BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	
Final Rule for National Ambient	)	RIN 2060-AN83
Air Quality Standards for Lead	)	EPA-HQ-OAR-2006-0735
	)	

PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act ("CAA" or "Act"), Missouri Coalition for the Environment Foundation, the Natural Resources Defense Council, the Coalition to End Childhood Lead Poisoning, and Physicians for Social Responsibility petition the Administrator of the Environmental Protection Agency ("EPA" or "Agency") to reconsider certain provisions of its final rule on the National Ambient Air Quality Standards for Lead ("lead NAAQS"), as published at 73 Fed. Reg. 66964 (Nov. 12, 2008) ("final rule"). The objections raised in this petition concern the EPA's final decision on the emissions threshold for monitoring lead emissions at specific sources of lead. This threshold determines which sources are monitored and which are not; it is thus central to the ability of EPA and the public to identify violations of the NAAQS and to ensure that public health is adequately protected. The final decision on the threshold ignored EPA's own analysis showing that the threshold should be set at a lower emissions level to better protect public health and marks a capitulation to pressure from the White House Office of Management and Budget ("OMB"). The decision on the source-oriented monitoring threshold represents a triumph of politics over science – at the expense of public health – and should be reconsidered. The grounds for the objections raised in this petition arose after the period for public comment and are of central relevance to the outcome of the rule. The Administrator must therefore "convene a

proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." CAA § 307(d)(7)(B).

INTRODUCTION

This petition raises objections to the final rule. The grounds for the objections raised in this petition "arose after the period for public comment." CAA § 307(d)(7)(B). With respect to each objection, the regulatory language and EPA interpretations that render the rule arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law appeared for the first time in the final rule published in the Federal Register on November 12, 2008, 73 Fed. Reg. 66964, and made available on the Agency's website in mid-October 2008. The public comment period for EPA's proposed rule on the lead NAAQS closed on August 4, 2008. 73 Fed. Reg. 29184 (May 20, 2008 notice of proposed rule); 73 Fed. Reg. 39235 (July 9, 2008) (extending comment period). Moreover, each objection is "of central relevance to the outcome of the rule," CAA § 307(d)(7)(B), in that it demonstrates that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 307(d)(9)(A).

Judicial review of the final rule is available by the filing of a petition for review by January 12, 2009. CAA § 307(b)(1)) (within 60 days of the date of notice of promulgation of the rule). Therefore, the grounds for the objections arose "within the time specified for judicial review." CAA § 307(d)(7)(B).

OBJECTIONS

I. The Grounds for the Objections Raised Here Arose After the Close of Public Comment.

The final rule on the lead NAAQS requires source-specific monitoring only near sources emitting 1.0 ton per year ("tpy") or more of lead. That 1.0 tpy threshold falls well outside the range of thresholds set forth in the proposed rule, which discussed and solicited comment only on values ranging from 200 kilograms ("kg") to 600 kilograms per year. 73 Fed. Reg. at 29263. The decision to depart from the proposed range and the accompanying rationale were made public only after the close of public comment on the proposed rule, and appears to have been heavily influenced by comments submitted to the Agency and added to the docket well after the close of public comment, as discussed further below. Thus, the ground for our objections arose after the close of public comment and the raising of those objections during the comment period was impracticable. *See* CAA § 307 (d)(7)(B).

First, neither the final 1.0 tpy threshold nor the accompanying rationale appeared in EPA's proposed rule on the lead NAAQS. *See* 73 Fed. Reg. at 29263. Nor did they appear in any of the supporting technical analyses EPA made available to the public on its website before and during the public comment period on the proposed rule. *See* Memorandum from Kevin Cavender to the Lead NAAQS Review Docket (OAR-2006-0735), Lead NAAQS Ambient Air Monitoring Network: Network Design Options Under Consideration (March 3, 2008), Document ID: EPA-HQ-OAR-2006-0735-5305 ("Cavender Memo I"). The 1.0 tpy threshold or the accompanying rationale did not even appear in the technical analysis made available to the public on the day that the final rule was approved by the Administrator. Memorandum from Kevin Cavender to the Lead

NAAQS Review Docket (OAR-2006-0735), Update of Analysis of Proposed Source-Oriented Monitoring Emission Threshold 3 (Oct. 15, 2008), Document ID: EPA-HQ-OAR-2006-0735-5871 ("Cavender Memo II").

