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NO. 06-1410
(consolidated with Nos. 06-1411, 06-1415, 06-1416, and 06-1417)

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

AMERICAN FARM BUREAU FEDERATION, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

JOINT COARSE PM NAAQS BRIEF FOR INDUSTRY INTERVENORS IN SUPPORT OF RESPONDENT

Richard E. Schwartz
Kirsten L. Nathanson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Counsel for the American Farm Bureau Federation and National Pork Producers Council

Robert R. Gasaway
Ashley C. Parrish
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W., Ste. 1200
Washington, D.C. 20005
(202) 879-5000

Counsel for the Alliance of Automobile Manufacturers

Peter Glaser
TROUTMAN SANDERS LLP
401 9th Street, N.W., Ste. 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for the National Mining Association

INITIAL BRIEF: January 29, 2008

Additional counsel:

Julie Anna Potts, Esq.
Danielle D. Quist, Esq.
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Washington, D.C. 20024

Michael Formica, Esq.
NATIONAL PORK PRODUCERS COUNCIL
122 C Street, N.W., Ste 875
Washington, D.C. 20001

Harold P. Quinn, Jr.
Executive Vice President and General Counsel
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, N.W., Ste 500 East
Washington, D.C. 20001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

The parties, intervenors, and amici in these consolidated cases are listed in the joint briefs of petitioners.

B. Rulings Under Review

The agency ruling under review is EPA's *National Ambient Air Quality Standards for Particulate Matter, Final Rule,* 71 Fed. Reg. 61,144 (Oct. 17, 2006).

C. Related Cases

The case on review has not been previously before this Court or any other court.

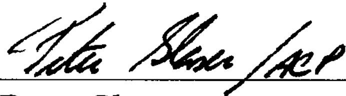
Respectfully submitted,

Richard E. Schwartz
Kirsten L. Nathanson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Counsel for the American Farm Bureau Federation and National Pork Producers Council

Robert R. Gasaway
Ashley C. Parrish
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W., Ste. 1200
Washington, D.C. 20005
(202) 879-5000

Counsel for the Alliance of Automobile Manufacturers



Peter Glaser
TROUTMAN SANDERS LLP
401 9th Street, N.W., Ste. 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for the
National Mining Association

INITIAL BRIEF: January 29, 2008

RULE 26.1 DISCLOSURE STATEMENT

Alliance of Automobile Manufacturers. The Alliance of Automobile Manufacturers is an I.R.C. Section 501(c)(6) not-for-profit trade association of car and light truck manufacturers and whose members include: BMW Group, Chrysler LLC, Ford Motor Company, General Motors Corporation, Mazda North American Operations, Mercedes-Benz USA, Mitsubishi Motor Sales of America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc. and Volkswagen of America, Inc. The Alliance operates for the purpose of promoting the general commercial, professional, legislative, and other common interests of its members. The Alliance does not have any outstanding shares or debt securities in the hands of the public, nor does it have a parent company. No publicly held company has a 10% or greater ownership interest in the Alliance.

American Farm Bureau Federation. The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF represents more than five million member families through member organizations in all 50 states and Puerto Rico. AFBF has no parent companies, and no publicly-held companies have an ownership interest in AFBF.

National Pork Producers Council. The National Pork Producers Council ("NPPC") is a voluntary non-profit trade association representing 44 affiliated state association members and a significant portion of the domestic pork producing industry. NPPC conducts public policy outreach, product promotion, and market development on behalf of its member-investors and the industry. NPPC has no parent companies, and no publicly-held companies have an ownership interest in NPPC.

National Mining Association. The National Mining Association ("NMA") is an incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

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INTRODUCTION

Intervenor-respondents are a diverse group of industry associations with differing perspectives on the important issues that comprise EPA's final rule regulating coarse particulates. Although their views are aligned as to EPA's decision to eliminate the annual PM_{10} standard, intervenors disagree among themselves on the merits of EPA's decision to retain the daily PM_{10} standard. This brief is divided into two sections.

