JONES DAY

1420 PEACHTREE STREET, N.E. • SUITE 800 • ATLANTA, GEORGIA 30309.3053

TELEPHONE: +1.404.521.3939 • FACSIMILE: +1.404.581.8330

September 6, 2016

VIA HAND DELIVERY:

The Honorable Gina McCarthy
Office of the Administrator
U.S. Environmental Protection Agency
Room 3000
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

VIA OVERNIGHT DELIVERY and ELECTRONIC MAIL:

Mr. Keith Barnett
Group Manager
Sector Policies and Program Division
U.S. Environmental Protection Agency
109 T.W. Alexander Drive
Mail Code: D243-04
Research Triangle Park, NC 27709
Barnett.Keith@epa.gov

Ms. Susan Fairchild
Environmental Protection Agency
109 T.W. Alexander Drive
Mail Code: D243-04
Research Triangle Park, NC 27709
Fairchild.Susan@epa.gov

Jonathon C. Averback
Air and Radiation Law Office
U.S. Environmental Protection Agency
Mail Code: 2344A
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
Averback.Jonathan@epa.gov

Re: Amended Petition for Reconsideration and Petition for Rulemaking to Revise the MACT Floor Standard for Mercury Emissions from Existing Phosphate Rock Calciners, 40 C.F.R. Part 63, Subpart AA (EPA Docket No. EPA-HQ-OAR-2012-0522)

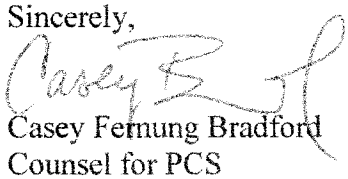
Dear Administrator McCarthy,

PCS Phosphate Company, Inc.; White Springs Agricultural Chemical, Inc., d/b/a PCS Phosphate-White Springs; and PCS Nitrogen Fertilizer, L.P., (collectively "PCS") respectfully submit this Amended Petition for Reconsideration and Petition for Rulemaking to correct deficiencies in 40 C.F.R. Part 63, Subpart AA, as amended by "Phosphoric Acid Manufacturing

17cv1906 Sierra Club v. EPA - 6/22 Production ED_001523_00007571-00001

and Phosphate Fertilizer Production RTR and Standards of Performance for Phosphate Processing." 80 Fed. Reg. 50,386 (Aug. 19, 2015). Please contact me with any questions.

Sincerely,



Casey Fennung Bradford
Counsel for PCS
(404) 581-8119

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

PCS PHOSPHATE COMPANY, INC.; **WHITE SPRINGS AGRICULTURAL CHEMICALS, INC., d/b/a PCS PHOSPHATE-WHITE SPRINGS;** **and** **PCS NITROGEN FERTILIZER, L.P.** **Petitioners**	**EPA Docket #:** **EPA-HQ-OAR-2012-0522**

AMENDED PETITION FOR RECONSIDERATION AND PETITION FOR RULEMAKING TO REVISE THE MACT FLOOR STANDARD FOR MERCURY EMISSIONS FROM EXISTING PHOSPHATE ROCK CALCINERS

Charles T. Wehland
JONES DAY
77 West Wacker Drive
Chicago, IL 60601
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
Email: ctwehland@jonesday.com

Casey F. Bradford
JONES DAY
1420 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 581-8119
Facsimile: (404) 581-8330
Email: cbradford@jonesday.com

Jessica DeMonte
Senior Counsel
PCS Administration (USA), Inc.
1101 Skokie Boulevard
Suite 400
P.O. Box 3320
Northbrook, Illinois 60062
Telephone: (847) 849-4291
Facsimile: (847) 849-4663
Email: Jessica.DeMonte@potashcorp.com

