ORAL ARGUMENT NOT YET SCHEDULED

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1410
(and consolidated cases)

AMERICAN FARM BUREAU FEDERATION, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Action
of the U.S. Environmental Protection Agency

JOINT BRIEF OF FINE PM INDUSTRY INTERVENOR-RESPONDENTS

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January 29, 2008

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	)	**No. 06-1410 (and**
Petitioners,	)	**consolidated cases)**
v.	)	
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to Circuit Rule 28(a)(1)(A) on behalf of Fine PM Industry Intervenor-Respondents (Utility Air Regulatory Group, American Chemistry Council, American Coke & Coal Chemicals Institute, American Forest & Paper Association, American Iron & Steel Institute, American Petroleum Institute, Chamber of Commerce of the United States of America, Corn Refiners Association, Council of Industrial Boiler Owners, National Association of Manufacturers, National Cotton Council of America, National Oilseed Processors Association, National Petrochemical & Refiners Association, and Portland Cement Association).

A. Parties and Amici[1]

All parties, intervenors, and amici appearing in this Court are listed in the Petitioners' briefs.

[1] A Rule 26.1 disclosure statement for the Fine PM Industry Intervenor-Respondents joining in this Brief appears following this certificate.

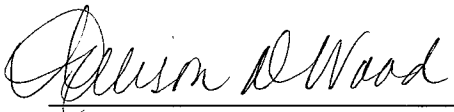
B. Rulings Under Review

The Agency action under review is EPA's final rule on National Ambient Air Quality Standards for Particulate Matter, published at 71 Fed. Reg. 61144 (October 17, 2006).

C. Related Cases

These cases were not previously before this Court or any other court. There are no related cases currently pending in this Court or in any other court of which undersigned counsel are aware.

Respectfully submitted,



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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Fine PM Industry Intervenor-Respondents file the following statement:

The Utility Air Regulatory Group is a not-for-profit trade association of individual electric generating companies and national trade associations that participates collectively in administrative proceedings, and in litigation arising from those proceedings, that affect electric generators under the Clean Air Act.

The American Chemistry Council is a not-for-profit trade association that represents many of the companies engaged in the business of chemistry and chemical manufacturing within the United States.

The American Coke & Coal Chemicals Institute is a not-for-profit trade association that represents many of the companies in the metallurgical coke and coal chemicals industry within the United States.

The American Forest & Paper Association is a not-for-profit trade association of the forest, pulp, paper, paperboard, and wood products industry within the United States.

The American Iron & Steel Institute is a not-for-profit trade association representing the interests of North American integrated, electric arc furnace, and reconstituted steel mills.

The American Petroleum Institute is a not-for-profit trade association representing nearly 400 companies that are involved in all aspects of the oil and natural gas industry within the United States, including exploration and production, refining, marketing, pipeline, marine, and associated industries.

The Chamber of Commerce of the United States of America is a not-for-profit business federation representing more than 3 million businesses of all sizes, sectors, and regions, and includes hundreds of associations, thousands of local chambers, and more than 100 American Chambers of Commerce in 91 countries.

The Corn Refiners Association is a not-for-profit trade association representing the corn refining (wet milling) industry of the United States.

The Council of Industrial Boiler Owners is a not-for-profit trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and universities representing 20 major industrial sectors.

The National Association of Manufacturers is a not-for-profit trade association representing small and large manufacturers in every industrial sector and in all 50 states.

The National Cotton Council of America is a not-for-profit trade association of the cotton industry in the United States, representing all seven raw cotton industry segments, including producers, ginners, warehousers, merchants, cottonseed processors/dealers, cooperatives and textile manufacturers.

The National Oilseed Processors Association is a not-for-profit trade association that represents oilseed crushers of canola, flaxseed, safflower, soybeans and sunflower, including

thirteen regular member firms engaged in the actual processing of oilseeds, and twelve associate member firms who are consumers of vegetable oil or oilseed meal.

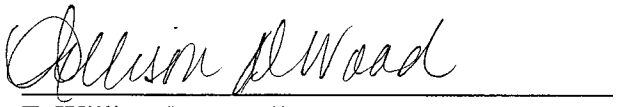
The National Petrochemical & Refiners Association is a not-for-profit trade association that represents virtually all U.S. refiners and petrochemical manufacturers and whose members supply consumers with a wide variety of products, including gasoline, diesel fuel, home heating oil, jet fuel, lubricants, and other chemicals.

The Portland Cement Association is a not-for-profit trade association of cement companies in the United States and Canada.

* * *

Each of the foregoing trade associations operates for the purpose of promoting the general commercial, professional, and other common interests of its respective membership. None of the foregoing trade associations has any outstanding shares or debt securities in the hands of the public, and none has a parent company. No publicly held company has a 10 percent or greater ownership in any of the foregoing trade associations.

Respectfully submitted,



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Dated: January 29, 2008

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MISCELLANEOUS

GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief.

ALA	American Lung Association
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
EPA	U.S. Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
PM	Particulate Matter
$PM_{2.5}$	Fine Particulate Matter
ppm	Parts per million
SAB	Science Advisory Board
$\mu g/m^3$	Micrograms-per-Cubic-Meter

ORAL ARGUMENT NOT YET SCHEDULED

JOINT BRIEF OF FINE PM INDUSTRY INTERVENOR-RESPONDENTS

STATUTES AND REGULATIONS

Statutes and other legal authorities are in addenda to Petitioners' briefs. An addendum hereto includes excerpts from the Clean Air Act Amendments of 1977.

SUMMARY OF ARGUMENT

This Court should uphold the 2006 national ambient air quality standards ("NAAQS) for fine particulate matter ("$PM_{2.5}$"). 71 Fed. Reg. 61144 (Oct. 17, 2006), JA__. The record shows that the Administrator of the U.S. Environmental Protection Agency ("EPA") considered the recommendations of the Clean Air Scientific Advisory Committee ("CASAC"), adopting some recommendations and explaining why, in his judgment, it was necessary to differ from them in some respects. This is consistent with the statute's plain language and past EPA practice. Moreover, EPA's 2005 risk assessment justifies keeping the $PM_{2.5}$ annual NAAQS at 15 $\mu g/m^3$ because the risk attributed to ambient $PM_{2.5}$ exposure at that NAAQS level has stayed the same or decreased since EPA established that standard in 1997. Additionally, EPA has now provided increased visibility protection by tightening the secondary NAAQS to be equivalent to the new, more stringent primary NAAQS. Nothing in the record regarding particulate matter's ("PM") role in visibility impairment has changed enough to justify deviating from EPA's 1997 decision, upheld by this Court, that setting the secondary $PM_{2.5}$ standards at a level identical to the primary standards, in conjunction with the regional haze program, provides the requisite level of public welfare protection.

ARGUMENT

The Clean Air Act ("CAA" or "Act") requires EPA's Administrator to set NAAQS for certain pollutants, including PM, at levels that "in the judgment of the Administrator" are "requisite" to protect public health with "an adequate margin of safety" (primary NAAQS) and to protect public welfare (secondary NAAQS). 42 U.S.C. §7409(b). The Administrator must exercise his "judgment" to set NAAQS "at the level that is 'requisite'—that is, not lower or higher than is necessary—to protect the public health" and welfare. *Whitman v. ATA*, 531 U.S. 457, 475-76 (2001) (quoting 42 U.S.C. §7409(b)(1)); 42 U.S.C. §7409(b)(2). EPA need not, however, set NAAQS at a level that eliminates all risk. *Whitman*, 531 U.S. at 494 (Breyer, J., concurring) ("The statute, by its express terms, does not compel the elimination of *all* risk...."); *see also Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1152-55 (D.C. Cir. 1980); 71 Fed. Reg. at 61145, JA__.

In 1997, EPA revised the PM NAAQS, adding a new particulate size limitation (2.5 microns) and making the standards more stringent. In its 2006 rulemaking, EPA again increased the PM NAAQS' stringency by: (1) substantially tightening the numerical level of the 24-hour $PM_{2.5}$ NAAQS[1] (from 65 $\mu g/m^3$ to 35 $\mu g/m^3$); (2) retaining the level of the annual $PM_{2.5}$ NAAQS (15 $\mu g/m^3$) but revising its form;[2] and (3) tightening the secondary $PM_{2.5}$ NAAQS by making them equivalent to the new, more stringent primary NAAQS.

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[1] This brief does not address the NAAQS for coarse PM; references hereinafter to PM are to $PM_{2.5}$ unless stated otherwise.

[2] Although the annual $PM_{2.5}$ NAAQS remained at 15 $\mu g/m^3$, EPA changed that NAAQS' form (*i.e.*, the method to determine attainment of the NAAQS) in a manner that makes that NAAQS more stringent. *See* Memorandum from M. Schmidt, et al., Output A.7 at 2, 13 (June 2005), JA__. Specifically, the Administrator increased from 0.6 to 0.9 the required correlation coefficient between properly sited monitor pairs that may be spatially averaged and required that this correlation be attained on a seasonal basis. 71 Fed. Reg. at 61165-67, JA__.

Petitioners challenge two aspects of the revised, more stringent $PM_{2.5}$ NAAQS: (1) the Administrator's decision to retain the level of the annual primary NAAQS for $PM_{2.5}$ at 15 $\mu g/m^3$; and (2) his decision to have the secondary $PM_{2.5}$ NAAQS equal the primary NAAQS. Petitioners claim these decisions[3] are unlawful. Nothing in the record or the law supports their claims. To the contrary, the Administrator made careful and reasoned policy decisions consistent with the CAA and based on the scientific evidence before him.

I. The CAA Makes Clear that CASAC's Recommendations Are Not Binding.

Petitioners argue the Administrator's decision not to adopt CASAC's recommendations regarding the annual primary standard's numerical level and the secondary NAAQS' averaging time was unlawful. *See generally* State Br. 16-24; ALA Br. 12-15. This argument is refuted by the CAA's plain language.