Section I addresses EPA's decision to eliminate the annual PM_{10} standard. All parties to this brief join Section I and agree that EPA's decision should be affirmed. The Clean Air Act requires EPA to undertake a "thorough review" of NAAQS at five-year intervals, and requires EPA to revise existing standards as "appropriate." 42 U.S.C. § 7409. There is nothing in the statute requiring EPA to maintain an unwarranted annual PM_{10} standard. EPA's decision is supported by the overwhelming weight of scientific evidence, which shows the standard is not necessary to protect public health.

Section II addresses EPA's decision to retain the daily PM_{10} standard. The arguments in this section reflect only the views of the Alliance of Automobile Manufacturers. In the Alliance's view, EPA's decision to retain the hourly PM_{10} standard is not subject to reversal. The other parties to this brief — the American

Farm Bureau Federation, the National Pork Producers Council, and the National Mining Association — oppose the arguments set forth in Section II.

ARGUMENT

I. The Court Should Deny The Environmental Petitioners' Challenge To EPA's Decision To Eliminate The Annual PM_{10} Standard.

The Environmental Petitioners' challenge to EPA's decision to eliminate the annual PM_{10} standard lacks merit and should be denied.

A. Nothing In The Clean Air Act Prevents EPA From Eliminating The Annual PM_{10} Standard.

The Environmental Petitioners contend the Clean Air Act prohibits EPA from eliminating the annual PM_{10} standard, arguing that Congress "incorporat[ed] and preserv[ed]" the PM_{10} NAAQS in the 1990 Amendments. Envtl. Pet. Br. 29. According to the Environmental Petitioners, "[b]y building the statutory scheme on EPA's regulations, which included both 24-hour and annual averaging periods for the PM_{10} NAAQS, ... Congress limited EPA's flexibility to revisit its past decisions and change the way areas demonstrate compliance with the PM_{10} NAAQS." *Id.* at 29-30.

These arguments plainly lack merit. They are essentially the same arguments, albeit made with respect to PM_{10}, that both this Court and the Supreme Court rejected in the *American Trucking* litigation concerning ozone. In *American Trucking*, this Court rejected arguments that the Clean Air Act's 1990

Amendments precluded EPA from revising the primary and secondary ozone NAAQS because Congress "codified" a particular ozone NAAQS in the Clean Air Act. *See American Trucking Associations v. EPA*, 175 F.3d 1027, 1046-47 (D.C. Cir. 1999). Later, on review of this Court's decision, the Supreme Court determined in *Whitman* that the 1990 Amendments did not establish the "exclusive, permanent means of enforcing a revised ozone standard in non-attainment areas." *Whitman v. American Trucking Associations*, 531 U.S. 457, 484 (2001). The Environmental Petitioners thus concede, as they must, that "the statute leaves room for EPA to revise the standards as appropriate to protect public health and welfare." Envtl. Pet. Br. 30.

The Environmental Petitioners nonetheless maintain that this modification authority does not encompass discretion to eliminate the annual PM_{10} standard. They put decisive interpretive weight on section 188(d), which permits the Administrator to extend the initial attainment deadline established by statute if the "annual mean concentration of PM_{10} in the area ... is less than or equal to the standard level." 42 U.S.C. § 7513(d)(2); *see also id.* § 7513(c)(1) (setting attainment deadline for moderate non-attainment areas). In the Environmental Petitioners' view, the statutory implementation provisions in sections 107 and 188 revoked EPA's authority under section 109 to review each NAAQS every five years and to make appropriate modifications.

In granting EPA discretion to extend statutory compliance deadlines for the then-existing PM_{10} standard, however, Congress was endowing EPA with legal authority to address real-world effects of its existing regulations, not seeking to eliminate EPA's discretion to eliminate standards found not requisite to protect the public health. EPA undoubtedly "retains discretionary authority to avoid regulating risks that it reasonably concludes are trivial in context." *Whitman*, 531 U.S. at 496 (Breyer, J., concurring).