17cv1906 Sierra Club v. EPA - 6/22 Production ED_001523_00007571-00003

AMENDED PETITION FOR RECONSIDERATION

AND

PETITION FOR RULEMAKING
TO REVISE THE MACT FLOOR STANDARD FOR MERCURY EMISSIONS FROM EXISTING PHOSPHATE ROCK CALCINERS

Pursuant to Clean Air Act Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553(e), 705, PCS Phosphate Company, Inc.; White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate-White Springs; and PCS Nitrogen Fertilizer, L.P. (together referred to herein as "PCS") respectfully submit this Amended Petition for Reconsideration and Petition for Rulemaking ("Petition") to request that the United States Environmental Protection Agency ("EPA" or the "Agency") correct deficiencies in 40 C.F.R. Part 63, Subpart AA, as amended by Phosphoric Acid Manufacturing and Phosphate Fertilizer Production RTR and Standards of Performance for Phosphate Processing, 80 Fed. Reg. 50,386 (Aug. 19, 2015) ("Final Rule") (EPA-HQ-OAR-2012-0522). This filing serves to:

1) Withdraw a request for reconsideration of the total fluoride emissions limit for existing phosphate rock calciners made in the PCS Petition for Reconsideration and Administrative Stay filed on October 16, 2015 (the "Original Petition," included as Attachment A);
2) Amend the Original Petition to request that EPA include the mercury emission limit for existing calciners in the Agency's ongoing reconsideration of the Final Rule based on new information that was not available before the Final Rule was issued;
3) As an alternative to reconsidering the mercury limit, request that EPA initiate a new rulemaking to update the mercury limit for existing calciners based on all available emissions data for the PCS calciners in Aurora, North Carolina; and
4) Stay the portions of Subpart AA that are subject to this Amended Petition and Petition for Rulemaking.

17cv1906 Sierra Club v. EPA - 6/22 Production ED_001523_00007571-00004

In the Original Petition, PCS requested reconsideration of the total fluoride limit for existing calciners and a requirement for liquid-to-gas ratio monitoring of low energy absorbers. PCS explained that it did not previously have an opportunity to review or comment on a numeric limit for total fluoride emissions from existing calciners and would supplement the Original Petition upon completing a review of all available fluorides data. Original Petition at 10–11.

EPA granted the Original Petition on December 4, 2015. *See* Attachment B, Letter from Janet G. McCabe, EPA Acting Assistant Administrator (Dec. 4, 2015). Since that time, PCS has collected and reviewed a significant amount of additional data on fluoride emissions from the PCS calciners in Aurora, North Carolina. Based on the outcome of that review, PCS is hereby withdrawing the request in the Original Petition for reconsideration and administrative stay of the total fluoride limit for existing calciners. PCS is maintaining all other requests in the Original Petition, including the request for EPA to reconsider and stay the Final Rule provisions as to liquid-to-gas ratio monitoring requirements for low energy absorbers.

The remainder of this Amended Petition and Petition for Rulemaking reaffirms and supplements another request submitted to EPA on May 10, 2016 seeking reconsideration and revision of the MACT floor limit for mercury emissions from existing calciners under the Final Rule. *See* Attachment C, Letter from C. Bradford to S. Fairchild (May 10, 2016). As explained in Section I below, PCS owns and operates the only six existing phosphate rock calciners in the Subpart AA source category, and yet the mercury limit for existing calciners is more stringent than the average emissions performance of the PCS calciners. An emissions limit that requires the only existing sources in a source category to reduce emissions is not consistent with MACT floor requirements under Clean Air Act Section 112(d)(3)(B), 42 U.S.C. § 7412(d)(3)(B). PCS requests that EPA revise the mercury limit for existing calciners to accurately reflect the average

performance of the PCS calciners based on all available emissions data, and using the upper prediction limit methodology utilized by EPA in promulgating the Final Rule. *See* 80 Fed. Reg. at 50,399.[1]

Federal law provides two mechanisms by which PCS is entitled to make this request, and PCS is exercising its right to both mechanisms. First, PCS requests that EPA revise the mercury limit as part of its ongoing reconsideration of the Final Rule in response to the Original Petition. *See infra* § II. Section 307(d)(7)(B) of the Clean Air Act requires that EPA grant reconsideration of the mercury limit because the grounds for objection to the limit arose after the public comment period that preceded the Final Rule, but within the time allowed for judicial review, and the objection is of central relevance to the Final Rule. 42 U.S.C. § 7607(d)(7)(B). The grounds for objection are found in new mercury emissions information that resulted from conditions encountered at the PCS facility in early 2016 and which was not available during the public comment period. Reconsideration is the appropriate and most efficient mechanism for revising the mercury limit, and PCS urges EPA to resolve the deficiencies in the limit as part of the same reconsideration process which is already underway for the Final Rule.