As noted above, EPA's proposed rule on the lead NAAQS considered a threshold only in the range of 200 kg to 600 kg per year, and explained that the final choice of threshold within this range would depend on the level (in micrograms per cubic meter, or $\mu g/m^3$) of the final ambient standard. 73 Fed. Reg. at 29263. EPA's analysis in the proposed rule was based on the arithmetic mean of four different methods used to calculate an appropriate threshold emissions rate for each potential NAAQS level within the range of levels the Agency was then considering. *Id.*; Cavender Memo I. An updated EPA analysis based on the final NAAQS level of 0.15 $\mu g/m^3$ supports a threshold of 0.5 tpy. Cavender Memo II. Yet EPA finalized an entirely new threshold of 1.0 tpy, or twice the threshold supported by its most recent technical analysis. 73 Fed. Reg. at 67026. EPA asserted that this weaker threshold was necessary to alleviate the administrative burden on the agencies charged with source-specific monitoring, but did not explain the basis for that view (except by reference to unattributed "comments") or for its specific choice of the 1.0 tpy value. *Id.* Neither EPA's proposed rule, nor any of the technical analyses cited above, included discussion of this purported rationale. 73 Fed. Reg. at 29263; Cavender Memo I; Cavender Memo II. Therefore, the public did not have an opportunity to consider or comment on the final threshold or the rationale supporting that threshold before EPA published its final rule.

Materials docketed after the close of the public comment period, and thus unavailable to the public during that period, shed light on the development of the

purported rationale for the revised monitoring threshold. These materials indicate that as late as early October 2008 – less than two weeks before it posted the final rule on its website – EPA planned to set the a source-oriented monitoring threshold of 0.5 tpy of lead. *See* E-mail from Lydia Wegman, EPA, to Heidi King, OMB (Oct. 7, 2007, 10:17 AM) (referring to discussion of issues on 10/3/08), Document ID: EPA-HQ-OAR-2006-0735-5828, and attached Interagency Presentation on Monitoring at 4, Document ID: EPA-HQ-OAR-2006-0735-5828.1, and Interagency Presentation on Lead Implementation Issues at 2, Document ID: EPA-HQ-OAR-2006-0735-5828.2 (attached as Exhibit A to this Petition); *see* 73 Fed. Reg. at 67051 (approval of rule by Administrator dated Oct. 15, 2008).

Subsequent correspondence between the EPA and OMB show that OMB pressured EPA to change the threshold and that EPA did not believe that there was sufficient scientific basis for the change. As late as October 14, 2008, the day before Administrator Johnson approved the final rule and EPA published the final rule on its website, Lydia Wegman, Director of EPA's Health and Environmental Impacts Division which develops NAAQS and emission standards to protect public health and the environment, sent OMB versions of the monitoring requirements that required monitoring at sources emitting 0.5 tpy or more of lead. E-mails from Lydia Wegman, EPA, to Heidi King, OMB (Oct. 14, 2008).[1] Also on October 14, 2008, EPA informed

[1] E-mail from Lydia Wegman, EPA, to Heidi King, OMB (Oct. 14, 2008, 10:47 AM), Document ID: EPA-HQ-OAR-2006-0735-5903, and attached edited draft of monitoring requirement regulations at paragraph 4.5, Document ID: EPA-HQ-OAR-2006-0735-5903.1 (attached as Exhibit B); E-mail from Lydia Wegman, EPA, to Heidi King, OMB (Oct. 14, 2008, 11:51 AM), Document ID: EPA-HQ-OAR-2006-0735-5898, and attachment (following 10:47 AM e-mail with corrected edited draft of monitoring requirement regulations), Document ID: EPA-HQ-OAR-2006-0735-5898.1 (attached as Exhibit C); E-mail from Lydia Wegman, EPA, to Heidi King, OMB (Oct. 14, 2008, 11:53 AM), Document ID: EPA-HQ-OAR-2006-0735-5889, and attachment (following 10:47 AM and 10:51 AM e-mails with corrected edited draft of

OMB staff that "that if OMB wants a 1 ton threshold, it would have to provide a rationale for that point of view," and specifically requested "a technical rationale, and not policy views." E-mail from Lydia Wegman, EPA, to Heidi King, OMB (Oct. 14, 2008, 9:18 PM), Document ID: EPA-HQ-OAR-2006-0735-5849, (attached as Exhibit E) (emphasis supplied); *see also id.* (stating that "[i]f you do have such a rationale, we would like to see it"). On October 15, 2008, and apparently in response to OMB pressure concerning the number of sources that states would need to monitor, EPA staff sent another revision to the same regulation that adjusted the regulation to require evaluation but not monitoring of sources emitting between 0.5 and 1.0 tpy of lead. E-mail from Lydia Wegman, EPA, to Heidi King, OMB (Oct. 15, 2008, 3:11 PM), Document ID: EPA-HQ-OAR-2006-0735-5901, and attachment (edited draft of monitoring requirement regulations), Document ID: EPA-HQ-OAR-2006-0735-5901.1 (attached as Exhibit F).