Nor do the Clean Air Act provisions cited by the Environmental Petitioners suggest that EPA's "control strategy must include both a 24-hour and an annual standard." Envtl. Pet. Br. 30. The statute provides, rather, that "[n]ational primary ambient air quality standards ... shall be ambient air quality standards the attainment and maintenance of which *in the judgment of the Administrator*, ... are *requisite to protect the public health*." 42 U.S.C. § 7409(b)(1) (emphasis added). The statute makes clear that such "standards may be revised in the same manner as promulgated," *id.*, and requires EPA to review the national standards at regular intervals. *Id.* § 7409(d)(2)(C). In carrying out this statutory directive, EPA is not required to establish standards at a zero-risk level or to maintain standards that are not requisite to protect public health. *National Ambient Air Quality Standards for Pariticulate Matter*, 71 Fed. Reg. 61,144 at 61,145 (Oct. 17, 2006) (citing *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1156 n.51 (D.C. Cir.

1980)). To the contrary, EPA's "task is to establish standards that are neither more nor less stringent than necessary." *Id.* (citing *Whitman*, 531 U.S. at 465-72, 475-76).

This plain reading of the relevant statutory provisions is supported by the legislative history. The Clean Air Act's 1990 Amendments demonstrate that EPA's authority to promulgate and revise NAAQS (as set forth in sections 108 and 109) is separate from, and intended to precede, its authority to implement and enforce whatever standards it has promulgated or revised (as set forth in sections 107 and 188). The House Report thus states that section 101 of the 1990 Amendments, which revised section 107(d), was intended "to establish a somewhat different structure for State and EPA action *following promulgation of a new or revised NAAQS.*" H.R. Rep. No. 101-490 at 215 (1990) (emphasis added). The House Report further explains that section 107(d) was revised "to provide that *after the Administrator promulgates a new or revised NAAQS*, each State is required to designate each area within the State as nonattainment, attainment, or unclassifiable ... for the *new or revised standard.*" *Id.* (emphasis added). The House Report likewise notes that, under the revised section 107(d), it was Congress's intent that, "*[a]fter promulgating a new or revised NAAQS*, the Administrator must promulgate the [attainment] designations for all areas of the country as expeditiously as practicable." *Id.* (emphasis added).

Similarly, contrary to the Environmental Petitioners' assertions, section 188(d) does not mandate both an annual and 24-hour standard. To the contrary, the House Report simply notes that "[s]ection 188(d) authorizes the Administrator to allow up to two one year extensions of the attainment date if the State has met all SIP commitments and has not recorded more than one exceedance of the standard in the year preceding the extension year." *Id.* at 263. There is no indication that Congress intended section 188 to limit EPA's discretion to roll back the "standard" to be attained in circumstances where that standard is unnecessary to protect public health.

In short, Congress did not cast in stone a particular standard for coarse particulates, or set forth an exclusive or permanent means for enforcing compliance with the regulatory standards. To the contrary, it specifically required EPA's Administrator to exercise judgment to adopt standards required to protect public health, and to revise or eliminate standards that are not necessary to serve that goal. Because it is now clear, in the wake of *Whitman*, that the Clean Air Act does not permit EPA to regulate when regulation is not "requisite" for public-health protection, EPA's decision to revoke the unnecessary annual PM_{10} standard was mandatory and fully appropriate.

B. EPA's Decision To Eliminate The Annual PM_{10} Standard Is Supported By Record Evidence.

The Environmental Petitioners contend that EPA's decision to eliminate the annual PM_{10} standard was not justified. But this contention overlooks the extensive scientific support for EPA's decision.

After examining the scientific evidence, EPA determined that "an annual averaging time is not currently warranted for the coarse particle standard." 71 Fed. Reg. at 61,198. EPA specifically found with respect to the annual PM_{10} standard that the "available evidence" shows no association between long-term exposure to coarse particulates and adverse health effects. *See also* 71 Fed. Reg. at 61,180 ("available epidemiological studies do not provide evidence that long-term community-levels exposure to thoracic coarse particles is associated with mortality or morbidity"). EPA further determined what is mathematically obvious and inevitable: A "24-hour standard would in effect also provide protection against any as yet unidentified potential effects of long-term exposure at ambient levels." *Id.* at 61,198-61,199 ("an annual coarse particle standard is not warranted at this time").