Second, in Section III of this Petition, PCS is also exercising a separate right under the APA Section 553(e), 5 U.S.C. § 553(e), to petition EPA for a new rulemaking to revise the mercury limit for existing calciners under Section 112(d) of the Clean Air Act.

---

[1] When used throughout this Petition, the word "average" in reference to the MACT floor is intended to incorporate EPA's standard calculation procedure, which accounts for variability by using the upper prediction limit methodology. *See* 80 Fed. Reg. at 50,399 ("The MACT floor was calculated using the upper prediction limit (UPL) methodology"); Phosphoric Acid Manufacturing and Phosphate Fertilizer Production RTR and Standards of Performance for Phosphate Processing, 79 Fed. Reg. 66,512, 66,533 (Nov 7, 2014) ("To account for variability in the operation and emissions, we used the stack test data to calculate the average emissions and the 99-percent upper prediction limit (UPL) to derive the MACT floor limit.").

Consistent with EPA's obligation to respond in a reasonable and timely manner, 5 U.S.C. § 555(b), PCS requests that EPA provide a substantive response to both requests in this Amended Petition and Petition for Rulemaking within 180 days. A period of 180 days is reasonable and appropriately reflects the urgency of this matter in light of the significant legal risks, costs, and disruption of normal plant operations involved. If the Agency's response is unreasonably delayed, PCS will be forced to pursue litigation to compel a response. *See Envtl. Integrity Project v. EPA*, 2015 U.S. Dist. LEXIS 160578, *29 (D.D.C. Dec. 1, 2015).[2] PCS stands ready to assist the Agency as needed in revising the mercury limit and requests that EPA stay the limit pending the outcome of either the reconsideration proceeding or a new rulemaking.

I. The Mercury Limit for Existing Calciners Is Inconsistent With MACT Floor Requirements.

The mercury limit in the Final Rule is a product of EPA's residual risk and technology review of the Subpart AA source category, which includes the PCS calciners. In the Final Rule, EPA determined that the existing requirements under Subpart AA are sufficient to protect human health and the environment with an ample margin of safety. 80 Fed. Reg. at 50,390–91. EPA nevertheless added new requirements in the Final Rule for several emission units, including the PCS calciners. While Subpart AA had for many years regulated particulate matter emissions from phosphate rock calciners as a surrogate for mercury, EPA established the first-ever direct standard for mercury emissions from existing calciners in the Final Rule. *Id.* at 50,391. EPA relied on its authority for MACT floor standards under Clean Air Act Section 112(d) in setting this new mercury limit. *Id.*

[2] EPA should consider this filing to constitute notice of intent to file suit pursuant to Clean Air Act Section 304(a) in the event that a response from the Agency is delayed beyond 180 days. 42 U.S.C. § 7604(a).

In a source category with fewer than 30 sources, the Clean Air Act requires EPA to set the MACT floor for existing sources equal to the average emissions already achieved by the best performing five sources for which EPA has or could reasonably obtain emissions information. 42 U.S.C. § 7412(d)(3)(B). PCS owns and operates the only six existing calciners in Subpart AA. Therefore, the Clean Air Act defines the mercury floor for existing calciners as the average emissions already achieved by PCS. Emissions data collected earlier this year demonstrate that the mercury limit in the Final Rule is not consistent with the definition of a MACT floor.

A. The Clean Air Act Defines the Mercury Floor for Existing Calciners as the Average Emissions Already Achieved by PCS

In the Final Rule, EPA determined the MACT floor for mercury based on a total of twelve (12) individual emissions test runs conducted exclusively at the PCS calciners in 2010 and 2014 in response to EPA Information Collection Requests ("ICR"). *See* MACT Floor Analysis for Phosphate Rock Calciners at Phosphoric Acid Manufacturing Plants – Final Rule (June 9, 2015), Docket ID No. EPA-HQ-OAR-2012-0522-0075, at Appendix A-1. EPA applied a variability assessment to the PCS dataset to produce a limit that was supposed to reflect the average emissions already achieved by PCS, with adequate margin for variability. 80 Fed. Reg. at 50,399; 79 Fed. Reg. at 66,533.