Every five years, the Administrator shall review "the criteria published under section 7408 [the "Criteria Document"]...and the [NAAQS]...and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate." 42 U.S.C. §7409(d)(1). The Administrator must set any new or revised standard at the level that "*in...[his] judgment*...[is] requisite to protect" public health and welfare. *Id.* §7409(b)(1) (emphasis added); *see also id.* §7409(b)(2). Congress prohibited the Administrator from delegating his responsibility for setting NAAQS; only he may determine whether new standards are "appropriate" and what level, in his "judgment," is "requisite to protect" public health and welfare. *Id.* §§7409(b), 7601(a)(1), 7607(d)(1)(A). Congress thus told *the Administrator*—not CASAC—to exercise "judgment" to determine the appropriate standard and that disposes of petitioners' claims. Where, as here, "Congress has directly spoken to the precise question at

[3] State petitioners challenge only EPA's primary NAAQS decision, not its secondary NAAQS decision.

issue," Congress' intent is clear and "that is the end of the matter." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984).

This conclusion finds support in other CAA provisions. Congress specified in the CAA that CASAC's responsibility regarding NAAQS revision is to "*recommend*...any new [NAAQS] and revisions of existing criteria and standards as may be appropriate." 42 U.S.C. §7409(d)(2)(B) (emphasis added). By definition, a "recommendation" can be accepted or rejected. Consistent with this plain meaning, the Act expressly allows the Administrator not to adopt CASAC's recommendations, requiring only that he explain any important differences. *Id.* §7607(d)(3), (6)(A); *see ATA v. EPA*, 283 F.3d 355, 378-79 (D.C. Cir. 2002). Had Congress intended to bind the Administrator to CASAC's recommendations, as Petitioners imply, it would have had no need to direct him to explain differences, as he has done, because no differences could exist.

By contrast, when Congress intended to restrict EPA's authority based on conclusions of scientific review bodies, it did so expressly. For instance, before Congress amended the Act in 1990, it permitted revisions to certain heavy-duty-vehicle emissions standards *only* when "the National Academy of Sciences has not...issued a report substantially contrary to the findings of the Administrator." 42 U.S.C. §7521(a)(3)(C)(ii) (1988). Congress enacted this limitation on the Administrator's discretion as part of the same amendments that established CASAC and added the §7607(d) provisions recognizing EPA may properly "differ[]" from CASAC's "recommendations." Pub. L. No. 95-95, §§106, 224, 305 (Aug. 7, 1977). "[W]here Congress includes particular language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 406 U.S. 16, 23 (1983).

Finally, CASAC's own charter makes clear that CASAC's duties "are solely advisory in nature." EPA Charter: Clean Air Scientific Advisory Committee, ¶4 (filed with Congress Aug. 3, 2007), JA__. CASAC historically has respected this Charter, noting that "we...provid[e] advice and recommendations and it's up to the Administrator to make a final decision, of course." Transcript, CASAC Meeting, at 127 (Apr. 27, 2005) (statement of R. Henderson, CASAC Chair), JA__. By contrast, in its September 29, 2006 letter,[4] CASAC went beyond "providing advice," "question[ing] whether you [the Administrator] have appropriately given full consideration to CASAC's expert scientific advice" and arguing that "[w]hile there is uncertainty associated with the risk assessment for the $PM_{2.5}$ standard, this very uncertainty suggests a need for a prudent approach to providing an adequate margin of safety." EPA-CASAC-LTR-06-003, at 2, 3, JA__, __.

Selecting "a prudent approach" to determining "an adequate margin of safety," of course, is the precise function that the CAA assigns to the Administrator alone. 42 U.S.C. §§7409(b)(1), 7601(a)(1), 7607(d)(1)(A). Notwithstanding CASAC's opinion that "the decision to retain without change the annual $PM_{2.5}$ standard does not provide an 'adequate margin of safety...requisite to protect the public health,'" EPA-CASAC-LTR-06-003, at 2, JA__, the level that is "requisite" is a policy determination that Congress entrusted to the Administrator's "judgment," not to CASAC.

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[4] Petitioners repeatedly cite this letter and suggest the Administrator erred by not considering it. In fact, this letter was sent *after* the Administrator signed the final rule, 71 Fed. Reg. at 61224 (showing rule's signature date of September 21, 2006), JA__, and thus is plainly outside the record. A "promulgated [NAAQS] rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation." 42 U.S.C. §7607(d)(6)(C). Likewise, the letter is not part of the record for judicial review, *id.* §7607(d)(7)(A), and no party sought reconsideration based on the letter under §7607(d)(7)(B).

The Administrator did all the Act requires: He considered CASAC's recommendations and explained his reasons for differing with them.[5] *See* 71 Fed. Reg. at 61174, JA__; 71 Fed. Reg. 2620, 2652-53 (Jan. 17, 2006), JA__. Contrary to Petitioners' suggestion, State Br. 5, 10, this course was perfectly consistent with how the Administrator has previously considered CASAC recommendations. For example, as part of EPA's 1996 review of the ozone NAAQS, a majority of CASAC recommended a less stringent standard than 0.08 parts per million ("ppm"). EPA-SAB-CASAC-LTR-96-002, at 3 (Nov. 30, 1995), JA__. After considering that recommendation, the Administrator adopted a 0.08 ppm standard, 62 Fed. Reg. 38856, 38867-68 (July 18, 1997), JA__, __, and this Court affirmed the Administrator's determination. *ATA*, 283 F.3d at 378-79 (stating "EPA must either follow CASAC's advice or explain why the proposed rule 'differs...from...[CASAC's] recommendations'") (quoting 42 U.S.C. §7607(d)(3)) (alterations in original). Similarly, in 1996, a majority of CASAC recommended either an annual $PM_{2.5}$ standard less stringent than 15 $\mu g/m^3$ or no annual standard at all. EPA-SAB-CASAC-LTR-96-008, at 5-6 (June 13, 1996), JA__. After considering that recommendation, the Administrator established the stringent 15 $\mu g/m^3$ annual $PM_{2.5}$ standard, 62 Fed. Reg. 38652, 38669, 38674-75 (July 18, 1997), JA__, __, __, and this Court affirmed. *ATA*, 283 F.3d at 375.

Likewise, during review of the photochemical-oxidant NAAQS in the 1970s, the Science Advisory Board's ("SAB") Subcommittee on Scientific Criteria for Photochemical Oxidants, CASAC's predecessor, reviewed three drafts of EPA's oxidant criteria document, each time unanimously finding the document scientifically unacceptable. *See* Sheila Jasanoff, THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS 106 (1994), JA__. This body recommended

[5] Petitioners are wrong to assert that the Administrator "ignored CASAC's recommendations on the level of the NAAQS." State Br. 5. Far from ignoring those recommendations, the Administrator carefully considered them, adopted some of them, and explained his reasons where he differed from them. 71 Fed. Reg. at 61173-74, JA__.

that EPA not narrow that standard's scope to cover only ozone. *See* Eliot Marshall, *EPA Smog Standard Attacked by Industry, Science Advisers*, SCIENCE, Vol. 202, No. 4371, 949-50 (Dec. 1, 1978), JA__. After considering these recommendations, the Administrator nonetheless narrowed the standard to ozone alone. 44 Fed. Reg. 8202 (Feb. 8, 1979), JA__. His action was challenged unsuccessfully in this Court, which held "[t]he Act requires only that the EPA submit the criteria document to the Board for advice and comment; it does not require that the Administrator obtain approval of the SAB or incorporate all suggested changes." *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1188 (D.C. Cir. 1981).

In sum, the Administrator is not compelled to adopt CASAC's recommendations, only to consider and to explain any disagreement with those recommendations. Because the Administrator did that here, petitioners' challenge to his decision is baseless.

II. The Risk Assessment Supports the Administrator's Decision To Retain the Annual Primary $PM_{2.5}$ NAAQS.

In 1997, EPA determined 15 $\mu g/m^3$ was "*the* level that is 'requisite'—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety." *Whitman*, 531 U.S. at 475-76 (emphasis added). There is "at least a presumption" that an existing rule best carries out the policies committed to an agency by Congress. *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). As a result, were the Administrator to revise the level of the annual standard, he would need to supply a reasoned analysis for the revision based on a change of policy or judgment. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

For example, if new evidence before the Administrator established that the health risk was greater or significantly different in character than that which EPA found in 1997, a case might conceivably be advanced that EPA should change the level of the annual NAAQS under

the "requisite to protect" standard. Although Petitioners contend EPA's risk assessment provides such a basis, State Br. 22-24, the record in fact demonstrates that health risks associated with exposure to ambient $PM_{2.5}$ are no greater than EPA estimated them to be in 1997—and may indeed be less. As a result, EPA's current risk assessment provides no basis for a challenge to EPA's retention of the level of the annual standard.[6]

EPA in 1997 assessed the health risks associated with attainment of the $PM_{2.5}$ NAAQS it adopted that year, including the 15 $\mu g/m^3$ annual standard, and determined those risks were acceptable. 62 Fed. Reg. at 38655, JA__. In reviewing those NAAQS in 2005, EPA prepared a new assessment of the risk posed by $PM_{2.5}$ upon attainment of the NAAQS, taking into account more recent studies. Abt Associates, Inc., Particulate Matter Health Risk Assessment for Selected Urban Areas (Dec. 2005), JA__. The risks now predicted upon attainment of the 15 $\mu g/m^3$ NAAQS are, according to EPA, "about the same" as they were in 1997 when EPA determined those standards provide the requisite level of public health protection. 71 Fed. Reg. at 61161, JA__. Thus, because the 15 $\mu g/m^3$ NAAQS provides a level of health protection that EPA already determined "requisite"—and, thus, not less stringent than necessary—to protect public health, the current risk assessment supports the Administrator's decision not to revise that level.[7]

Regarding the only two cities addressed in both the 1997 and 2005 risk assessments (Los Angeles and Philadelphia), "the magnitude of the estimates [of short-term mortality or morbidity

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[6] As EPA explains, EPA Br. 17-18, the Administrator did not rely on the risk assessment in exercising his judgment regarding the annual standard level. If he had, his conclusion would not have changed, for the reasons discussed in this section.