EPA's determination is supported by the Clean Air Scientific Advisory Committee, which agrees that an annual standard is "not currently warranted" and expressed its support for the decision to eliminate the annual standard. CASAC Review of EPA Staff Recommendations, *available at* http:www/epa.gov

/sab/panels/casacpmpanel.html. CASAC's recommendations were consistent, moreover, with the findings of EPA's staff. Although some parties, including the Environmental Petitioners, suggested that an annual standard should be retained to provide additional protection against the effects of short-term exposure, EPA's staff noted, after reviewing the relevant scientific evidence, that there is "little basis" for retaining "an annual averaging time for protecting against such health effects." PM Staff Paper, at 5-71.

Moreover, the Environmental Petitioners engage in selective citation of the record in contending that the annual standard was adopted to protect against both short- and long-term exposures. Although EPA stated during the previous PM_{10} rulemaking that the annual standard would yield benefits in reducing short-term exposures, those benefits were not the reason EPA adopted the annual standard. To the contrary, EPA concluded that the 24-hour standard it was adopting was set at a level that "will provide adequate protection against the known and potential effects of short-term coarse fraction particle exposures that have been identified to date in the scientific literature." *National Ambient Air Quality Standards for Particulate Matter*, 62 Fed. Reg. 38,652, 38,679 (July 18, 1997). A similar statement was made about the annual standard. *Id.* at 38,678-79. Each standard was thus justified on its own. Accordingly, EPA's decision based on new evidence and additional experience to revoke the annual standard does not

eliminate protections against short-term exposures that EPA assertedly relied on in promulgating the annual standard in 1997.

Because scientific evidence shows that an annual standard is not requisite to protect public health, EPA's determination was fully appropriate and not subject to reversal.

II. EPA's Decision To Retain The Daily PM_{10} Standard Is Not Subject To Reversal.

The Alliance of Automobile Manufacturers contends that EPA's decision to retain the pre-existing daily PM_{10} standard is justified on grounds that it maintains a regulatory *status quo* in the face of scientific and technological uncertainty. (The other Industry Intervenors oppose this section of the brief.)

A. The Clean Air Act Requires And, In Any Event, Permits EPA To Favor The Status Quo.

The Supreme Court held in *Whitman* that EPA must establish uniform national standards at a "requisite" level — that is, at a level "sufficient but not more than necessary" — to protect public health from the adverse effects of pollutants in the ambient air. 531 U.S. at 473. *Whitman* recognized that a zero-risk standard is neither possible nor what the statute demands. *Id.* at 475.

What the statute does demand is analytical rigor in finding a level of health protection that is requisite but no more than necessary, in stark contrast to the analytically loose "totality of the circumstances" approach EPA previously

used for standard setting. Under its pre-*Whitman* approach, EPA relied on impressionistic assessments of what pollutant concentrations were needed to protect public health, resulting in a continuous downward creep towards zero as the frontiers of scientific knowledge were pushed back. Under *Whitman*, by contrast, this unwarranted downward bias is eliminated and EPA must impose standards at levels that are "requisite but not more than necessary." Hence, it can no longer be maintained that the Act contemplates a bias toward greater stringency in standard setting – either based on its textual reference to an "adequate margin of safety" or otherwise. *Id.* 475-76; *cf.* EPA Br. 94-95 (wrongly suggesting a bias toward greater stringency based on the Act's supposed "precautionary" stance toward public-health protection).

Accordingly, once a NAAQS standard has been established and upheld on judicial review, EPA is justified in maintaining the status quo in the face of scientific or technological uncertainty. *See International Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992) (in areas of "scientific and technological uncertainty" the court must avoid "all temptation to direct the agency"). Precisely because the statute seeks to establish a regulatory golden mean reflecting a level "requisite" but not "more than necessary" to provide an "adequate" margin of safety, both the Administrator and reviewing courts should place the burden of persuasion on those who would alter existing

standards as opposed to maintaining them. *Cf. Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042-43 (D.C. Cir. 2002) (discussing provisions requiring FCC to critically review and "repeal or modify" any rule "not in the public interest"). Absent affirmative evidence that existing standards are not protecting public health, or that less-stringent standards would be equally effective, it is appropriate for EPA to withhold standard modifications pending the accumulation of further scientific evidence.

B. EPA's Decision To Maintain The Pre-Existing Daily PM_{10} Standard Is Not Subject To Reversal.

The Industry Petitioners argue that EPA's retention of the pre-existing PM_{10} standard is unlawful. In their view, because the daily PM_{10} standard depends on daily levels of $PM_{2.5}$, the standard will result in "arbitrarily varying PM coarse levels" that are not requisite to protect public health.