EPA concluded: "we … do not anticipate that any facilities will need to install a new control device to meet the existing phosphate rock calciner [mercury] limit." Phosphoric Acid Manufacturing and Phosphate Fertilizer Production RTR and Standards of Performance for Phosphate Processing – Summary of Public Comments and Responses (July 2015), Docket ID No. EPA-HQ-OAR-2012-0522-0083, at 12-1 ("Response to Comments"); *see also* 80 Fed. Reg. at 50,400 ("Based on the available data, the existing phosphate rock calciners would be able to comply with this limit without installing additional Hg controls."). EPA clearly did not intend to

require PCS to reduce emissions to meet the mercury limit for existing sources under the Final Rule. Indeed, EPA lacks authority to set a MACT floor standard for mercury that requires PCS to reduce emissions from its calciners. The Clean Air Act mandates that the mercury floor is the average emissions already achieved by PCS. 42 U.S.C. § 7412(d)(3)(B).

B. New Emissions Data Demonstrate that the Mercury Limit Is More Stringent than the MACT Floor.

As required by the Final Rule, PCS completed initial performance testing of mercury emissions from the calciners in early 2016 and submitted the results to EPA in March 2016. *See* Attachment D, Email and attachment from C. Bradford to S. Fairchild (March 31, 2016). The initial performance test results for three PCS calciners exceeded the new mercury limit. *Id.* at Table 2-3. For the other three PCS calciners, the results of initial mercury performance testing were slightly below the limit on a three-run average. *Id.*

Upon receiving the preliminary results of initial performance testing, PCS initiated a study of mercury emissions variability at the calciners. *See* Attachment E, Email from C. Bradford to S. Fairchild (Feb. 17, 2016) ("PCS needs to complete a review of the relevant data before it can draw any conclusions about the results or whether the new mercury limit is achievable notwithstanding what appears to be significant variability in the mercury content of the feed."). The study included fifty (50) test runs of mercury emissions, in addition to the twenty one (21) performance test runs already completed in February 2016. PCS also analyzed the concentration of mercury in more than one hundred and seventy (170) samples of phosphate rock feed to the calciners. The purpose of this study was to evaluate the cause of mercury emissions variability and determine whether or not the mercury limit in the Final Rule accurately reflects the MACT floor.

PCS completed the mercury study in May 2016 and concluded that the mercury limit established in the Final Rule is not consistent with MACT floor criteria. On May 10, 2016, PCS requested that EPA reconsider and revise the mercury limit. Attachment C, Email and attachment from C. Bradford to S. Fairchild (requesting a meeting to "discuss the need for a revision of the MACT floor limit" for mercury and asserting that "the limit in the final rule does not reflect the MACT floor . . ."). On May 26, 2016, PCS presented the results of the mercury emissions study as support for its request for a new limit at meeting with EPA in Raleigh, North Carolina. A copy of the presentation was submitted to EPA the following day, on May 27, 2016. *See* Attachment F, Email and attachment from C. Bradford to S. Fairchild and K. Barnett (May 27, 2016).

As shown in Attachment G to this Petition (2016 Hg Emissions Data), the mercury limit in the Final Rule is not consistent with the performance of the PCS calciners during representative operating conditions. The fact that PCS is still working to understand why the performance tests do not reliably achieve the emissions limit for the calciners is ample demonstration that it was impracticable to raise an objection during the time for public comment. Among the possible reasons for the 2016 test results that PCS has investigated are variability in the mercury concentration of rock concentrate from the PCS mine. Although limited data collected in 2010 indicated a concentration below the quantification limit of 0.040 parts per million ("ppm") mercury in rock samples collected at that time, more than one-third of the rock samples collected in 2016 have exceeded 0.040 ppm, and there is unanticipated variability in the samples that are below the 2010 detection limit because these concentrations also vary significantly over short periods of time. *See* Attachment F at 8. PCS explained to EPA in the May 27, 2016 presentation that it has no control over the concentration of mercury in calciner

feed. *Id.* at 10. There is simply no feasible way for PCS to identify or isolate low-mercury rock concentrate at the PCS mine.