[7] Indeed, given the scientific record, a decision to make the NAAQS more stringent arguably would have been arbitrary and capricious, especially given that the record shows short-term risks from $PM_{2.5}$ have decreased. 71 Fed. Reg. at 2640, JA__.

risk] associated with just meeting the current annual standard, in terms of the percentage of total incidence, is similar in one of the locations (Philadelphia) and the current [*i.e.*, 2005] estimate is *lower* in the other location (Los Angeles)." 71 Fed. Reg. at 2640 (emphasis added), JA__; *see also* 71 Fed. Reg. at 61161, JA__. Furthermore, "[i]n terms of the magnitude of the risk estimates [associated with long-term exposure to PM], the estimates in terms of percentage of total incidence [in those cities] are very similar." 71 Fed. Reg. at 2640, JA__; *see also* 71 Fed. Reg. at 61161, JA__.

Moreover, estimated mortality rates for each of the other seven cities considered in the 2005 assessment are *lower* than those for Los Angeles and Philadelphia upon attainment of the 1997 $PM_{2.5}$ NAAQS, when one assumes the CASAC-recommended threshold of 10 $\mu g/m^3$ for possible health effects. EPA, Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information (OAQPS Staff Paper Dec. 2005), at 5-12, 5-13, JA____, ____; EPA-SAB-CASAC-05-007 (June 6, 2005), at 6, JA__. Given that the predicted incidence rates in those cities are lower than in Los Angeles and Philadelphia—where, since 1997, long-term-risk estimates have not changed and where short-term-risk estimates for Los Angeles have decreased while Philadelphia's remained the same—the risks in these additional cities are *below* the risk levels EPA determined in 1997 are acceptable. *See* Anne E. Smith, Ph.D., *Technical Comments on the Proposed Rule for National Ambient Air Quality Standards for Particulate Matter*, at 3-14 (corrected Apr. 27, 2006) (Attachment 2 to comments of the Utility Air Regulatory Group), JA__-__.

Finally, not only does EPA's 2005 risk assessment estimate less risk for the 15 $\mu g/m^3$ standard level than the risk EPA determined in 1997 was acceptable, but the approaches EPA used in the 2005 risk assessment virtually ensured that assessment overstated the risks. As Dr.

Smith observed, EPA overlooked concentration-response functions lacking a statistically significant association with $PM_{2.5}$. *Id.* at 7-8, 9-12, JA__, __. If the risk assessment had used those functions, the estimated level of risk associated with exposure to $PM_{2.5}$ in ambient air *would have included zero.* Indeed, record information shows, using Los Angeles and Philadelphia as examples, that in an integrated uncertainty analysis (a risk analysis that considers simultaneously the multiple uncertainties in the science associating $PM_{2.5}$ exposure with health endpoints), the probability of zero health risk from ambient $PM_{2.5}$ may be as much as 50 percent. *Id.* at 16-17, JA__.

Thus, no basis exists for Petitioners' risk-assessment-based claims that EPA's decision to retain the 15 $\mu g/m^3$ level of the annual NAAQS was arbitrary.

III. EPA Reasonably Concluded that Tightening the Secondary PM NAAQS To Make Them Identical to the New Primary Standards Provides the Requisite Protection.

In 1997, the Administrator concluded setting secondary PM NAAQS "identical to the suite of primary standards" would be requisite to protect against "the welfare effects associated with visibility impairment." 62 Fed. Reg. at 38683, JA__. This Court upheld EPA, finding "Congress did not intend the secondary NAAQS to eliminate all adverse visibility effects" and "EPA acted within the scope of its authority in deciding to rely upon the regional haze program to mitigate some of the adverse visibility effects caused by PM2.5." *ATA*, 283 F.3d at 375 (quotation omitted). As part of the Administrator's 2006 action, he again made the secondary PM NAAQS "identical in all respects to the revised suite of primary $PM_{2.5}$ standards." 71 Fed. Reg. at 61208, JA__. Given that available information concerning PM's role in visibility impairment has not fundamentally changed since 1997, *id.* at 61204, the Administrator's decision was precautionary because it provides *increased* protection of visibility through the tightening of the 24-hour NAAQS.

Thus, no basis exists for environmental petitioners' claim that the secondary standards as revised in 2006 provide no "target level of protection" for visibility. ALA Br. 26. In fact, those standards provide a greater level of visibility protection than that already affirmed by this Court. *ATA*, 283 F.3d at 375. Moreover, Petitioners are incorrect that reliance on the regional haze program is improper. ALA Br. 28. This Court has already upheld EPA's reliance on the regional haze program in conjunction with the secondary NAAQS to address visibility impairment. *ATA*, 283 F.3d at 375. As this Court held, environmental petitioners' argument "must be wrong" because the Act's regional haze provisions address visibility impairment "that persist[s] in class I areas *after* attainment of the secondary NAAQS." *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1056 (D.C. Cir.), *modified on reh'g on other grounds*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part, rev'd in part, and remanded on other grounds*, *Whitman*, 531 U.S. 457 (2001) (emphasis added). As EPA explained in 1997, the regional haze program, while targeted at visibility in Class I areas, requires regional emission reductions and will improve visibility "in many urban and non-Class I areas as well." 62 Fed. Reg. at 38681-82, JA__. This remains the case; EPA recognizes the regional haze program will improve visibility "in broad areas across the country." EPA, Air Quality Criteria for Particulate Matter (Oct. 2004), at 4-181, JA__; *see also* 64 Fed. Reg. at 35714, 35719 (July 1, 1999) (explaining that the regional haze rules have "additional benefits, as EPA expects the...program to improve visibility outside of Class I areas as well"), JA__, __.

Contrary to Petitioners' assertions, ALA Br. 26-27, the Administrator did not need to use a 4- to 8-hour averaging time for the secondary NAAQS. The Administrator's consideration of the averaging time did not start with a blank slate; EPA already had secondary standards (including the 24-hour secondary standard), upheld by this Court, that it had determined are

"requisite" to protect public welfare from adverse visibility effects, in conjunction with the regional haze program. Changing that standard's averaging time would require the Administrator to provide a "reasoned analysis for the change," *State Farm,* 463 U.S. at 42, and show that a new averaging time is now "necessary," *Whitman*, 531 U.S. at 476. No such showing was or could have been made based on the record here.

CONCLUSION

The Court should deny the petitions for review challenging the $PM_{2.5}$ NAAQS as insufficiently stringent.

Respectfully submitted,

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Dated: January 29, 2008

ORAL ARGUMENT NOT YET SCHEDULED

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1410
(and consolidated cases)

AMERICAN FARM BUREAU FEDERATION, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Action of the U.S. Environmental Protection Agency

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Statutory Addendum to the Joint Brief of Fine PM Industry Intervenor-Respondents

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January 29, 2008

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SUBCHAPTER II—EMISSION STANDARDS FOR MOVING SOURCES

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 7414, 7613 of this title.

PART A—MOTOR VEHICLE EMISSION AND FUEL STANDARDS

§ 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)(A)(i) The Administrator shall prescribe regulations under paragraph (1) of this subsection applicable to emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen from classes or categories of heavy-duty vehicles or engines manufactured during and after model year 1979. Such regulations applicable to such pollutants from such classes or categories of vehicles or engines manufactured during model years 1979 through 1982 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology.

(ii) Unless a different standard is temporarily promulgated as provided in subparagraph (B) or unless the standard is changed as provided in subparagraph (E), regulations under paragraph (1) of this subsection applicable to emissions from vehicles or engines manufactured during and after model year—

(I) 1983, in the case of hydrocarbons and carbon monoxide, shall contain standards which require a reduction of at least 90 per cent, and

(II) 1985, in the case of oxides of nitrogen, shall contain standards which require a reduction of at least 75 per cent,

from the average of the actually measured emissions from heavy-duty gasoline-fueled vehicles or engines, or any class or category thereof, manufactured during the baseline model year.

(iii) The Administrator shall prescribe regulations under paragraph (1) of this subsection applicable to emissions of particulate matter from classes or categories of vehicles manufactured during and after model year 1981 (or during any earlier model year, if practicable). Such regulations shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology. Such standards shall be promulgated and shall take effect as expeditiously as practicable taking into account the period necessary for compliance.

(iv) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, or such other factors as may be appropriate.

(v) For the purpose of this paragraph, the term "baseline model year" means, with respect to any pollutant emitted from any vehicle or engine, or class or category thereof, the model year immediately preceding the model year in which Federal standards applicable to such vehicle or engine, or class or category thereof, first applied with respect to such pollutant.

(B) During the period of June 1 through December 31, 1978, in the case of hydrocarbons and carbon monoxide, or during the period of June 1 through December 31, 1980, in the case of oxides of nitrogen, and during each period of June 1 through December 31 of each third year thereafter, the Administrator may, after notice and opportunity for a public hearing promulgate regulations revising any standard prescribed as provided in subparagraph (A)(ii) for any class or category of heavy-duty vehicles or engines. Such standard shall apply only for the period of three model years beginning four model years after the model year in which such revised standard is promulgated. In revising any standard under this subparagraph for any such three model year period, the Administrator shall determine the maximum degree of emission reduction which can be achieved by means reasonably expected to be available for production of such period and shall prescribe a revised emission standard in accordance with such determination. Such revised standard shall require a reduction of emissions from any standard which applies in the previous model year.