In *American Trucking*, this Court held that EPA did not adequately justify the PM_{10} standard because, although EPA believed the PM_{10} standard would work in conjunction with the $PM_{2.5}$ standard, the agency provided "no explanation to aid [the court] in understanding its decision." *ATA*, 175 F.3d at 1054. In the absence of an adequate explanation, the Court expressed concern that the two indicators "when used together" would "lead to 'double regulation' of the $PM_{2.5}$ component of PM_{10} and potential underregulation of $PM_{10-2.5}$ component." *Id.* The Court held that EPA could not justify using PM_{10} merely

for reasons of "administrative convenience" unrelated to "public health" – namely, because "a nationwide monitoring program for PM_{10} already exists." *Id.*

The Industry Petitioners contend that EPA's decision to maintain the PM_{10} standard continues to rest on mere "administrative convenience." Indus. Pet. Br. 32. But that mischaracterizes EPA's most recent explanation for its decision. In fact, as the rulemaking documents show, EPA considered all the available options and determined that other potential approaches were not as effective as the existing daily PM_{10} standard in protecting public health, were "more stringent than necessary," and/or were not supported by sound science. 71 Fed. Reg. at 61,195 (a PM_{10} standard is "more effective[] and more appropriate[] than all other indicators evaluated by EPA"); *id.* at 61,193 (a qualified indicator would be "insufficiently protective" of health).

Relatedly, the Industry Petitioners assert that retaining the PM_{10} standard results in an unjustified double regulation because "EPA has offered no intelligible rationale" for regulating PM fine through two distinct 24-hour NAAQS. *See* Indus. Pet. Br. 35. In fact, however, EPA provided a detailed explanation to "aid" this reviewing Court in understanding its decision, addressing this precise concern. *See* 71 Fed. Reg. at 61,196. Significantly, nothing in the Clean Air Act requires EPA to divide NAAQS programs into hermetically sealed and separate categories. EPA's NAAQS for sulfur oxides, for instance,

overlaps substantially with its NAAQS for fine and coarse particulates. *See* 40 C.F.R. §§ 50.4–50.7; *Approval and Promulgation of Air Quality Implementation Plans; Minnesota,* 72 Fed. Reg 68,508, at 68,510 (Dec. 5, 2007) (recognizing that sulfur dioxide is "a precursor of acid rain and fine particulate matter formation"). Likewise, EPA's NAAQS for ozone overlaps with its NAAQS for nitrogen oxides, which are precursors to ozone formation in the ambient air. *See* 40 C.F.R. §§ 50.9-50.11; *Proposed Rule to Implement the Fine Particle National Ambient Air Quality Standards,* 70 Fed. Reg. 65,984, at 66,034-66,035 (Nov. 1, 2005) (nitrogen oxide is a precursor to ozone). The fact that daily levels of fine particulates — $PM_{2.5}$ — are regulated once under the daily $PM_{2.5}$ standard and again under the daily PM_{10} standard presents nothing anomalous viewed in the overall context of EPA NAAQS standards.

More substantively, the Industry Petitioners contend that EPA's retention of the daily PM_{10} standard is improper because allowable levels of coarse particles ($PM_{10-2.5}$) will continue to depend on the amount of fine particles ($PM_{2.5}$) in the ambient air. *See* Indus. Pet. Br. 34. But this glosses over EPA's justification for the overlap. EPA explained that, given the current science, including $PM_{2.5}$ in the PM_{10} indicator provides the most appropriate "targeted health protection," because it permits daily levels of coarse particulates to vary depending on daily $PM_{2.5}$ levels, which generally correspond to areas in which concentrations of

coarse particles may raise health risks. EPA further explained that, "to the extent that higher $PM_{2.5}$ levels lead to a lower allowable level of coarse particles in some areas compared to others, this will occur in precisely those locations — *i.e.* urban or industrial areas — where the science has shown the strongest evidence of adverse health effects associated with exposure to coarse particles." 71 Fed. Reg. at 61,195-61,196. In contrast, "lower levels of $PM_{2.5}$ lead to a higher allowable level of coarse particles" in precisely those areas where "the health risks associated with coarse particles" are "inconclusive." *Id.* at 61,196.