Nor are the existing air pollution control devices at the calciners able to effectively control mercury emissions to meet the current limit. EPA correctly noted in response to comments that the predominant species of mercury released by the PCS calciners is elemental mercury. Response to Comments at 6-4. The PCS calciners are equipped with wet electrostatic precipitators and Venturi-type wet scrubbers, neither of which are effective in controlling elemental mercury. *See* Attachment F at 11. PCS therefore requested in May 2016 that EPA recalculate the MACT floor and revise the mercury limit for existing calciners. *Id.* at 13.

C. Installing New Mercury Control Devices to Meet the Mercury Limit is Infeasible and Inconsistent with the Clean Air Act.

To date, EPA has not responded to the request for reconsideration of the mercury limit for existing calciners. The Agency, instead, has raised questions about whether new mercury control devices are feasible for the calciners. This Petition responds to EPA's questions about control devices.

Requiring PCS to install new mercury controls is contrary to EPA's conclusion in the Final Rule that PCS would not be required to install any control devices to meet the mercury limit. Response to Comments at 12-1; 80 Fed. Reg. at 50,400. More to the point, EPA's interest in new control devices runs afoul of the MACT floor standard under Clean Air Act Section 112(d), 42 U.S.C. § 7412(d). As already noted, PCS operates the only six existing calciners in the Subpart AA source category. An emission limit that requires the only existing sources to install new controls is not a MACT floor standard under the Clean Air Act.

Installing and operating new controls to meet the current limit is also infeasible. EPA itself concluded in the Final Rule that Activated Carbon Injection ("ACI") and Gore Mercury

Control System ("GMCS") technologies would impose significant negative economic impacts on the PCS facility in Aurora, North Carolina. EPA rejected those technologies in the Final Rule based on the annualized costs relative to revenues at the PCS facility. 80 Fed. Reg. at 50,398 (concluding that annualized control costs could reach as high as 5.3 percent of the PCS facility revenues). The cost estimates cited by EPA for this conclusion were developed approximately one year ago and still reasonably represent the annual costs of ACI and GMCS at the PCS calciners. Therefore, the grounds for eliminating ACI and GMCS from consideration are unaffected by the new emissions information collected in 2016.

In conversations with PCS regarding the May 2016 request for reconsideration, EPA has suggested that PCS should consider other mercury control technologies that were not identified in the Final Rule as potential options for meeting the current mercury limit. However, there are simply no mercury control technologies that would be technically and economically feasible and effective in reducing mercury emissions from the PCS calciners to achieve the current limit. More to the point, there is no basis in the Clean Air Act for requiring new controls to meet a MACT floor standard in these circumstances.

II. PCS Requests that EPA Revise the Mercury Limit as Part of its Ongoing Reconsideration of the Final Rule.

Section 307(d)(7)(B) of the Clean Air Act requires EPA to convene a reconsideration proceeding if it was impracticable to raise an objection during the time for public comment, or "if the grounds for such objection arose after the period for public comment (but within the time period specified for judicial review)," and such objection is "of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). In these circumstances, EPA must "respond to the petition and, if it denies the petition, set forth its reasons." *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975). Failure to do so is an abuse of discretion. *North*

Carolina v. EPA, 531 F.3d 896, 928 (D.C. Cir. 2008) (vacating and remanding denial of petition for reconsideration), judgment modified on other grounds, *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008).

EPA has utilized its reconsideration authority on prior occasions to address new circumstances with unintended consequences that come to light after an EPA final rule. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Prepared Feeds Manufacturing; Amendments, 76 Fed. Reg. 80,261, 80,263 (Dec. 23, 2011) (amending area source standards published in January 2010 because a June 2011 petition demonstrated that "most existing sources would need to install new cyclones," and "that was not the intent of the final rule"). The same approach should be used to correct the deficiencies in the mercury limit for existing calciners because all conditions for reconsideration are satisfied.