(C) Action revising any standard for any period may be taken by the Administrator under subparagraph (B) only if he finds—

(i) that compliance with the emission standards otherwise applicable for such model year cannot be achieved by technology, processes, operating methods, or other alternatives reasonably expected to be available for production for such model year without increasing cost or decreasing fuel economy to an excessive and unreasonable degree; and

(ii) the National Academy of Sciences has not, pursuant to its study and investigation under subsection (c) of this section, issued a report substantially contrary to the findings of the Administrator under clause (i).

(D) A report shall be made to the Congress with respect to any standard revised under subparagraph (B) which shall contain—

(i) a summary of the health effects found, or believed to be associated with, the pollutant covered by such standard,

(ii) an analysis of the cost-effectiveness of other strategies for attaining and maintaining national ambient air quality standards and carrying out regulations under part C of subchapter I (relating to significant deterioration) in relation to the cost-effectiveness for such purposes of standards which, but for such revision, would apply.

(iii) a summary of the research and development efforts and progress being made by each manufacturer for purposes of meeting the standards promulgated as provided in subparagraph (A)(ii) or, if applicable, subparagraph (E), and

(iv) specific findings as to the relative costs of compliance, and relative fuel economy, which may be expected to result from the application for any model year of such revised standard and the application for such model year of the standard, which, but for such revision, would apply.

(E)(i) The Administrator shall conduct a continuing pollutant-specific study concerning the effects of each air pollutant emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare. The results of such study shall be published in the Federal Register and reported to the Congress not later than June 1, 1978, in the case of hydrocarbons and carbon monoxide, and June 1, 1980, in the case of oxides of nitrogen, and before June 1 of each third year thereafter.

(ii) On the basis of such study and such other information as is available to him (including the studies under section 7548 of this title), the Administrator may, after notice and opportunity for a public hearing, promulgate regulations under paragraph (1) of this subsection changing any standard prescribed in subparagraph (A)(ii) (or revised under subparagraph (B) or previously changed under this subparagraph). No such changed standard shall apply for any model year before the model year four years after the model year during which regulations containing such changed standard are promulgated.

(F) For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 7525(f)(1) of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) of this section applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

(4)(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with standards prescribed under this subsection if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and (iii) the availability of other devices, systems, or elements of design which may be used to conform to standards prescribed under this subsection without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant information developed pursuant to section 7548 of this title.

(5)(A) If the Administrator promulgates final regulations which define the degree of control required and the test procedures by which compliance could be determined for gasoline vapor recovery of uncontrolled emissions from the fueling of motor vehicles, the Administrator shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe standards for new motor vehicles in order to insure effective connection between such fill pipe and any vapor recovery system which the Administrator determines may be required to comply with such vapor recovery regulations. In promulgating such standards the Administrator shall take into consideration limits on fill pipe diameter, minimum design criteria for nozzle retainer lips, limits on the location of the unleaded fuel restrictors, a minimum access zone surrounding a fill pipe, a minimum pipe or nozzle insertion angle, and such other factors as he deems pertinent.

(B) Regulations prescribing standards under subparagraph (A) shall not become effective until the introduction of the model year for which it would be feasible to implement such

standards, taking into consideration the restraints of an adequate leadtime for design and production.

(C) Nothing in subparagraph (A) shall (i) prevent the Administrator from specifying different nozzle and fill neck sizes for gasoline with additives and gasoline without additives or (ii) permit the Administrator to require a specific location, configuration, modeling, or styling of the motor vehicle body with respect to the fuel tank fill neck or fill nozzle clearance envelope.

(D) For the purpose of this paragraph, the term "fill pipe" shall include the fuel tank fill pipe, fill neck, fill inlet, and closure.

(6) The Administrator shall determine the feasibility and desirability of requiring new motor vehicles to utilize onboard hydrocarbon control technology which would avoid the necessity of gasoline vapor recovery of uncontrolled emissions emanating from the fueling of motor vehicles. The Administrator shall compare the costs and effectiveness of such technology to that of implementing and maintaining vapor recovery systems (taking into consideration such factors as fuel economy, economic costs of such technology, administrative burdens, and equitable distribution of costs). If the Administrator finds that it is feasible and desirable to employ such technology, he shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, standards requiring the use of onboard hydrocarbon technology which shall not become effective until the introduction to the model year for which it would be feasible to implement such standards, taking into consideration compliance costs and the restraints of an adequate lead time for design and production.

(b) Emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen; annual report to Congress; waiver of emission standards; research objectives

(1)(A) The regulations under subsection (a) of this section applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1977 through 1979 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide. The regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during the model year 1980 shall contain standards which provide that such emissions may not exceed 7.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of hydrocarbons from light-duty vehicles and engines manufactured during or after model year 1980 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970. Unless waived as provided in paragraph (5), regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during or after the model year 1981 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970.

(B) The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during model years 1977 through 1980 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 2.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during the model year 1981 and thereafter shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.0 gram per vehicle mile. The Administrator shall prescribe standards in lieu of those required by the preceding sentence, which provide that emissions of oxides of nitrogen may not exceed 2.0 grams per vehicle mile for any light-duty vehicle manufactured during model years 1981 and 1982 by any manufacturer whose production, by corporate identity, for calendar year 1976 was less than three hundred thousand light-duty motor vehicles worldwide if the Administrator determines that—

(i) the ability of such manufacturer to meet emission standards in the 1975 and subsequent model years was, and is, primarily dependent upon technology developed by other manufacturers and purchased from such manufacturers; and

(ii) such manufacturer lacks the financial resources and technological ability to develop such technology.

(C) Effective with respect to vehicles and engines manufactured after model year 1978 (or in the case of heavy-duty vehicles or engines, such later model year as the Administrator determines is the earliest feasible model year), the test procedure promulgated under paragraph (2) for measurement of evaporative emissions of hydrocarbons shall require that such emissions be measured from the vehicle or engine as a whole. Regulations to carry out this subparagraph shall be promulgated not later than two hundred and seventy days after August 7, 1977.

(2) Emission standards under paragraph (1), and measurement techniques on which such standards are based (if not promulgated prior to December 31, 1970), shall be prescribed by regulation within 180 days after such date.

(3) For purposes of this part—

(A)(i) The term "model year" with reference to any specific calendar year means the manufacturer's annual production period (as determined by the Administrator) which includes January 1 of such calendar year. If the manufacturer has no annual production period, the term "model year" shall mean the calendar year.

(ii) For the purpose of assuring that vehicles and engines manufactured before the be-

ginning of a model year were not manufactured for purposes of circumventing the effective date of a standard required to be prescribed by subsection (b) of this section, the Administrator may prescribe regulations defining "model year" otherwise than as provided in clause (i).

(B) The term "light duty vehicles and engines" means new light duty motor vehicles and new light duty motor vehicle engines, as determined under regulations of the Administrator.

(C) The term "heavy duty vehicle" means a truck, bus, or other vehicle manufactured primarily for use on the public streets, roads, and highways (not including any vehicle operated exclusively on a rail or rails) which has a gross vehicle weight (as determined under regulations promulgated by the Administrator) in excess of six thousand pounds. Such term includes any such vehicle which has special features enabling off-street or off-highway operation and use.

(4) On July 1 of 1971, and of each year thereafter, the Administrator shall report to the Congress with respect to the development of systems necessary to implement the emission standards established pursuant to this section. Such reports shall include information regarding the continuing effects of such air pollutants subject to standards under this section on the public health and welfare, the extent and progress of efforts being made to develop the necessary systems, the costs associated with development and application of such systems, and following such hearings as he may deem advisable, any recommendations for additional congressional action necessary to achieve the purposes of this chapter. In gathering information for the purposes of this paragraph and in connection with any hearing, the provisions of section 7607(a) of this title (relating to subpenas) shall apply.

(5)(A) At any time after August 31, 1978, any manufacturer may file an application requesting the waiver for model years 1981 and 1982 of the effective date of the emission standard required by paragraph (1)(A) for carbon monoxide applicable to any model (as determined by the Administration) of light-duty motor vehicles and engines manufactured in such model years. The Administrator shall make his determination with respect to any such application within sixty days after such application is filed with respect to such model. If he determines, in accordance with the provisions of this paragraph, that such waiver should be granted, he shall simultaneously with such determination prescribe by regulation emission standards which shall apply (in lieu of the standards required to be prescribed by paragraph (1)(A) of this subsection) to emissions of carbon monoxide from such model of vehicles or engines manufactured during model years 1981 and 1982.

(B) Any standards prescribed under this paragraph shall not permit emissions of carbon monoxide from vehicles and engines to which such waiver applies to exceed 7.0 grams per vehicle per mile.

(C) Within sixty days after receipt of the application for any such waiver and after public hearing, the Administrator shall issue a decision granting or refusing such waiver. The Administrator may grant such waiver if he finds that protection of the public health does not require attainment of such 90 percent reduction for carbon monoxide for the model years to which such waiver applies in the case of such vehicles and engines and if he determines that—

(i) such waiver is essential to the public interest or the public health and welfare of the United States;

(ii) all good faith efforts have been made to meet the standards established by this subsection;

(iii) the applicant has established that effective control technology, processes, operating methods, or other alternatives are not available or have not been available with respect to the model in question for a sufficient period of time to achieve compliance prior to the effective date of such standards, taking into consideration costs, driveability, and fuel economy; and

(iv) studies and investigations of the National Academy of Sciences conducted pursuant to subsection (c) of this section and other information available to him has not indicated that technology, processes, or other alternatives are available (within the meaning of clause (iii)) to meet such standards.