The Industry Petitioners also object that EPA "offers no data and no evidence" that the "asserted health risks from contaminated urban coarse particles are *directly proportional* to ambient levels of $PM_{2.5}$." Indus. Pet. Br. 35. But no showing of "direct proportionality" is required. Instead, EPA necessarily made the types of fine regulatory judgments inherent in the task of establishing numerical regulatory standards that seek to reconcile competing considerations pulling in opposing directions by pinpointing an optimal numerical value. *See Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996) (Posner, J.) (agencies often must make "reasonable but arbitrary (not in the 'arbitrary or capricious' sense) rules").

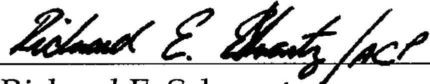
Here, EPA's suite of coarse and fine standards, taken together, effectively establish an absolute limit on daily fine particulates that may never be exceeded.

As long as that absolute limit is met, the suite of standards permit the substitution of coarse particle concentrations for fine particle concentrations within the overall cap. Especially given the Industry Petitioners' insistence that coarse particulate exposures are significantly less harmful than similar fine particulate exposures (a characterization with which the Alliance takes issue), allowing such substitutions — substitutions of less harmful pollutant concentrations for more harmful ones — can hardly be deemed arbitrary or capricious.

CONCLUSION

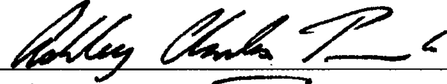
For the foregoing reasons, EPA's decision should be affirmed.

Respectfully submitted,



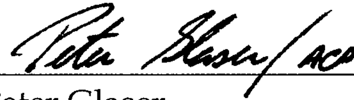
Richard E. Schwartz
Kirsten L. Nathanson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Counsel for the American Farm Bureau Federation and National Pork Producers Council



Robert R. Gasaway
Ashley C. Parrish
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W., Ste. 1200
Washington, D.C. 20005
(202) 879-5000

Counsel for the Alliance of Automobile Manufacturers



Peter Glaser
TROUTMAN SANDERS LLP
401 9th Street, N.W., Ste. 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for the National Mining Association

INITIAL BRIEF: January 29, 2008

Additional counsel:

Julie Anna Potts, Esq.
Danielle D. Quist, Esq.
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Washington, D.C. 20024

Michael Formica, Esq.
NATIONAL PORK PRODUCERS COUNCIL
122 C Street, N.W., Ste 875
Washington, D.C. 20001

Harold P. Quinn, Jr.
Executive Vice President and General Counsel
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, N.W., Ste 500 East
Washington, D.C. 20001

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure And Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 3,179 words as determined by the word-counting feature of Microsoft Word 2000.

Ashley C. Parrish

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 29th day of January, 2008, served a copy of the foregoing documents by first-class mail, postage prepaid, upon:

ENVIRONMENTAL PROTECTION AGENCY

Norman Louis Rave, Jr.
John Charles Cruden
Brian H. Link
U.S. Department of Justice
Environmental and Natural Resources
P.O. Box 23986
L'Enfant Plaza Station
Washington D.C. 20026-3986

Steven E. Silverman, Attorney
U.S. Environmental Protection Agency
Office of the General Counsel
1200 Pennsylvania Avenue, NW
Ariel Rios Building
Washington, DC 20460

AMERICAN LUNG ASSOCIATION

Deborah Suzanne Reames
Paul Robert Cort
Earthjustice Legal Defense Fund
426 17th Street
6th Floor
Oakland, CA 94612

David Samuel Baron
Earthjustice Legal Defense Fund
1625 Massachusetts Avenue, NW
Suite 702
Washington, DC 20036-2212