First, the grounds for objection to the mercury limit for existing calciners arose on May 10, 2016, when PCS completed its study of mercury emissions variability and determined that the mercury limit does not reflect the average emissions performance of the PCS calciners. It was impractical, and furthermore impossible, for PCS to raise this issue before encountering the conditions of testing experienced in 2016. The ICR data relied on by EPA to propose and finalize the mercury limit contained no basis for concern with the current limit. Even if PCS had voluntarily collected more emissions data than was required by EPA to inform the Final Rule, data collected in 2015 or prior years may not have reflected the conditions presently encountered at the PCS phosphate rock mine or the current emissions from the PCS calciners. The results of the 2016 mercury study demonstrate that the mercury content of the feed has a variability that was not previously known when the concentrations were below the applicable detection limit. The results of the study also indicate that mercury emissions are now higher at all six calciners

than during the testing in 2010 and 2014. PCS could not have identified these conditions, let alone commented on their implications on the mercury floor, before the conditions were detected.

Second, the grounds for objection to the mercury limit arose "within the time period specified for judicial review." 42 U.S.C. § 7607(d)(7)(B). Section 307(b)(1) provides a right to judicial review more than sixty days after a final rule is issued in circumstances where the request for review is "based solely on grounds arising after such sixtieth day," provided that a petition for judicial review has been filed "within sixty days after such grounds arise." § 7607(b)(1). PCS filed a petition for judicial review of the Final Rule in the U.S. Court of Appeals for the D.C. Circuit on October 16, 2015. *See PCS Phosphate Co., Inc., et al v. EPA, et al*, Case No. 15-1353 (D.C. Cir., filed Oct. 16, 2015). That petition is still before the D.C. Circuit and is being held in abeyance pending the outcome of EPA's ongoing reconsideration of the Final Rule. Therefore, the grounds for objection to the mercury limit have been provided to EPA within the time allowed for judicial review of the Final Rule.

Third, the basis for reconsideration of the mercury limit for existing calciners is of central relevance to the outcome of the Final Rule. Extensive data is now available showing that the mercury limit for existing calciners in the Final Rule does not reflect the average emissions performance of the PCS calciners and, therefore, does not comply with the Clean Air Act. EPA must reconsider and revise the mercury limit to comply with the Clean Air Act.

III. In The Alternative, PCS Requests that EPA Undertake a New Rulemaking to Revise the Mercury Limit for Existing Calciners.

EPA is required to initiate rulemakings as necessary to carry out its duties under the Clean Air Act. 42 U.S.C. § 7601(a)(1) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."); § 7412(d) (requiring

the Administrator to promulgate MACT emission standards). The APA, in turn, codifies the right to petition EPA for a rulemaking, providing that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). Courts have construed this plain language as applying broadly to the EPA and the Clean Air Act. *See, e.g., Oljato*, 515 F.2d at 666–67 ("[T]he public's right to petition the Administrator for revision of a standard of performance and the Administrator's duty to respond substantively to such requests exist completely independently of Section 307 and this court's appellate jurisdiction.").[3]

One of the duties assigned to EPA under the Clean Air Act is to promulgate emission standards for mercury emissions from existing phosphate rock calciners in accordance with the MACT floor requirements established by Section 112(d)(3) of the Act. 42 U.S.C. § 7412(d)(1). As outlined in Section I, the average mercury emissions already achieved by the PCS calciners define the MACT floor for existing calciners, and new data show that the mercury limit in the Final Rule does not meet this MACT floor definition. EPA should therefore grant this Petition for Rulemaking, if the Agency fails to resolve these deficiencies as part of its ongoing reconsideration of the Final Rule. Specifically, PCS requests that EPA promptly initiate a rulemaking to revise the mercury limit in Table 1 of 40 C.F.R. Part 63, Subpart AA based on all available mercury emissions data for the PCS calciners. Failure to do so constitutes arbitrary and capricious action under the APA, 5 U.S.C. § 706.