(6)(A) Upon the petition of any manufacturer, the Administrator, after notice and opportunity for public hearing, may waive the standard required under subparagraph (B) of paragraph (1) to not exceed 1.5 grams of oxides of nitrogen per vehicle mile for any class or category of light-duty vehicles or engines manufactured by such manufacturer during any period of up to four model years beginning after the model year 1980 if the manufacturer demonstrates that such waiver is necessary to permit the use of an innovative power train technology, or innovative emission control device or system, in such class or category of vehicles or engines and that such technology or system was not utilized by more than 1 percent of the light-duty vehicles sold in the United States in the 1975 model year. Such waiver may be granted only if the Administrator determines—

(i) that such waiver would not endanger public health,

(ii) that there is a substantial likelihood that the vehicles or engines will be able to comply with the applicable standard under this section at the expiration of the waiver, and

(iii) that the technology or system has a potential for long-term air quality benefit and has the potential to meet or exceed the average fuel economy standard applicable under the Energy Policy and Conservation Act [42 U.S.C. 6201 et seq.] upon the expiration of the waiver.

No waiver under this subparagraph granted to any manufacturer shall apply to more than 5 percent of such manufacturer's production or more than fifty thousand vehicles or engines, whichever is greater.

(B) Upon the petition of any manufacturer, the Administrator, after notice and opportunity for public hearing, may waive the standard required under subparagraph (B) of paragraph (1) to not to exceed 1.5 grams of oxides of nitrogen per vehicle mile for any class or category of light-duty vehicles and engines manufactured by such manufacturer during the four model year period beginning with the model year 1981 if the manufacturer can show that such waiver is necessary to permit the use of diesel engine technology in such class or category of vehicles or engines. Such waiver may be granted if the Administrator determines—

(i) that such waiver will not endanger public health,

(ii) that such waiver will result in significant fuel savings at least equal to the fuel economy standard applicable in each year under the Energy Policy and Conservation Act [42 U.S.C. 6201 et seq.], and

(iii) that the technology has a potential for long-term air quality benefit and has the potential to meet or exceed the average fuel economy standard applicable under the Energy Policy and Conservation Act [42 U.S.C. 6201 et seq.] at the expiration of the waiver.

(7) The Congress hereby declares and establishes as a research objective, the development of propulsion systems and emission control technology to achieve standards which represent a reduction of at least 90 per centum from the average emissions of oxides of nitrogen actually measured from light duty motor vehicles manufactured in model year 1971 not subject to any Federal or State emission standard for oxides of nitrogen. The Administrator shall, by regulations promulgated within one hundred and eighty days after August 7, 1977, require each manufacturer whose sales represent at least 0.5 per centum of light duty motor vehicle sales in the United States, to build and, on a regular basis, demonstrate the operation of light duty motor vehicles that meet this research objective, in addition to any other applicable standards or requirements for other pollutants under this chapter. Such demonstration vehicles shall be submitted to the Administrator no later than model year 1979 and in each model year thereafter. Such demonstration shall, in accordance with applicable regulations, to the greatest extent possible, (A) be designed to encourage the development of new powerplant and emission control technologies that are fuel efficient, (B) assure that the demonstration vehicles are or could reasonably be expected to be within the productive capability of the manufacturers, and (C) assure the utilization of optimum engine, fuel, and emission control systems.

(c) Feasibility study and investigation by National Academy of Sciences; reports to Administrator and Congress; availability of information

(1) The Administrator shall undertake to enter into appropriate arrangements with the National Academy of Sciences to conduct a comprehensive study and investigation of the technological feasibility of meeting the emissions standards required to be prescribed by the Administrator by subsection (b) of this section.

(2) Of the funds authorized to be appropriated to the Administrator by this chapter, such amounts as are required shall be available to carry out the study and investigation authorized by paragraph (1) of this subsection.

(3) In entering into any arrangement with the National Academy of Sciences for conducting the study and investigation authorized by paragraph (1) of this subsection, the Administrator shall request the National Academy of Sciences to submit semiannual reports on the progress of its study and investigation to the Administrator and the Congress, beginning not later than July 1, 1971, and continuing until such study and investigation is completed.

(4) The Administrator shall furnish to such Academy at its request any information which the Academy deems necessary for the purpose of conducting the investigation and study authorized by paragraph (1) of this subsection. For the purpose of furnishing such information, the Administrator may use any authority he has under this chapter (A) to obtain information from any person, and (B) to require such person to conduct such tests, keep such records, and make such reports respecting research or other activities conducted by such person as may be reasonably necessary to carry out this subsection.

(d) Useful life of vehicles

The Administrator shall prescribe regulations under which the useful life of vehicles and engines shall be determined for purposes of subsection (a)(1) of this section and section 7541 of this title. Such regulations shall provide that useful life shall—

(1) in the case of light duty vehicles and light duty vehicle engines, be a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs;

(2) in the case of any other motor vehicle or motor vehicle engine (other than motorcycles or motorcycle engines), be a period of use set forth in paragraph (1) unless the Administrator determines that a period of use of greater duration or mileage is appropriate; and

(3) in the case of any motorcycle or motorcycle engine, be a period of use the Administrator shall determine.

(e) New power sources or propulsion systems

In the event of a new power source or propulsion system for new motor vehicles or new motor vehicle engines is submitted for certification pursuant to section 7525(a) of this title, the Administrator may postpone certification until he has prescribed standards for any air pollutants emitted by such vehicle or engine which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger the public health or welfare but for which standards have not been prescribed under subsection (a) of this section.

(f) High altitude regulations

(1) The high altitude regulation in effect with respect to model year 1977 motor vehicles shall not apply to the manufacture, distribution, or sale of 1978 and later model year motor vehicles. Any future regulation affecting the sale or

distribution of motor vehicles or engines manufactured before the model year 1984 in high altitude areas of the country shall take effect no earlier than model year 1981.

(2) Any such future regulation applicable to high altitude vehicles or engines shall not require a percentage of reduction in the emissions of such vehicles which is greater than the required percentage of reduction in emissions from motor vehicles as set forth in subsection (b) of this section. This percentage reduction shall be determined by comparing any proposed high altitude emission standards to high altitude emissions from vehicles manufactured during model year 1970. In no event shall regulations applicable to high altitude vehicles manufactured before the model year 1984 establish a numerical standard which is more stringent than that applicable to vehicles certified under non-high altitude conditions.

(3) Section 7607(d) of this title shall apply to any high altitude regulation referred to in paragraph (2) and before promulgating any such regulation, the Administrator shall consider and make a finding with respect to—

(A) the economic impact upon consumers, individual high altitude dealers, and the automobile industry of any such regulation, including the economic impact which was experienced as a result of the regulation imposed during model year 1977 with respect to high altitude certification requirements;

(B) the present and future availability of emission control technology capable of meeting the applicable vehicle and engine emission requirements without reducing model availability; and

(C) the likelihood that the adoption of such a high altitude regulation will result in any significant improvement in air quality in any area to which it shall apply.

(July 14, 1955, ch. 360, title II, § 202, as added Oct. 20, 1965, Pub. L. 89-272, title I, § 101(8), 79 Stat. 992, and amended Nov. 21, 1967, Pub. L. 90-148, § 2, 81 Stat. 499; Dec. 31, 1970, Pub. L. 91-604, § 6(a), 84 Stat. 1690; June 22, 1974, Pub. L. 93-319, § 5, 88 Stat. 258; Aug. 7, 1977, Pub. L. 95-95, title II, §§ 201, 202(b), 213(b), 214(a), 215-217, 224(a), (b), (g), title IV, § 401(d), 91 Stat. 751-753, 758-761, 765, 767, 769, 791; Nov. 16, 1977, Pub. L. 95-190, § 14(a)(60)-(65), (b)(5), 91 Stat. 1403, 1405.)

REFERENCES IN TEXT

The Energy Policy and Conservation Act, referred to in subsec. (b)(6)(A)(iii), (B)(ii), (iii), is Pub. L. 94-163, Dec. 22, 1975, 89 Stat. 871, as amended, which is classified principally to chapter 77 (§ 6201 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6201 of this title and Tables.

CODIFICATION

Section was formerly classified to section 1857f-1 of this title.

AMENDMENTS

1977—Subsec. (a)(1). Pub. L. 95-190, § 14(a)(60), restructured subsec. (a) by providing for designation of par. (1) to precede "The Administrator" in place of "Except as".

Pub. L. 95-95, § 401(d)(1), substituted "Except as otherwise provided in subsection (b) of this section the Administrator" for "The Administrator", "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" for "causes or contributes to, or is likely to cause or contribute to, air pollution which endangers the public health or welfare", and "useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices" for "useful life (as determined under subsection (d) of this section) whether such vehicles and engines are designed as complete systems or incorporated devices".

Subsec. (a)(2). Pub. L. 95-95, § 214(a), substituted "prescribed under paragraph (1) of this subsection" for "prescribed under this subsection".

Subsec. (a)(3). Pub. L. 95-95, § 224(a), added par. (3).

Subsec. (a)(3)(B). Pub. L. 95-190, § 14(a)(61), (62), substituted provisions setting forth applicable periods of from June 1 through Dec. 31, 1978, June 1 through Dec. 31, 1980, and during each period of June 1 through Dec. 31 of each third year thereafter, for provisions setting forth applicable periods of from June 1 through Dec. 31, 1979, and during each period of June 1 through Dec. 31 of each third year after 1979, and substituted "from any" for "of from any".

Subsec. (a)(3)(E). Pub. L. 95-190, § 14(a)(63), substituted "1978, in the case of hydrocarbons and carbon monoxide, and June 1, 1980, in the case of oxides of nitrogen" for "1979,".

Subsec. (a)(4). Pub. L. 95-95, § 214(a), added par. (4).

Subsec. (a)(5). Pub. L. 95-95, § 215, added par. (5).

Subsec. (a)(6). Pub. L. 95-95, § 216, added par. (6).

Subsec. (b)(1)(A). Pub. L. 95-95, § 201(a), substituted provisions setting the standards for emissions from light-duty vehicles and engines manufactured during the model years 1977 through 1980 for provisions which had set the standards for emissions from light-duty vehicles and engines manufactured during the model years 1975 and 1976, substituted "model year 1980" for "model year 1977" in provisions requiring a reduction of at least 90 per centum from the emissions allowable under standards for model year 1970, and inserted provisions that, unless waived as provided in par. (5), the standards for vehicles and engines manufactured during or after the model year 1981 represent a reduction of at least 90 per centum from the emissions allowable under standards for model year 1970.