ENVIRONMENTAL DEFENSE	Deborah Suzanne Reames Paul Robert Cort David Samuel Baron Earthjustice Legal Defense Fund 426 17th Street Suite 1400 Oakland, CA 94612
	David Samuel Baron Earthjustice Legal Defense Fund 1625 Massachusetts Avenue, NW Suite 702 Washington, DC 20036-2212
NATIONAL PARKS CONSERVATION ASSOCIATION	Deborah Suzanne Reames Earthjustice Legal Defense Fund 426 17th Street 6th Floor Oakland, CA 94612
	David Samuel Baron Earthjustice Legal Defense Fund 1625 Massachusetts Avenue, NW Suite 702 Washington, DC 20036-2212
STATE OF NEW YORK	Katherine Kennedy Michael J. Myers Attorney General's Office of State of New York The Capitol New York State Department of Law Albany, NY 12224-0341

STATE OF CALIFORNIA

Tom Greene
Theodora Berger
Susan L. Durbin
Attorney General's Office
California Department of Justice
1300 I Street, P.O. Box 944255
Sacramento, CA 94244-2550

STATE OF CONNECTICUT

Kimberly P. Massicotte
Scott Koschwitz
Attorney General's Office of State of Connecticut
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120

STATE OF ARIZONA

Joseph P. Mikitish
Attorney General's Office
1275 West Washington Street
Phoenix, AZ 85007

STATE OF DELAWARE

Valerie Satterfield Csizmadia
Attorney General's Office of State of Delaware
102 West Water Street
Third Floor
Dover, DE 19904

STATE OF ILLINOIS

Thomas Edward Davis
Environmental Bureau
Attorney General's Office of State of Illinois
500 South Second Street
Springfield, IL 62706

STATE OF MAINE

Gerald D. Reid
Attorney General's Office of State of Maine
State House Station #6
Augusta, ME 04333-0006

COMMONWEALTH OF MASSACHUSETTS	James R. Milkey William L. Pardee Siu Tip Lam Assistant Attorneys General Environmental Protection Division One Ahsburn Place Boston, MA 02108
STATE OF MARYLAND	Kathy M. Kinsey Susan F. Martielli Maryland Department of the Environment 1800 Washington Boulevard Baltimore, MD 21230
STATE OF NEW HAMPSHIRE	Maureen D. Smith Attorney General's Office of State of New Hampshire 33 Capitol Street Concord, NH 03301-6397
STATE OF NEW JERSEY	Kevin P. Auerbacher Attorney General's Office of State of New Jersey Division of Law 25 Market Street PO Box 093, Richard J. Hughes Justice Complex Trenton, NJ 08625-0093
STATE OF NEW MEXICO	Stephen Robert Farris Karen L. Reed, MBA Attorney General's Office of State of New Mexico PO Drawer 1508 Santa Fe, NM 87504-1508

	Tracy M. Hughes New Mexico Environment Department Office of the General Counsel 1190 St. Francis Drive Suite N - 4050 Santa Fe, NM 87505
	William G. Grantham National Tribal Environmental Council 2221 Rio Grande Blvd., NW Albuquerque, NM 87104
STATE OF OREGON	Philip Schradle Richard M. Whitman Attorney General's Office of State of Oregon Office of General Counsel 1162 Court Street, NE 100 Justice Building Salem, OR 97301
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	Kristen Margaret Campfield Richard P. Mather, Sr. Rachel Carson State Office Building 9th Floor, P.O. Box 8464 Harrisburg, PA 17105-8464
STATE OF RHODE ISLAND	Tricia K. Jedele Attorney General's Office of State of Rhode Island 150 South Maine Street Providence, RI 02903
STATE OF VERMONT	Kevin O. Leske Attorney General's Office of State of Vermont 109 State Street Montpelier, VT 05609-1001

DISTRICT OF COLUMBIA	Donna M. Murasky Office of the Attorney General for the District of Columbia 441 4th Street, NW Sixth Floor Washington, DC 20001-2714
	Kimberly Katzenbarger Counsel to the Air Quality Division District Dept. of the Environment 51 N. Street, NE Washington, DC 20002
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT	Barbara Beth Baird Kurt R. Wiese South Coast AQMD 21865 E Copley Drive PO Box 4940 Diamond Bar, CA 91765-0940
AMERICAN COKE AND COAL CHEMICALS INSTITUTE	Norman William Fichthorn Lucinda Minton Langworthy F. William Brownell Hunton & Williams LLP 1900 K Street, NW Suite 1200 Washington, DC 20006-1109
AMERICAN FOREST AND PAPER ASSOCIATION INC.	Norman William Fichthorn Lucinda Minton Langworthy F. William Brownell Hunton & Williams LLP 1900 K Street, NW Suite 1200 Washington, DC 20006-1109

