

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NATIONAL RESOURCES DEFENSE	§	
COUNCIL, <i>et al.</i>	§	
	§	
	§	
Petitioners,	§	
	§	
v.	§	Case No. 04-1323
	§	
U.S. ENVIRONMENTAL PROTECTION	§	
AGENCY, <i>et al.</i>	§	
	§	
	§	
Respondents.	§	

**UNOPPOSED JOINT MOTION OF THE STATE AND TERRITORIAL AIR
POLLUTION PROGRAM ADMINISTRATORS AND THE ASSOCIATION OF LOCAL
AIR POLLUTION CONTROL OFFICIALS FOR LEAVE OF COURT TO FILE BRIEF
*AMICUS CURIAE***

Pursuant to Fed. R. App. P. 29(b) and D.C. Circuit Rule 29(b), the State and Territorial Air Pollution Program Administrators (“STAPPA”) and the Association of Local Air Pollution Control Officials (“ALAPCO”) jointly move this Court for leave to file a brief *amicus curiae* in the above-captioned case in support of the Petition for Review filed by Petitioners Natural Resources Defense Council and Sierra Club. In support of this Motion, STAPPA and ALAPCO state as follows:

Nature of the Case

1. The Petition for Review challenges the National Emission Standard for Hazardous Air Pollutants published at 69 Fed. Reg. 45,944 (July 30, 2004), which the U.S. Environmental Protection Agency promulgated to establish maximum achievable control technology (“MACT”) standards for the emission of hazardous air pollutants (“HAPs”) by manufacturers of plywood and composite wood products. STAPPA and ALAPCO believe that the regulations under review

violate twin mandates of the 1990 Amendments to the Clean Air Act. First, MACT standards “are to be based *not* on an assessment of the risks posed by HAPs,” but rather “must reflect the emissions limitation achieved by the best-performing sources in a particular category” *Sierra Club v. EPA*, 353 F.3d 976, 980 (D.C. Cir. 2004) (emphasis added). Second, even when it becomes appropriate to consider risk – during a second phase of regulation that EPA has not yet reached for plywood and composite wood products manufacturing – EPA may do so only for the purpose of imposing “more *stringent* standards than [can be] achieved through MACT.” *Id.* (emphasis added).

2. EPA’s purported MACT standard for plywood and composite wood products violates these core principles. Instead of eschewing any “risk-based analysis” and firmly “requir[ing] *all* sources in a category to at least clean up their emissions to the level that their best performing peers have shown can be achieved” (*id.* (emphasis added)), EPA has established a MACT standard that employs a *risk-based approach* to allow *some* sources in a particular category to emit *higher* levels of pollutants than their peers have shown can be achieved through current technologies.

Interests of the Amici

3. STAPPA and ALAPCO are two national associations representing air pollution control agencies in 53 states and territories, and more than 165 major metropolitan areas across the United States. State and local air pollution control officials formed STAPPA and ALAPCO over 30 years ago to improve their effectiveness as managers of air quality programs. STAPPA and ALAPCO work jointly to encourage the exchange of information among air pollution control officials, to enhance communication and cooperation among federal, state and local regulatory agencies, and to promote good management of air resources.

4. Given their purposes and focus, STAPPA and ALAPCO are vitally interested in the outcome of this case and, more generally, in the proper interpretation and implementation of the 1990 Amendments to the Clean Air Act. Representing those who have been and will continue to be on the front lines of protecting our nation's air quality – and, indeed, of implementing and enforcing the regime mandated by Congress and the regulations promulgated by EPA – STAPPA and ALAPCO have a unique perspective that should prove helpful to the Court and may not be reflected in the parties' briefs.

5. For example, members of STAPPA and ALAPCO are keenly aware, as air quality regulators themselves, of practical considerations that stand to impede prompt implementation of the risk-based approach that EPA has adopted. Petitioners can be expected to explain that EPA's approach conflicts with the language and structure of the 1990 Amendments to the Clean Air Act, but STAPPA and ALAPCO can attest that implementing EPA's approach, *as a practical matter*, threatens to reintroduce a risk-based log jam much like the one Congress "sought to exorcize" when it required the development of a single, bright-line, technology-based emissions standard for all sources in each category. *Sierra Club*, 353 F.3d at 990.

6. Similarly, STAPPA and ALAPCO are uniquely positioned to speak to the reality that, instead of establishing a "MACT floor" that binds all facilities in a given industry and stands to improve air quality everywhere, EPA's approach will prevent achievement of the level playing field that MACT standards are supposed to ensure, to the detriment of industry and the environment in certain locales, states and regions.

Positions of the Parties on This Motion

7. STAPPA and ALAPCO sought the consent of all parties – petitioners, respondents, and intervenors – before filing this Motion. Petitioners Natural Resources Defense Council, Sierra Club, Louisiana-Pacific Corp. and Norbord Inc. have consented, as have

intervenors Environmental Integrity Project, Coastal Industrial Products Co., Hood Industries, Inc., and Scotch Plywood Co.

8. Respondents EPA and Michael Leavitt, EPA Administrator, as well as Intervenor American Furniture Manufacturers Association, have indicated that they do not oppose STAPPA and ALAPCO's request to participate as amici.

9. Intervenors American Forest & Paper Association, APA-The Engineered Wood Association, and Composite Panel Association have indicated that they "take no position" on STAPPA and ALAPCO's request for consent to file an *amicus* brief.

10. Pursuant to D.C. Cir. R. 29(b), the Rule 26.1 Disclosure Statement of STAPPA is attached hereto as Exhibit A.

11. Pursuant to D.C. Cir. R. 29(b), the Rule 26.1 Disclosure Statement of ALAPCO is attached hereto as Exhibit B.

12. If leave is granted by the Court, STAPPA and ALAPCO are prepared to file their joint *amicus* brief within the time required by any briefing schedule established by the Court.

WHEREFORE, for all the foregoing reasons, STAPPA and ALAPCO respectfully request that they be granted leave to file a brief *amicus curiae* in support of the Petitioners in this case.

Date: November 29, 2004

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing was served on the following by first-class mail, postage prepaid, on November 29, 2004:

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