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September 20, 2006

**LEGAL MEMORANDUM
SUPPORTING COMMENTS OF
NATIONAL STONE, SAND AND GRAVEL ASSOCIATION
AND PORTLAND CEMENT ASSOCIATION
ON
“DETAILED PROCEDURES FOR PREPARING EMISSION FACTORS”
JUNE 29, 2006 DRAFT**

This Memorandum supports the comments of the National Stone, Sand & Gravel Association (NSSGA) and Portland Cement Association (PCA) concerning the document titled, “Detailed Procedures for Preparing Emission Factors (Draft)” dated June 29, 2006 and posted on the U.S. Environmental Protection Agency website on July 5, 2006.

As discussed in the technical comments of NSSGA and PCA, emission factors are especially important to mineral product industries due to the complexity and cost associated with testing of fugitive dust emission sources. These industries have committed substantial resources to the goal of obtaining accurate emission factors, in productive collaboration with EPA staff. They recognize that more effective procedures are needed for updating outdated emission factors for a wide variety of other industries. However, they are extremely concerned that procedures designed for such “baseline” circumstances may reverse the significant progress that has been made with respect to mineral industry emission factor data.

For these reasons, NSSGA and PCA urge EPA not to adopt new procedures that would cause significant revision of the emission factors applicable in their industries. Suggestions for attaining this goal, while at the same time facilitating development of more accurate factors for other industries, are provided in the technical comments. If EPA proceeds to adopt new procedures that may result in significant change of the emission factors for NSSGA or PCA members, notice and comment rulemaking is required. In addition, EPA is prohibited from adopting new procedures that increase scientific uncertainty and would lead to adoption of new, less accurate emission factors for these mineral industries. These points are discussed in detail below.

I. PROCEDURES FOR DEVELOPING EMISSION FACTORS CAN ONLY BE CHANGED BY RULE

In adopting new procedures for development of AP42 emission factors, EPA is required to follow notice and comment rulemaking procedures. With respect to proposed rules, the federal Administrative Procedures Act (APA) requires publication in the Federal Register of a notice of proposed rulemaking, followed by opportunity for public comment (see 5 USC § 553(b), (c)). After consideration of public comments, the agency is required to publish final rules that include a concise statement of their basis and purpose (id.). All of these procedural protections must be provided with respect to adoption of new procedures for development of AP42 emission factors.

It is clear that the emission factors are “rules” for which these procedures must be followed. The APA defines “rule” as “an agency statement of general or particular applicability

and future effect designed to implement, interpret, or prescribe law or policy” (5 USC§551(13)). An agency action is a rule if it “change[s] any existing law, right or duty.”¹

Revision of AP42 emission factors clearly satisfies these requirements. An increase in estimated emissions would impose serious regulatory consequences for NSSGA and PCA members, because AP42 emission factors are used for a wide variety of purposes under EPA’s air quality program. EPA’s regulations expressly provide for use of the AP-42 emission factors in the following ways:

- Input data for emission models used to determine attainment and maintenance of ambient air quality standards and PSD increments (see 40 CFR §51, App. W, §9.1.1(b));
- Emission rates for determining whether a facility is subject to new source review, performance and permitting requirements (see 40 CFR §60.14);
- Emission rates for determining whether a source is subject to hazardous air pollutant (HAP) requirements (see 40 CFR §61.15).

AP42 emission factors are used for many other purposes as well, and the AP42 manual confirms that “AP42 emission factors may have effects on most aspects of air pollution control and air quality management, including operating permit fees, compliance assessments and SIP attainment emission inventories . . .” (p. 10). The Introduction to the manual expressly states that the emission factors are adopted to implement the Clean Air Act Amendments of 1990 and the Emergency Planning and Community Right to Know Act of 1986 (p. 1). EPA’s draft procedures document confirms these effects and suggests a number of

¹ Clarry v. U.S., 85 F.3d 1041, 1049 (2d Cir. 1996).

relatively new uses, such as site-specific risk assessment and confirmation of emissions offset and emissions banking calculations (p.2). Many of the uses of the AP42 emission factors are similar to the uses of EPA's Air Quality Modeling Guidelines, which must be revised through rulemaking procedures as the agency has recognized. See, e.g., 70 Fed. Reg. 68218 (November 9, 2005).

Because the AP42 emission factors are so widely used, the AP42 manual states that “these factors are always made available for public review and comment before publication” (*id.*). We understand that EPA is providing that opportunity here, in an informal manner. However, the APA requires formal rulemaking in this case, to ensure that a final agency decision is made on the basis of a public record that is adequate for judicial review. The federal courts have made it clear that EPA must engage in notice-and-comment rulemaking whenever it adopts “critical compliance data” such as the AP-42 correction factor. For example, in PPG Industries v. Costle, 659 F.2d 1239, 1249-51 (D.C. Cir. 1981), the court addressed EPA guidelines that required a change from “block” to “running” averages as the method for determining compliance with sulfur dioxide ambient air quality standards, but had not been adopted using the required procedures. Noting that this could change reported SO₂ concentrations by as much as 30-40%, the court held that the guidelines amounted to a “rule” that was “without legal effect” because the required procedures had not been followed.