AMERICAN IRON AND STEEL INSTITUTE

Norman William Fichthorn
Lucinda Minton Langworthy
F. William Brownell
Hunton & Williams LLP
1900 K Street, NW
Suite 1200
Washington, DC 20006-1109

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Norman William Fichthorn
Lucinda Minton Langworthy
F. William Brownell
Hunton & Williams LLP
1900 K Street, NW
Suite 1200
Washington, DC 20006-1109

CORN REFINERS ASSOCIATION

Norman William Fichthorn
Lucinda Minton Langworthy
F. William Brownell
Hunton & Williams LLP
1900 K Street, NW
Suite 1200
Washington, DC 20006-1109

NATIONAL ASSOCIATION OF MANUFACTURERS

Norman William Fichthorn
Lucinda Minton Langworthy
F. William Brownell
Hunton & Williams LLP
1900 K Street, NW
Suite 1200
Washington, DC 20006-1109

NATIONAL COTTON COUNCIL OF AMERICA

Norman William Fichthorn
Lucinda Minton Langworthy
F. William Brownell
Hunton & Williams LLP
1900 K Street, NW
Suite 1200
Washington, DC 20006-1109

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NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION	Norman William Fichthorn Lucinda Minton Langworthy F. William Brownell Hunton & Williams LLP 1900 K Street, NW Suite 1200 Washington, DC 20006-1109
PORTLAND CEMENT ASSOCIATION	Norman William Fichthorn Lucinda Minton Langworthy F. William Brownell Hunton & Williams LLP 1900 K Street, NW Suite 1200 Washington, DC 20006-1109
UTILITY AIR REGULATORY GROUP	Norman William Fichthorn Lucinda Minton Langworthy F. William Brownell Hunton & Williams LLP 1900 K Street, NW Suite 1200 Washington, DC 20006-1109
AMERICAN THORACIC SOCIETY	Hope Madeline Babcock Eric Bluemel Georgetown University Law Center 600 New Jersey Ave, NW Suite 312 Washington, DC 20001

AMERICAN ACADEMY OF PEDIATRICS

Hope Madeline Babcock
Eric Bluemel
Georgetown University Law Center
600 New Jersey Ave, NW
Suite 312
Washington, DC 20001

AMERICAN ASSOCIATION OF CARDIOVASCULAR AND PULMONARY REHABILITATION

Hope Madeline Babcock
Eric Bluemel
Georgetown University Law Center
600 New Jersey Ave, NW
Suite 312
Washington, DC 20001

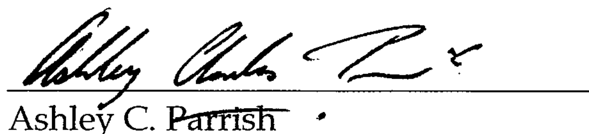
NATIONAL ASSOCIATION FOR THE MEDICAL DIRECTION OF RESPIRATORY CARE

Hope Madeline Babcock
Eric Bluemel
Georgetown University Law Center
600 New Jersey Ave, NW
Suite 312
Washington, DC 20001

AMERICAN MEDICAL ASSOCIATION

Hope Madeline Babcock
Eric Bluemel
Georgetown University Law Center
600 New Jersey Ave, NW
Suite 312
Washington, DC 20001

AMERICAN COLLEGE OF CHEST PHYSICIANS	Hope Madeline Babcock Eric Bluemel Georgetown University Law Center 600 New Jersey Ave, NW Suite 312 Washington, DC 20001
COURSE PM INTERVENORS GROUP	Kurt E. Blase O'CONNOR & HANNON LLP 1666 K Street, Ste 500 Washington, D.C. 2006 (202) 887-1400
NATIONAL CATTLEMEN'S BEEF ASSOCIATION	Denise W. Kennedy HOLLAND & HART LLP P.O. Box 8749 Denver, CO 80201 Tamara Thies National Cattlemen's Beef Association 1301 Pennsylvania Ave., N.W., Ste 300 Washington, D.C. 20004



Ashley C. Parrish