Subsec. (b)(1)(B). Pub. L. 95-190, § 14(a)(64), (65), substituted "calendar year 1976" for "model year 1976" and in cl. (i) substituted "other" for "United States".

Pub. L. 95-95, § 201(b), substituted provisions setting the standards for emissions from light-duty vehicles and engines manufactured during the model years 1977 through 1980 for provisions which had set the standards for emissions from light-duty vehicles and engines manufactured during the model years 1975 through 1977, substituted provisions that the standards for model years 1981 and after allow emissions of no more than 1.0 gram per vehicle mile for provisions that the standards for model year 1978 and after require a reduction of at least 90 per centum from the average of emissions actually measured from light-duty vehicles manufactured during model year 1971 which were not subject to any Federal or State emission standards for oxides of nitrogen, and inserted provisions directing the Administrator to prescribe separate standards for model years 1981 and 1982 for manufacturers whose production, by corporate identity, for model year 1976 was less than three hundred thousand light-duty motor vehicles worldwide if the manufacturer's capability to meet emission standards depends upon United States technology and if the manufacturer cannot develop one.

Subsec. (b)(1)(C). Pub. L. 95-95, § 217, added subpar. (C).

Subsec. (b)(3)(C). Pub. L. 95-95, § 224(b), added subpar. (C).

Subsec. (b)(5). Pub. L. 95-95, § 201(c), substituted provisions setting up a procedure under which a manufacturer may apply for a waiver for model years 1981 and 1982 of the effective date of the emission standards for carbon monoxide required by par. (1)(A) for provisions which had set up a procedure under which a manufacturer, after Jan. 1, 1975, could apply for a one-year suspension of the effective date of any emission standard required by par. (1)(A) for model year 1977.

Subsec. (b)(6). Pub. L. 95-95, § 201(c), added par. (6).

Subsec. (b)(7). Pub. L. 95-95, § 202(b), added par. (7).

Subsec. (d)(2). Pub. L. 95-95, § 224(g), as amended by Pub. L. 95-190, § 14(b)(5), to correct typographical error in directory language, inserted "(other than motorcycles or motorcycle engines)" after "motor vehicle or motor vehicle engine".

Subsec. (d)(3). Pub. L. 95-95, § 224(g), added par. (3).

Subsec. (e). Pub. L. 95-95, § 401(d)(2), substituted "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger" for "which cause or contribute to, or are likely to cause or contribute to, air pollution which endangers".

Subsec. (f). Pub. L. 95-95, § 213(b), added subsec. (f).

1974—Subsec. (b)(1)(A). Pub. L. 93-319, § 5(a), substituted "model year 1977" for "model year 1975" in provisions requiring a reduction of at least 90 per centum from the emissions allowable under standards for model year 1970 and inserted provisions covering regulations for model years 1975 and 1976.

Subsec. (b)(1)(B). Pub. L. 93-319, § 5(b), substituted "model year 1978" for "model year 1976" in provisions requiring a reduction of at least 90 per centum from the average of emissions actually measured from vehicles manufactured during model year 1971 and inserted provisions covering regulations for model years 1975, 1976, and 1977.

Subsec. (b)(5). Pub. L. 93-319, § 5(c), (d), substituted in subpar. (A), "At any time after January 1, 1975" for "At any time after January 1, 1972", "with respect to such manufacturer for light-duty vehicles and engines manufactured in model year 1977" for "with respect to such manufacturer", "sixty days" for "60 days", "paragraph (1)(A) of this subsection" for "paragraph (1)(A)", and "vehicles and engines manufactured during model year 1977" for "vehicles and engines manufactured during model year 1975", redesignated subpars. (C) to (E) as (B) to (D), respectively, and struck out former subpar. (B) which had allowed manufacturers, at any time after Jan. 1, 1973, to file with the Administrator an application requesting a 1-year suspension of the effective date of any emission standard required by subsec. (b)(1)(B) with respect to such manufacturer.

1970—Subsec. (a). Pub. L. 91-604 redesignated existing provisions as par. (1), substituted Administrator for Secretary as the issuing authority for standards, inserted references to the useful life of engines, and substituted the emission of any air pollutant for the emission of any kind of substance as the subject to be regulated, and added par. (2).

Subsec. (b). Pub. L. 91-604 added subsec. (b). Former subsec. (b) redesignated as par. (2) of subsec. (a).

Subsecs. (c) to (e). Pub. L. 91-604 added subsecs. (c) to (e).

1967—Pub. L. 90-148 reenacted section without change.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as a note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 [this chapter], see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

STUDY ON OXIDES OF NITROGEN FROM LIGHT-DUTY VEHICLES

Section 202(a) of Pub. L. 95-95 provided that the Administrator of the Environmental Protection Agency conduct a study of the public health implications of attaining an emission standard on oxides of nitrogen from light-duty vehicles of 0.4 gram per vehicle mile, the cost and technological capability of attaining such standard, and the need for such a standard to protect public health or welfare and that the Administrator submit a report of such study to the Congress, together with recommendations not later than July 1, 1980.

STUDY OF CARBON MONOXIDE INTRUSION INTO SUSTAINED-USE VEHICLES

Section 226 of Pub. L. 95-95 provided that the Administrator, in conjunction with the Secretary of Transportation, study the problem of carbon monoxide intrusion into the passenger area of sustained-use motor vehicles and that within one year the Administrator report to the Congress respecting the results of such study.

CONTINUING COMPREHENSIVE STUDIES AND INVESTIGATIONS BY NATIONAL ACADEMY OF SCIENCES

Section 403(f) of Pub. L. 95-95 provided that: "The Administrator of the Environmental Protection Agency shall undertake to enter into appropriate arrangements with the National Academy of Sciences to conduct continuing comprehensive studies and investigations of the effects on public health and welfare of emissions subject to section 202(a) of the Clean Air Act [subsec. (a) of this section] (including sulfur compounds) and the technological feasibility of meeting emission standards required to be prescribed by the Administrator by section 202(b) of such Act [subsec. (b) of this section]. The Administrator shall report to the Congress within six months of the date of enactment of this section [Aug. 7, 1977] and each year thereafter regarding the status of the contractual arrangements and conditions necessary to implement this paragraph."

STUDY ON EMISSION OF SULFUR-BEARING COMPOUNDS FROM MOTOR VEHICLES AND MOTOR VEHICLE AND AIRCRAFT ENGINES

Section 403(g) of Pub. L. 95-95 provided that the Administrator of the Environmental Protection Agency conduct a study and report to the Congress by the date one year after Aug. 7, 1977, on the emission of sulfur-bearing compounds from motor vehicles and motor vehicle engines and aircraft engines.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 7408, 7417, 7522, 7525, 7541, 7543, 7545, 7546, 7548, 7549, 7550, 7607, 7608, 7617 of this title; title 15 sections 1410, 2002.

§ 7522. Prohibited acts

(a) Enumerated prohibitions

The following acts and the causing thereof are prohibited—

(1) in the case of a manufacturer of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the

Public Law 95-95
95th Congress

An Act

To amend the Clean Air Act, and for other purposes.

Aug. 7, 1977
[H.R. 6161]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Clean Air Act Amendments of 1977.

SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act, together with the following table of contents, may be cited as the "Clean Air Act Amendments of 1977".

42 USC 7401 note.*

TABLE OF CONTENTS

* The Clean Air Act which was formerly classified to 42 USC 1857 *et seq.* has been transferred and is now classified to 42 USC 7401 *et seq.* Marginal citations to the U.S. Code for sections of the Clean Air Act in this slip law are to the new classifications. For former classifications of the Clean Air Act, consult the Tables volume of the U.S. Code.

AIR QUALITY STANDARDS

SEC. 106. (a) Section 109 of the Clean Air Act, as amended by subsection (b) of this section, is amended by adding the following new subsection at the end thereof: 42 USC 7409.

"(d) (1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 108 and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph. Review and revision. *Ante*, p. 689; *Post*, p. 790.

"(2) (A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies. Scientific review committee, appointment.

"(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 108 and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 108 and subsection (b) of this section.

"(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.".

(b) Section 109 of such Act is amended by adding the following new subsection at the end thereof: NO_2 standards, promulgation. *Supra*.

"(c) The Administrator shall, not later than one year after the date of the enactment of the Clean Air Act Amendments of 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 108(c), he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.".

ENERGY OR ECONOMIC EMERGENCY AUTHORITY

SEC. 107. (a) Section 110(f) of the Clean Air Act is amended to read as follows: Energy emergency, Presidential determination. Notice and hearing. Petition. 42 USC 7410.

"(f) (1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

"(3) Effective on the date of the enactment of this subsection, the regulations of the Administrator under this section respecting fuel additives (40 CFR part 80) shall be deemed amended to comply with the requirement contained in paragraph (2).

"(4) Nothing in this section shall be construed to preempt the right of any State to take action as permitted by section 211(c)(4) of this Act.". 42 USC 7545.

EMISSION STANDARDS FOR HEAVY DUTY VEHICLES OR ENGINES AND CERTAIN OTHER VEHICLES OR ENGINES

SEC. 224. (a) Section 202(a) of the Clean Air Act is amended by adding the following new paragraph at the end thereof: 42 USC 7521.

"(3)(A)(i) The Administrator shall prescribe regulations under paragraph (1) of this subsection applicable to emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen from classes or categories of heavy-duty vehicles or engines manufactured during and after model year 1979. Such regulations applicable to such pollutants from such classes or categories of vehicles or engines manufactured during model years 1979 through 1982 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology. Regulations. Emission standards for heavy-duty vehicles or engines.

