**CKRC**

**PS-11 LITIGATION DECISION OUTLINE**

**9.25.19**

**I. QUESTION PRESENTED**

Since 2004, CKRC, PCA and UARG (utility trade association), have been Petitioners in the case challenging EPA’s final rule setting Performance Specification 11 and Quality Assurance Procedure 2 for PM CEMS (“PS-11 Rule”).[[1]](#footnote-1) The case has been in abeyance since 2004. In June 2019, UARG voluntarily dismissed its case, making CKRC the new Lead Petitioner. PCA also plans to dismiss its case.

In light of withdrawals by UARG and PCA, should CKRC also dismiss its case, or remain as the sole Petitioner challenging the PS-11 rule?

**II. BACKGROUND**

CKRC has consistently opposed the required use of PM CEMS at HWCs, on the basis that EPA has not demonstrated the feasibility of that technology for compliance monitoring at HWCs.

During the development of the HWC MACT, EPA disagreed with CKRC that PM CEMS were not suitable technology for HWCs. Nonetheless, EPA concluded that before it could require PM CEMS, it needed to develop performance specifications to address technical implementation issues specific to HWCs. Consequently, the HWC MACT, at 40 CFR §63.1209(a)(1)(iii), requires PM CEMS but the requirement is not operative until EPA “promulgates all performance specifications and operational requirements applicable to PM CEMS.”[[2]](#footnote-2)

The same concern arose when EPA issued the PS-11 Rule. CKRC opposed the application of PS-11 and Procedure 2 to HWCs on the basis that EPA had not demonstrated that HWCs operating PM CEMS could meet those requirements on a consistent basis. Again, EPA disagreed and concluded that PM CEMS are suitable for compliance monitoring at HWCs. EPA also asserted that it had modified PS-11 and Procedure 2 to account for performance issues discovered during field testing at HWCs.[[3]](#footnote-3)

CKRC was concerned that the PS-11 Rule could be construed as supplying the performance specifications and operational requirements that would trigger the PM CEMS requirement in the HWC MACT. The PS-11 Rule preamble clearly (and helpfully) states that PS-11 does not define the applicability of PM CEMS, and that industry-specific criteria need to be included in the rule applicable to a specific source category.[[4]](#footnote-4) Notwithstanding that preamble statement, CKRC wanted some assurance from EPA that the PM CEMS requirement would not take effect until EPA had established HWC-specific performance criteria through notice and comment rulemaking. EPA Deputy Assistant Administrator of OSWER Barry Breen confirmed in a 2004 letter that such a rulemaking was necessary before PM CEMS could be required and that the PS-11 Rule did not constitute such a rulemaking.

In addition to obtaining the Breen letter, CKRC also challenged the PS-11 Rule in court. PCA joined CKRC in its lawsuit and UARG also sued to overturn the PS-11 Rule. Industry Petitioners and EPA agreed to try to resolve the regulatory impasse out of court and the case was put in abeyance. EPA granted administrative reconsideration of some issues and issued a revised final PS-11 Rule. That Rule did not resolve the issues raised by CKRC, PCA and UARG. Parties had a continuing commitment to resolving these issues, however, and restated that position in regular status reports filed with the Court for 15 years.

Fast forward to 2019, UARG has withdrawn from the case. PCA also plans to withdraw. CKRC must now decide whether to remain in the case as the sole Petitioner challenging the PS-11 rule, withdraw from the case or take some other action (e.g. engage in a dialogue and reach a mutually agreeable settlement). It is unclear what, if any, progress has been made on the issues raised by CKRC.

This memo outlines options and implications and considerations for those options.

**III. LITIGATION OPTIONS AND IMPLICATIONS**

**A**. **WITHDRAW THE DC CIRCUIT PETITION JOINTLY WITH PCA.**

CKRC and PCA jointly filed a Petition and could withdraw jointly.

1. Legal effect
   * CKRC would give up any right to challenge this PS-11 Rule.
   * If EPA were to issue another PS-11 rule with different features and content, CKRC could challenge that rule.
2. Additional considerations
   * CKRC is expecting EPA to adhere to its position that PM CEMS cannot be required for HWCs until EPA does notice and comment rulemaking. That position is stated with greater or lesser clarity in three places: codified regulatory text, the preamble to a final rule and in an authoritative letter from EPA to CKRC. Were EPA to disregard those authorities and put the PM CEMS requirement into effect without a prior rulemaking, CKRC would be able to challenge the procedure and substance of that agency action. CKRC would claim that EPA altered its legal rights and obligations with no notice and comment.
   * There is a slight chance that CKRC could invoke a rarely used legal doctrine to challenge aspects of the PS-11 Rule if in the future EPA applies it to HWCs illegally. A grounds-arising-after claim recognizes that claims may arise beyond the 60-day deadline to challenge a final rule, where changed circumstances are unanticipated or beyond the control of the claimant. The doctrine offers parties a narrow opportunity for relief, under specialized circumstances. In making a decision on whether to withdraw its current challenge, CKRC should not count on being able to bring a grounds-arising-after claim later on. But it is not harmful at least to be aware of a remote possibility of this type of relief.