All of these materials were included in the docket after the close of comments. *See* Docket EPA-HQ-OAR-2006-0735, Document IDs: EPA-HQ-OAR-2006-0735-5828, -5828.1, 5828.2, -5849, -5871, -5889, -5889.1, -5898, -5898.1, -5901, -5901.1, -5903, -5903.1 (all posted between Oct. 16, 2008 and Oct. 19, 2008). The only rationale or considerations supporting the threshold that the public was able to comment on was EPA's March 2008 analysis supporting a threshold of 0.5 tpy of lead at a NAAQS of 0.15 $\mu g/m^3$. Therefore, the public did not have an opportunity to consider or comment on either the propriety of the final 1.0 tpy threshold or EPA's purported rationale for choosing that threshold.

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monitoring requirement regulations), Document ID: EPA-HQ-OAR-2006-0735-5889.1 (attached as Exhibit D).

II. The Objections Raised Are of Central Relevance to the Outcome of the Rule.

The objections raised here are of central relevance to the outcome of the rule, *see* CAA § 307(d)(7)(B), because they go to the core procedural and substantive validity of the monitoring requirements of the rule--including the public's opportunity to comment on those provisions and the considerations underlying the final choice, and the consistency of those provisions with fundamental standards of reasoned agency decision-making and with the Act. EPA failed to take public comment on and critique of its OMB-driven source-oriented monitoring threshold or the rationale supporting that threshold; it failed to meet standards of reasoned decision-making; and it failed to meet the objectives of the Act. Had these objections been addressed, and had EPA made this decision without political pressure from OMB, there is a likelihood that the monitoring threshold in the final rule would have been set at 0.5 tpy.

A. EPA Violated the Clean Air Act's Procedural Protections by Failing to Provide Public Notice and Opportunity for Public Comment on the 1.0 Ton Per Year Threshold for Source-Specific Monitoring Requirements.

EPA unlawfully failed to present the selected monitoring threshold for source-oriented monitors and the accompanying rationale to the public for comment. Under Clean Air Act section 307(d), which applies to this proceeding, EPA must present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." CAA § 307(d)(3)(C). In addition, EPA's chosen monitoring threshold and accompanying rationale are not a logical outgrowth of the monitoring threshold discussion in the proposed rule because the final threshold and the administrative burden rationale were not raised in the proposed rule, and therefore EPA should have provided an opportunity for comment on these issues before adopting a source-oriented monitoring

threshold of 1.0 tpy.[2] *See Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004).

These procedural failures are of "such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See* § 307(d)(8). This is demonstrated by the fact that until October 14, 2008, a day before the final rule was approved by Administrator Johnson, prior to further OMB pressure, EPA was still including a 0.5 tpy threshold in the source-oriented monitoring regulations based on the analyses carried out by its staff.

B. EPA's Adoption of a 1.0 Ton Per Year Threshold is Arbitrary and Capricious Because It Fails to Meet Basic Standards of Reasoned Decision-making.

An action is "arbitrary and capricious" if it relies on "factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008). The arbitrary and capricious standard "is the same under the CAA and the [Administrative Procedure Act]." *Id.* (quotations omitted).

EPA's eleventh-hour decision to adopt a 1.0 ton per year source-oriented monitoring threshold is unsupported by any reasoned analysis and is contradicted by the record before the agency. In its preamble to the final lead NAAQS rule, EPA explains

[2] While EPA did discuss a *waiver* of monitoring requirements for sources that emit less than 1.0 tpy, the option of a waiver based on a factual showing that the facility will not contribute to an exceedence of the NAAQS is different from excusing all sources below 1.0 tpy from monitoring requirements regardless of that factual showing. As discussed further above, all EPA analyses as to the appropriate source-oriented monitoring threshold to cover all sources that have a reasonable potential to contribute to NAAQS exceedences support the 0.5 tpy threshold that EPA scientists advocated, and no analyses support the 1.0 tpy threshold that OMB pressured EPA to adopt.

that the 0.5 tpy threshold supported by its technical analyses was based on "a reasonable worst case scenario" and that "basing the threshold on these worst case conditions would place an unnecessary burden on monitoring agencies to evaluate or monitor around sources that may not have a significant potential to exceed the NAAQS." 73 Fed. Reg. at 67026. EPA purports to defend its chosen threshold of 1.0 tpy as "more likely to clearly identify sources that would contribute to exceedences of the NAAQS," but provides no basis for this conclusion except to observe that 1.0 tpy is twice 0.5 tpy.