"(ii) Unless a different standard is temporarily promulgated as provided in subparagraph (B) or unless the standard is changed as provided in subparagraph (E), regulations under paragraph (1) of this subsection applicable to emissions from vehicles or engines manufactured during and after model year—

"(I) 1983, in the case of hydrocarbons and carbon monoxide, shall contain standards which require a reduction of at least 90 per cent, and 1983 standards for hydrocarbons and carbon monoxide.

"(II) 1985, in the case of oxides of nitrogen, shall contain standards which require a reduction of at least 75 per cent, 1985 standards for oxides of nitrogen.

from the average of the actually measured emissions from heavy-duty gasoline-fueled vehicles or engines, or any class or category thereof, manufactured during the baseline model year.

"(iii) The Administrator shall prescribe regulations under paragraph (1) of this subsection applicable to emissions of particulate matter from classes or categories of vehicles manufactured during and after model year 1981 (or during any earlier model year, if practicable). Such regulations shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology. Such standards shall be promulgated and shall take effect as expeditiously as practicable taking into account the period necessary for compliance. 1981 standards for particulate matter.

"(iv) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, or such other factors as may be appropriate. Vehicle and engine classes or categories, criteria.

"Baseline model year."

"(v) For the purpose of this paragraph, the term 'baseline model year' means, with respect to any pollutant emitted from any vehicle or engine, or class or category thereof, the model year immediately preceding the model year in which Federal standards applicable to such vehicle or engine, or class or category thereof, first applied with respect to such pollutant.

Standards, triennial revision.

"(B) During the period of June 1 through December 31, 1979, and during each period of June 1 through December 31 of each third year after 1979, the Administrator may, after notice and opportunity for a public hearing promulgate regulations revising any standard prescribed as provided in subparagraph (A)(ii) for any class or category of heavy-duty vehicles or engines. Such standard shall apply only for the period of three model years beginning four model years after the model year in which such revised standard is promulgated. In revising any standard under this subparagraph for any such three model year period, the Administrator shall determine the maximum degree of emission reduction which can be achieved by means reasonably expected to be available for production of such period and shall prescribe a revised emission standard in accordance with such determination. Such revised standard shall require a reduction of emissions of from any standard which applies in the previous model year.

"(C) Action revising any standard for any period may be taken by the Administrator under subparagraph (B) only if he finds—

"(i) that compliance with the emission standards otherwise applicable for such model year cannot be achieved by technology, processes, operating methods, or other alternatives reasonably expected to be available for production for such model year without increasing cost or decreasing fuel economy to an excessive and unreasonable degree; and

"(ii) the National Academy of Sciences has not, pursuant to its study and investigation under subsection (c), issued a report substantially contrary to the findings of the Administrator under clause (i).

Report to Congress. Contents.

"(D) A report shall be made to the Congress with respect to any standard revised under subparagraph (B) which shall contain—

"(i) a summary of the health effects found, or believed to be associated with, the pollutant covered by such standard,

"(ii) an analysis of the cost-effectiveness of other strategies for attaining and maintaining national ambient air quality standards and carrying out regulations under part C of title I (relating to significant deterioration) in relation to the cost-effectiveness for such purposes of standards which, but for such revision, would apply.

Ante, p. 731.

"(iii) a summary of the research and development efforts and progress being made by each manufacturer for purposes of meeting the standards promulgated as provided in subparagraph (A)(ii) or, if applicable, subparagraph (E), and

"(iv) specific findings as to the relative costs of compliance, and relative fuel economy, which may be expected to result from the application for any model year of such revised standard and the application for such model year of the standard, which, but for such revision, would apply.

Pollutant-specific study.

"(E)(i) The Administrator shall conduct a continuing pollutant-specific study concerning the effects of each air pollutant emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare. The results of such study shall be published in the Federal Register and reported

Publication in Federal Register and report to Congress.

to the Congress not later than June 1, 1979, and before June 1 of each third year thereafter.

"(ii) On the basis of such study and such other information as is available to him (including the studies under section 214), the Administrator may, after notice and opportunity for a public hearing, promulgate regulations under paragraph (1) of this subsection changing any standard prescribed in subparagraph (A)(ii) (or revised under subparagraph (B) or previously changed under this subparagraph). No such changed standard shall apply for any model year before the model year four years after the model year during which regulations containing such changed standard are promulgated. *Infra.*

"(F) For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 206(f)(1)) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.". Motorcycle classification. *Ante*, p. 758.

(b) Section 202(b)(3) of such Act is amended by adding the following new subparagraph at the end thereof: "Heavy duty vehicle." 42 USC 7521.

"(C) The term 'heavy duty vehicle' means a truck, bus, or other vehicle manufactured primarily for use on the public streets, roads, and highways (not including any vehicle operated exclusively on a rail or rails) which has a gross vehicle weight (as determined under regulations promulgated by the Administrator) in excess of six thousand pounds. Such term includes any such vehicle which has special features enabling off-street or off-highway operation and use.".

(c) Section 312 of such Act is amended by inserting "AND STUDIES OF COST-EFFECTIVENESS ANALYSES" at the end of the heading thereof and by adding the following new subsection at the end thereof: Use of cost-effectiveness, study. 42 USC 7612.

"(c) Not later than January 1, 1979, the Administrator shall study the possibility of increased use of cost-effectiveness analyses in devising strategies for the control of air pollution and shall report its recommendations to the Congress, including any recommendations for revisions in any provision of this Act. Such study shall also include an analysis and report to Congress concerning whether or not existing air pollution control strategies are adequate to achieve the purposes of this Act." Report to Congress. Contents.

(d) Part A of title II of such Act is amended by redesignating section 214 as section 216 and by inserting after section 213 the following new section: 42 USC 7550.

"STUDY OF PARTICULATE EMISSIONS FROM MOTOR VEHICLES

"SEC. 214. (a)(1) The Administrator shall conduct a study concerning the effects on health and welfare of particulate emissions from motor vehicles or motor vehicle engines to which section 202 applies. Such study shall characterize and quantify such emissions and analyze the relationship of such emissions to various fuels and fuel additives. 42 USC 7548. *Ante*, pp. 702, 751–753, 758–761, 765; *Supra; Post*, pp. 769, 791.

"(2) The study shall also include an analysis of particulate emissions from mobile sources which are not related to engine emissions (including, but not limited to tire debris, and asbestos from brake lining).

Report to Congress.

"(b) The Administrator shall report to the Congress the findings and results of the study conducted under subsection (a) not later than two years after the date of the enactment of the Clean Air Act Amendments of 1977. Such report shall also include recommendations for standards or methods to regulate particulate emissions described in paragraph (2) of subsection (a).".

Certificate of conformity. *Ante*, p. 758.

(e) Section 206 of such Act (relating to compliance testing and certification) is amended by adding the following new subsection at the end thereof:

"(g)(1) In the case of any class or category of heavy-duty vehicles or engines to which a standard promulgated under section 202(a) of this Act applies, except as provided in paragraph (2), a certificate of conformity shall be issued under subsection (a) and shall not be suspended or revoked under subsection (b) for such vehicles or engines manufactured by a manufacturer notwithstanding the failure of such vehicles or engines to meet such standard if such manufacturer pays a nonconformance penalty as provided under regulations promulgated by the Administrator after notice and opportunity for public hearing. In the case of motorcycles to which such a standard applies, such a certificate may be issued notwithstanding such failure if the manufacturer pays such a penalty.

Ante, pp. 759, 760, 765; *Post*, p. 791.

Motorcycles.

"(2) No certificate of conformity may be issued under paragraph (1) with respect to any class or category of vehicle or engine if the degree by which the manufacturer fails to meet any standard promulgated under section 202(a) with respect to such class or category exceeds the percentage determined under regulations promulgated by the Administrator to be practicable. Such regulations shall require such testing of vehicles or engines being produced as may be necessary to determine the percentage of the classes or categories of vehicles or engines which are not in compliance with the regulations with respect to which a certificate of conformity was issued and shall be promulgated not later than one year after the date of enactment of the Clean Air Act Amendments of 1977.

Vehicles or engines, testing.

"(3) The regulations promulgated under paragraph (1) shall, not later than one year after the date of enactment of the Clean Air Act Amendments of 1977, provide for nonconformance penalties in amounts determined under a formula established by the Administrator. Such penalties under such formula—

Penalties.

"(A) may vary from pollutant-to-pollutant;

"(B) may vary by class or category or vehicle or engine;

"(C) shall take into account the extent to which actual emissions of any air pollutant exceed allowable emissions under the standards promulgated under section 202;

Ante, pp. 702, 751-753, 758-761, 765, 767; *Post*, pp. 769, 791.

"(D) be increased periodically in order to create incentives for the development of production vehicles or engines which achieve the required degree of emission reduction; and

"(E) shall remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction (including any such disadvantage arising from the application of paragraph (4)).

"(4) In any case in which a certificate of conformity has been issued under this subsection, any warranty required under section 207(b)(2)

Ante, p. 756.

and any action under section 207(c) shall be required to be effective only for the emission levels which the Administrator determines that such certificate was issued and not for the emission levels required under the applicable standard. *Ante*, p. 755.

"(5) The authorities of section 208(a) shall apply, subject to the conditions of section 208(b), for purposes of this subsection.". 42 USC 7542.

(g) Section 202(d) of such Act is amended by striking out "and" at the end of paragraph (1) thereof; by inserting "(other than motorcycles or motorcycle engines)" after "engines" in paragraph (2) thereof; by striking out the period at the end of paragraph (2) and inserting in lieu thereof "; and"; and by adding a new paragraph (3) to read as follows: 42 USC 7521.

"(3) in the case of any motorcycle or motorcycle engine, be a period of use the Administrator shall determine.".

AIRCRAFT EMISSIONS STANDARDS

SEC. 225. Section 231(c) of the Clean Air Act is amended to read as follows: 42 USC 7571.