**B. REMAIN IN THE CASE**

Do nothing, remain in case. PCA would file a separate motion to withdraw.

1. Legal effect
   * CKRC would become solely responsible for executing any action in the litigation and would need to engage with DOJ/EPA.
   * CKRC could try to continue the abeyance. DOJ/EPA may not agree to continue the abeyance and CKRC would need to engage with DOJ/EPA on substance.
2. Additional considerations

If CKRC decides to remain in the case, CKRC will need to commit resources and engage in the process and substance of the case. Short and longer-term efforts would include:

* Interact with DOJ – at a minimum – to prepare, review and/or file 90-day status reports to keep the case in abeyance, a function that had been borne by other parties.
* Interact with DOJ/EPA on the substance of the PS-11 Rule and any procedural items that may arise.
  + With only CKRC remaining in the case, DOJ may not be willing to keep the case in abeyance and instead may seek to bring the case to completion, through either an EPA rulemaking that fixes CKRC’s concerns or litigation.
* Perform a technical analysis of the current status of PS-11 implementation and identify what changes to the Rule CKRC would still be interested in seeking. In comments on the PS-11 Rule, CKRC raised 35 specific and several general issues. [[5]](#footnote-5) These issues may or may not remain a concern.
  + It should be noted that the PS-11 rule has been in effect for 15 years and cross-references multiple NESHAPS. In that period, EPA has issued many interpretive and guidance documents implementing PS-11. A CKRC technical consultant generally reviewed these guidance documents and concluded that 1) many initial concerns with the PS-11 Rule have been addressed (it is unclear how many of CKRC’s general and 35 specific issues remain a concern) and 2) CKRC members would need to perform a facility-level analysis to determine what specific PS-11 elements potentially remain a concern for HWCs.
* For each specific aspect of the Rule CKRC intends to challenge, develop possible legal arguments and assess their viability in litigation.
* Prepare for possible negative publicity and unwanted attention to HWCs.
  + Active litigation entails electronic filings with the court, which are closely tracked by groups interested in RCRA and hazardous waste.

**C. NEGOTIATE A SETTLEMENT AGREEMENT WITH DOJ/EPA**

CKRC could try to negotiate with DOJ/EPA on a settlement agreement that includes helpful language.

1. Some helpful language could be, for example:
   * If DOJ is willing (and if the law permits), the agreement could preserve CKRC’s right to challenge elements of PS-11 that harm CKRC members once they are made applicable to HWCs.
   * If DOJ is willing, the agreement could re-state the regulatory precondition in the preamble and Breen letter that EPA must do an HWC-specific rulemaking before PM CEMS can be required, and that the PS-11 Rule does not constitute such a rulemaking.
2. Legal effect
   * CKRC would preserve its ability to sue and/or formally assure that PM CEMS will not take effect without a prior rulemaking.
   * DOJ could question how CKRC is harmed by PS-11, assuming DOJ agrees that EPA must do a rulemaking before the PM CEMS requirement takes effect.
   * Settlement agreements in rulemaking cases must be noticed in the Federal Register for 30 days of comment. That opens the door to an opposing factual and legal record that DOJ/EPA would need to overcome to finalize the settlement agreement.
   * This could trigger EPA’s commitment to transparency in resolving citizen suits and rulemaking challenges, which may involve informing all stakeholders of the pending negotiations.
3. Additional considerations

* Engaging on this level will also take resources, Assuming DOJ/EPA do not reject this option, the negotiations could take a fair amount of effort and time, and ultimate resolution could be well into the future.
  + - DOJ/EPA sometimes take a conservative approach to settlement agreements and will not consider agreements that impose extra-statutory legal obligations on the US. These provisions could be considered additive to already existing duties under the CAA.

1. *Cement Kiln Recycling v. EPA* (D.C. Cir. 04-1077) [↑](#footnote-ref-1)
2. See also, HWC MACT Final Rule 64 FR 52828 (Sep 30, 1999). [↑](#footnote-ref-2)
3. PS-11 Final Rule 69 FR 1786, 1790 (Jan 12, 2004). [↑](#footnote-ref-3)
4. PS-11 Final Rule 69 FR 1786, 1790 (Jan 12, 2004). [↑](#footnote-ref-4)
5. Among the general issues CKRC raised in comments are these: EPA has not demonstrated the technical adequacy of PM CEMS to meet the requirements of PS-11 and Procedure 2; EPA should continue to rely on continuous opacity monitors to evaluate compliance until PM CEMS have been technically demonstrated in general and with respect to their application to cement industry sources; Use of PM CEMS to establish operating permit limits (OPLs) is inappropriate; EPA has not demonstrated that there is a consistent and predictable relationship between PM emissions and metal HAP emissions to justify direct compliance using a PM CEMS; and the statistical analyses should be modified. [↑](#footnote-ref-5)