Seven years later, in NRDC v. Thomas, 845 F.2d 1088 (D.C. Cir. 1988), the court addressed an EPA memorandum in which the agency tried to switch averaging methods again, this time from running to block averages. Again, the court stated that the memorandum could

not be construed in a manner at variance with established agency policy because the required procedures had not been followed:

Rather than indicating that block averages are a proper practice while allowing or even encouraging the running average methodology, as was the status quo . . . [the] memorandum establishes block averages as the only official proper method. Since this conclusion was reached without the use of a proper rulemaking, in this one particular at least, NRDC appears correct that EPA has acted inconsistently with the mandate of PPG Industries.

* * *

[W]e would note that any construction of the memorandum departing from the practice set forth in our prior opinion must be without legal effect (845 F.2d at 1093-94).

EPA's proposed changes to the procedures for adopting AP42 emission factors make precisely the same kind of policy change, resulting in significant additional regulation, that the court struck down in these cases. Nor can the absence of procedural protections be justified by a claim that the correction factor is merely an interpretive rule or policy statement for which rulemaking is not required. This exception to the rulemaking requirements "will be narrowly construed and only reluctantly countenanced."² The courts have made it clear that:

an interpretive rule simply states what the administrative agency thinks the statute means, and only "reminds" affected parties of existing duties. On the other hand, if by its actions the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.³

² New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980)(and cases cited therein)(ambient air quality attainment designations are rules for which prior notice and opportunity for comment are required).

³ General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir.), cert. denied, 471 U.S 1074 (1984).

Clearly, revision of the procedures for establishing AP42 emission factors is capable of subjecting NSSGA and PCA members to new regulatory burdens that cannot be imposed in the absence of the notice and comment procedures required by the APA.

II. NEW PROCEDURES CANNOT BE APPLIED IN A MANNER THAT DECREASES THE ACCURACY OF EMISSION FACTORS

The APA requires that when an agency adopts final rules, “the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose” (5 USC §553(c)). That statement must provide a rational factual basis for the adopted rule; if not, the courts will invalidate the rule.⁴

Of course, agencies must be free to change their rules and policies in light of changed circumstances. However, changes must be reasonable and consistent with the governing statute and the underlying congressional intent. See National Family Planning and Reproductive Health Assn., Inc. v. Sullivan, 979 F.2d 227 (D.C. Cir. 1992). In such cases, adoption of the change through notice and comment rulemaking procedures is particularly important (*id.*). In cases where an agency is rescinding a prior position on which regulated entities have relied, the agency bears a particularly heavy burden to justify the change. As the Supreme Court stated in Motor Vehicle Mfrs. Assn. v. State Farm Mutual Life Ins. Co., 463 U.S. 29, 41-42 (1983):

A settled course of behavior embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

⁴See, e.g., API v. Costle, 665 F.2d 1176 (D.C. Cir. 1981); South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974).

In general, there are two circumstances where an agency is prohibited from applying a new regulation or policy: (1) the change is not reasonable and adequately justified; or (2) the change would cause undue hardship to parties who have relied on the prior rule or policy. See New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987). Although courts are reluctant to second-guess an agency's decision to change its procedures,

there are limits on this prerogative. An agency may not act precipitously or in an irrational manner in revising its rules . . . the agency [must] reasonably determine that existing procedures are unsatisfactory and take steps that are fairly targeted at improving the situation . . . To clear this hurdle, [the agency] must show both that its new rules constitute a rational means for achieving its stated objective and that it sensibly rejected other options . . . including the option of maintaining the status quo . . . This calculus must fairly account for any benefits lost by modifying existing rules, as well as any advantages expected to be gained through the adoption of updated rules. Citizens Awareness Network, Inc. v. U.S., 391 F.3d 338, 352 (1st Cir. 2004).

NSSGA and PCA recognize that the proposed changes to the AP42 procedures may satisfy all of these elements with respect to some other industries. However, none of them are satisfied with respect to NSSGA or PCA members that currently are subject to accurate AP42 emission factors, which would become less accurate if the new procedures are employed.

CONCLUSION

For the foregoing reasons, the proposed new procedures for developing AP42 emission factors cannot be applied: (1) if they are not adopted through notice and comment rulemaking proceedings; and (2) in cases where they would decrease the accuracy of existing AP42 emission factors.