Furthermore, EPA's purported "administrative burden" rationale does not withstand scrutiny. As EPA acknowledges, in 1980, there were over 900 total active lead monitoring sites in the United States and today, less than 200 of such monitoring sites exist. 73 Fed. Reg. at 29262. EPA's own analysis indicates that a maximum of 346 sites would be subject to source-specific monitoring had EPA adopted a 0.5 tpy source-specific threshold in its final rule. *See* E-mail from Lydia Wegman, EPA, to Heidi King, OMB (Oct. 7, 2007, 10:17 AM) and attachments (Interagency Presentation on Monitoring at 6) (attached). The analysis also indicates that approximately 100 sites would require monitors under a separate, population-based monitoring provision of the final rule we do not challenge here. *See* 73 Fed. Reg. at 67027. The total number of source-specific and other monitoring sites (447) with a monitoring threshold of 0.5 tpy thus falls far short of the 900 lead monitors active in 1980. EPA fails to explain why requiring monitoring at less than half the total number of monitoring locations that were active in 1980, nearly three decades ago, would impose too great a burden on monitoring agencies. For these reasons, EPA's choice of a 1.0 tpy source-oriented monitoring threshold was arbitrary and capricious. The evidence and the reasoned decision-making

support a source-oriented monitoring threshold of 0.5 tpy. Thus, EPA's arbitrary and capricious decision-making is of central relevance to the outcome of the source-oriented monitoring threshold rule.

C. EPA's Adoption of a 1.0 Ton Per Year Threshold Subverts the Act's Requirement that the NAAQS Protect Public Health with an Adequate Margin of Safety.

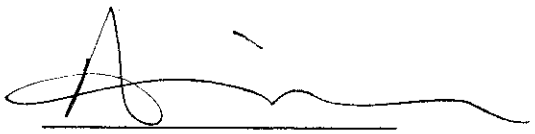
The CAA requires the EPA to set NAAQS at levels that protect public health with an adequate margin of safety. CAA § 109(b)(1). In its final rule, EPA determined that an ambient standard of 0.15 $\mu g/m^3$ of lead is requisite to protect public health with an adequate margin of safety. 73 Fed. Reg. at 67006. EPA has characterized the monitoring requirements as designed to provide the information necessary to assess compliance with that ambient standard and to identify violations of the standard. *See* 73 Fed. Reg. at 67024. Inadequate source-specific monitoring undermines the purpose of the NAAQS by making it more difficult, if not impossible, to assure that lead levels in the ambient air around major lead sources do not exceed the 0.15 $\mu g/m^3$ standard required to protect public health. EPA's justification for the source-oriented monitoring threshold adopted in the final rule focuses exclusively on the burdens on monitoring agencies, given a monitoring threshold of 0.5 tpy, instead of focusing on health considerations. 73 Fed. Reg. at 67026. EPA's own analysis shows that a source-oriented monitoring threshold of 0.5 tpy is needed to capture all potential violations given "reasonable" worst-case conditions. *See* 73 Fed. Reg. at 67026. Yet EPA never explains how the revised, weaker threshold affects—let alone protects, with an adequate margin of safety—public health. EPA's final monitoring threshold thus violates the spirit and requirements of the CAA.

The requirements and the purpose of the NAAQS support a source-oriented monitoring threshold of 0.5 tpy. EPA's failure to follow the NAAQS requirements is thus of central relevance to the outcome of the source-oriented monitoring threshold rule.

CONCLUSION

For the reasons above, we urge EPA to grant this petition for reconsideration and to replace the 1.0 tpy source-oriented monitoring threshold included in the final rule for the lead NAAQS with 0.5 tpy threshold, which both is supported by the record and reasoned analysis and is sufficient to protect public health with an adequate margin of safety.

Dated: January 12, 2009



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