by-case basis. SSRAs are not anticipated to be necessary for every facility, but should be conducted for facilities where there is some reason to believe that operation in accordance with the MACT standards alone may not be protective of human health and the environment. If a SSRA does demonstrate that operation in accordance with the MACT standards may not be protective of human health and the environment, permitting authorities may require additional conditions as necessary. See 64 FR 52841.

In addition to the SSRA policy, we have also published technical guidance to assist regulators and facilities should a risk assessment be determined to be necessary.

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[2] *Draft Strategy for Combustion of Hazardous Waste,* May 1993. *Draft Strategy for Waste Minimization and Combustion,* May 1994. *Strategy for Hazardous Waste Minimization and Combustion*, November 1994 (EPA530-R-94-044).

What is the recommended use of the SSRA policy?

SSRAs are not a regulatory requirement. SSRAs only should be required at individual facilities where there is some reason to believe that operation in accordance with the applicable technical standards alone may not be protective of human health and the environment, and the permitting authority has documented the basis for concluding that an SSRA was necessary for a given facility.[3] Neither the Combustion Strategy, in which we introduced the original SSRA policy, nor the Phase I NESHAP, in which we articulated our revision to the policy, conferred any new authorities or requirements regarding SSRAs. Thus, the policy itself cannot be used as a basis to require a risk assessment.

Where the permitting authority concludes that a risk assessment is necessary for a particular combustor, the need should be substantiated in each case. The factual and technical basis for any decisions to conduct a risk assessment should be included in the administrative record for the facility. See 40 CFR §§ 124.7, 124.8, 124.9, and 124.18. In addition, the appropriate citation of authority for a site-specific risk assessment is the RCRA omnibus authority and its associated regulations, e.g., 40 CFR §270.10(k), since it is these provisions, and not the SSRA policy or other EPA guidance, that can provide the authority to require SSRAs (or information needed to conduct an SSRA) in individual cases. If the facility, or any other party, files comments on a draft permit decision objecting to the permitting authority's conclusions regarding the need for a risk assessment, the authority must respond fully to the comments. If the permitting authority concludes that a risk assessment is necessary despite the comments, the response should be based on the factual, technical, and legal factors relevant to the combustor being permitted, not on the SSRA policy or other guidance.

What is the recommended use of the SSRA technical guidance?

As stated above, technical guidance has been made available to assist regulators and facilities should a risk assessment be determined necessary for a specific combustion unit. Similar to the SSRA policy, this technical guidance is not mandatory; it does not impose any legally binding requirements. Rather, it contains our current thinking concerning what emissions data may be appropriate for performing a risk assessment and how a risk assessment might be conducted. The purpose of the guidance is to ensure that the Agency's current best information on these issues is widely disseminated so that individual permit writers and facilities are not forced to "reinvent the wheel" in each case. Risk assessors may choose to follow the recommendations in the guidance or not, as appropriate for the combustion device in question and similar factors. Regardless of whether the technical guidance recommendations are used and because of the site-specific nature of this type of risk assessment, where the permitting authority

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[3]Of course, the facility is free to perform a risk assessment, or to request that the permitting authority perform a risk assessment, if the facility views such an assessment as beneficial for addressing communication or other concerns associated with permitting determinations, and the permitting authority may choose to participate at its discretion.

determines that such an assessment is necessary, we recommend that the permit writer and facility representatives meet prior to any analysis to discuss risk methodology and data input needs. Such a meeting allows both the permitting authority and facility the opportunity to raise questions and objections concerning the appropriateness of different methodologies, assumptions, and default values, and their application to the hazardous waste combustor. We recommend that risk assessors document the rationale for the final selected methodology in a risk assessment protocol or plan or in the final risk report. As with the decision to require a risk assessment, the permitting authority should fully respond to any comments filed on a draft permit decision objecting to the risk assessment methodology, and the response should be based on relevant factual and technical factors, not on the fact that the technical guidance recommends the methodology at issue.

What type of documentation should be provided for SSRAs?

When developing a facility's RCRA permit, the permitting authority must include in the administrative record all documents supporting any permit decisions (see 40 CFR §124.9). With respect to SSRAs, this means that the permitting authority should include the basis or justification for any decisions that an SSRA was necessary for a given facility. If the permitting authority determines that additional risk-based conditions are necessary in the facility's RCRA permit to protect human health and the environment, based on the risk assessment and pursuant to the omnibus authority, this decision likewise must be documented, along with any supporting information, in the facility's administrative record. Supporting documentation may include the risk assessment protocol or plan and the risk assessment report as appropriate. The permitting authority should identify the specific risk concern and discuss how the additional control will alleviate this concern. It is not appropriate to simply cite the SSRA policy or any other related combustion risk assessment guidance documents as the basis of the decision, although the permitting authority may rely, where appropriate, on risk information and conclusions developed during the Phase I NESHAP rulemaking supporting the current version of the policy (see, e.g., 64 FR 52839 - 52843). In total, the information provided in the administrative record must articulate the technical basis for the additional risk-based permit conditions. By placing this information in the administrative record, it allows both the public and the facility the opportunity to review the risk analysis and to raise questions and objections concerning the appropriateness of the analysis and any resulting permit conditions during the public notice and comment period on the draft permit decision. As required in 40 CFR §124.18, any comments and responses to those comments must also be placed in the administrative record.[4]

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[4]This memorandum focuses on the formal notice-and-comment aspect of the permitting process. However, in less formal communications (e.g., meetings with facility personnel, public meetings), the permitting authority should likewise treat the SSRA and other guidance documents as non-binding guidance and should be receptive to any arguments or views received according to their merits.

Proper application of Agency policy and guidance is an essential element for the continued success of the RCRA program. Agency policy and guidance must not be used in a manner that implies mandatory requirements as opposed to Agency recommendations. We hope that the information provided in this memorandum is helpful to you when considering the need for an SSRA and the possible application of the combustion risk assessment guidance. Should you have any questions regarding the above information or need assistance determining the appropriate scope for your regional document review, please contact Rosemary Workman or Sasha Gerhard of my staff at (703) 308-8725 and (703) 605-0632, respectively. Questions related specifically to either the human health or ecological risk methodology guidance documents should be directed to Karen Pollard also of my staff. Karen may be reached at (703) 308-3948.

cc: Robert Springer, OSW
Brian Grant, OGC
Regional Counsel, Regions 1 - 10
RCRA Senior Policy Advisors, Regions 1 - 10
Barbara Simcoe, ASTSWMO