---

[3] *See also Va. v. EPA.*, 108 F.3d 1397, 1402 n.3, decision modified on reh'g, 116 F.3d 499 (D.C. Cir. 1997) (APA Section 553(e) authorizes petitions for interstate abatement under the Clean Air Act, 42 U.S.C. § 7426); *Friends of the Earth v. EPA*, 934 F. Supp. 2d 40, 54 (D.D.C. 2013) (APA Section 553(e) authorizes a petition for an endangerment finding under 42 U.S.C. § 7571); *Sierra Club v. Ga. Power Co.*, 443 F.3d 1346, 1357 (11th Cir. 2006) (APA Section 553(e) allows requests for revisions of State Implementation Plans under 42 U.S.C. § 7410); *Ala. Envtl. Council v. EPA.*, 711 F.3d 1277, 1286 n. 8 (11th Cir. 2013) (same); *Vt. v. Thomas*, 850 F.2d 99, 104 (2d Cir. 1988) (APA Section 553(e) allows a petition for regional haze rulemakings under 42 U.S.C. § 7491); *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 325 (7th Cir. 1983) (APA Section 553(e) authorizes petitions for area redesignation under 42 U.S.C. § 7407).

Basic principles of administrative law require EPA to respond to this request in a reasonable manner and period of time. 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."); § 706(1) ("[A] reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed."); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (outlining a six factor test to assess what constitutes unreasonable delay by an agency under the APA); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (noting that "a reasonable time for agency action is typically counted in weeks or months, not years").

PCS requests that EPA provide a substantive response to this request within 180 calendar days. A response period of 180 days is reasonable under the APA and other federal laws and regulations. *See, e.g.*, 42 U.S.C. § 7604(a) (requiring notice of 180 days prior to commence of an action for unreasonable delay); 21 C.F.R. § 10.30(e)(2) ("[T]he [FDA] Commissioner shall furnish a response to each petitioner within 180 days of receipt of the petition."); *Envtl. Integrity Project*, 2015 U.S. Dist. LEXIS at *29 (holding that Clean Air Act Section 304(a) affords a remedy in court for EPA's unreasonable delay in responding a petition for rulemaking).

IV. EPA Should Stay The Mercury Limit for Existing Calciners Pending the Outcome of Either the Reconsideration Proceeding or a New Rulemaking to Revise the Limit.

In the Original Petition submitted on October 16, 2015, PCS requested that EPA stay the Final Rule so that the issues raised for reconsideration "can be resolved in an organized and fair manner without exposing PCS and other facilities to legal risks when it is impossible to achieve immediate compliance." Attachment A at 14. Although EPA granted reconsideration of all issues raised in the Original Petition, EPA did not respond to the request for a stay.

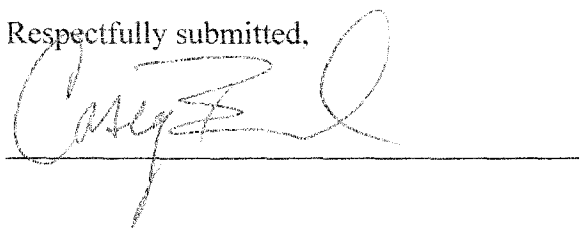
The same arguments presented in the Original Petition for issuing a stay apply with even more force to the calciner mercury limit. PCS is likely to succeed on the merits of its challenge to the calciner mercury limit, will (and has) suffered irreparable harm in the absence of a stay, and is requesting a stay in circumstances where a stay is consistent with the balance of equities and the public interest. Extensive data show that the current mercury limit is inconsistent with the Clean Air Act's directive for issuing MACT floor standards. PCS faces significant legal risks, costs, and disruption of normal plant operation on a daily basis as a result of the unlawful MACT limit. The better course, and the one required by equity and the public interest, is for EPA to stay the Final Rule while the Agency develops a sensible solution to the errors in the mercury limit and the liquid-to-gas ratio monitoring requirements in the Final Rule.

CONCLUSION

For the foregoing reasons, EPA should grant this Amended Petition for Reconsideration or alternatively grant the Petition for Rulemaking, administratively stay the Final Rule, and take any other steps needed to immediately defer or otherwise nullify the requirements of the Final Rule pending the outcome of reconsideration or judicial review.

Dated: September 6, 2016

Respectfully submitted,



17cv1906 Sierra Club v. EPA - 6/22 Production ED_001523 00007571-00017