"(c) Any regulations in effect under this section on date of enactment of the Clean Air Act Amendments of 1977 or proposed or promulgated thereafter, or amendments thereto, with respect to aircraft shall not apply if disapproved by the President, after notice and opportunity for public hearing, on the basis of a finding by the Secretary of Transportation that any such regulation would create a hazard to aircraft safety. Any such finding shall include a reasonably specific statement of the basis upon which the finding was made.". Notice and hearing.

CARBON MONOXIDE INTRUSION INTO SUSTAINED USE VEHICLES

SEC. 226. (a) The Administrator, in conjunction with the Secretary of Transportation, shall study the problem of carbon monoxide intrusion into the passenger area of sustained-use motor vehicles. Such study shall include an analysis of the sources and levels of carbon monoxide in the passenger area of such vehicles and a determination of the effects of carbon monoxide upon the passengers. The study shall also review available methods of monitoring and testing for the presence of carbon monoxide and shall analyze the cost and effectiveness of alternative methods of monitoring and testing. The study shall analyze the cost and effectiveness of alternative strategies for attaining and maintaining acceptable levels of carbon monoxide in the passenger area of such vehicles. Within one year the Administrator shall report to the Congress respecting the results of such study. Study. 42 USC 7521 note. Report to Congress.

(b) For the purpose of this section, the term "sustained-use motor vehicle" means any diesel or gasoline fueled motor vehicle (whether light or heavy duty) which, as determined by the Administrator (in conjunction with the Secretary), is normally used and occupied for a sustained, continuous, or extensive period of time, including buses, taxicabs, and police vehicles. "Sustained-use motor vehicle."

TITLE III—AMENDMENTS RELATING PRIMARILY TO TITLE III OF THE CLEAN AIR ACT

DEFINITIONS

SEC. 301. (a) Section 302 of the Clean Air Act is amended by adding the following new subsections at the end thereof: 42 USC 7602.

Ante, p. 742.
Ante, p. 726.
Ante, pp. 697, 699-701, 703, 791; *Post*, p. 791.
Ante, p. 701, 703; *Post*, p. 796.
42 USC 7604.

additives), or section 169A (relating to visibility protection), any condition or requirement under part B of title I (relating to ozone protection) any requirement under section 111 or 112 (without regard to whether such requirement is expressed as an emission standard or otherwise).".

(c) Section 304(e) of such Act is amended by inserting at the end thereof the following: "Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

"(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

"(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 118.".

Ante, p. 711.
Infra.

(d) Section 307 of such Act, as amended by section 305 of this Act, is amended by adding the following at the end thereof:

"(e) Nothing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section.".

CIVIL LITIGATION

42 USC 7605.

SEC. 304. (a) Section 305 of the Clean Air Act is amended to read as follows:

"REPRESENTATION IN LITIGATION

"SEC. 305. (a) The Administrator shall request the Attorney General to appear and represent him in any civil action instituted under this Act to which the Administrator is a party. Unless the Attorney General notifies the Administrator that he will appear in such action, within a reasonable time, attorneys appointed by the Administrator shall appear and represent him.

"(b) In the event the Attorney General agrees to appear and represent the Administrator in any such action, such representation shall be conducted in accordance with, and shall include participation by, attorneys appointed by the Administrator to the extent authorized by, the memorandum of understanding between the Department of Justice and the Environmental Protection Agency, dated June 13, 1977, respecting representation of the agency by the department in civil litigation.".

ADMINISTRATIVE PROCEDURES AND JUDICIAL REVIEW

42 USC 7607.

SEC. 305. (a) Section 307 of the Clean Air Act is amended by adding the following new subsection at the end thereof:

"(d)(1) This subsection applies to—

Ante, p. 691.

"(A) the promulgation or revision of any national ambient air quality standard under section 109,

Ante, p. 694.

"(B) the promulgation or revision of an implementation plan by the Administrator under section 110(c),

"(C) the promulgation or revision of any standard of performance under section 111 or emission standard under section 112, *Ante*, pp. 697, 699-701, 703; *Post*, p. 791.

"(D) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 211, *Ante*, pp. 701, 703; *Post*, p. 796.

"(E) the promulgation or revision of any aircraft emission standard under section 231, *Ante*, pp. 762, 764; *Post*, p. 791.

"(F) promulgation or revision of regulations pertaining to orders for coal conversion under section 113(d)(5) (but not including orders granting or denying any such orders), *Ante*, p. 769; *Post*, p. 791.

"(G) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 119 (but not including the granting or denying of any such order), *Ante*, p. 705. *Ante*, pp. 709, 712.

"(H) promulgation or revision of regulations under subtitle B of title I (relating to stratosphere and ozone protection), *Ante*, p. 726.

"(I) promulgation or revision of regulations under subtitle C of title I (relating to prevention of significant deterioration of air quality and protection of visibility), *Ante*, p. 731.

"(J) promulgation or revision of regulations under section 202 and test procedures for new motor vehicles or engines under section 206, and the revision of a standard under section 202 (a)(3), *Ante*, p. 702. *Ante*, p. 762. *Ante*, p. 765.

"(K) promulgation or revision of regulations for noncompliance penalties under section 120, *Ante*, p. 714.

"(L) promulgation or revision of any regulations promulgated under section 207 (relating to warranties and compliance by vehicles in actual use), *Ante*, pp. 754-758.

"(M) action of the Administrator under section 126 (relating to interstate pollution abatement), and *Ante*, p. 724.

"(N) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5 of the United States Code.

"(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a 'rule'). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency. Rulemaking docket, establishment.

"(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, United States Code, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the 'comment period'). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of— Publication in Federal Register. Purpose statement, contents.

"(A) the factual data on which the proposed rule is based;

"(B) the methodology used in obtaining the data and in analyzing the data; and

"(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a refer-

ence to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 109(d) and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

Ante, p. 691.

Docket inspection.

"(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

Hearing, transcript.

"(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

"(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

Oral or written submissions.

"(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

Transcript.

Purpose statement.

"(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

"(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

"(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

Record.

"(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

Reconsideration proceeding.

"(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall 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. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

Review.

Stay.

"(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters 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.

Interlocutory appeals, prohibition.

"(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

"(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

Extension.

"(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

"(11) The requirements of this subsection shall take effect with

respect to any rule the proposal of which occurs after ninety days after the date of enactment of the Clean Air Act Amendments of 1977.".

Notice and hearing. 42 USC 7405.

(b) Section 105 of such Act is amended by adding the following new subsection at the end thereof:

"(e) No application by a State for a grant under this section may be disapproved by the Administrator without prior notice and opportunity for a public hearing in the affected State, and no commitment or obligation of any funds under any such grant may be revoked or reduced without prior notice and opportunity for a public hearing in the affected State (or in one of the affected States if more than one State is affected).".

42 USC 7607.

(c)(1) The first sentence of section 307(b)(1) of such Act is amended by striking out "or" after "211," and by inserting after "231" the following: "any rule or order issued under section 120 (relating to noncompliance penalties, any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act".

Ante, p. 714.

(2) The second sentence of section 307(b)(1) of such Act is amended by inserting after "thereunder," the following: "or any other final action of the Administrator under this Act which is locally or regionally applicable".

Petition, filing.

(3) The last sentence of section 307(b)(1) of such Act is amended to read as follows: "Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(4) Section 307(b)(1) of such Act is further amended by inserting the following after the second sentence thereof: "Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.".

42 USC 7414.

(d)(1) Clause (iii) of section 114(a) of such Act relating to inspection, monitoring, and entry, is amended by striking out "section 119 or 303" and inserting in lieu thereof the following: "any provision of this Act (except with respect to a manufacturer of motor vehicles or motor vehicle engines)".

(2) Section 114(a)(1) of such Act is amended by striking out "the owner or operator of any emission source" and inserting in lieu thereof "any person subject to any requirement of thisAct (other than a manufacturer subject to the provisions of section 206(c) or 208)".

(3) Section 114(a)(2)(A) of such Act is amended by striking out "in which an emission source is located" and by inserting in lieu thereof "of such person".

(4) Section 114(a)(2)(B) of such Act is amended by striking out "the owner or operator of such source" and by inserting in lieu thereof "such person".

Regulations. 42 USC 7601.

(e) Section 301 of such Act is amended by inserting "(1)" after "(a)" and by inserting a new paragraph (2) to read:

"(2) Not later than one year after the date of enactment of this paragraph, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers

and employees (including the Regional Administrator) to follow in carrying out a delegation under paragraph (1), if any. Such regulations shall be designed—

"(A) to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the Act;

"(B) to assure at least an adequate quality audit of each State's performance and adherence to the requirements of this Act in implementing and enforcing the Act, particularly in the review of new sources and in enforcement of the Act; and

"(C) to provide a mechanism for identifying and standardizing inconsistent or varying criteria, procedures, and policies being employed by such officers and employees in implementing and enforcing the Act.".

Court costs.

(f) Section 307 of such Act, as amended by section 303(d) of this Act, is amended by adding the following new subsection at the end thereof: *Ante*, p. 772.

"(f) In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.".

Relief.

(g) Section 307 of such Act is amended by adding the following new subsection at the end thereof:

"(g) In any action respecting the promulgation of regulations under section 120 or the administration or enforcement of section 120 no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.". *Ante*, p. 714.

(h) Section 307(b) of such Act is amended by inserting "any order under section 120," after "111(d)". *Ante*, p. 776.

SEWAGE TREATMENT GRANTS

SEC. 306. Title III of the Clean Air Act is amended by striking out section 316 and adding the following new section at the end thereof:

"SEWAGE TREATMENT GRANTS

Construction. 42 USC 7616.

"SEC. 316. (a) No grant which the Administrator is authorized to make to any applicant for construction of sewage treatment works in any area in any State may be withheld, conditioned, or restricted by the Administrator on the basis of any requirement of this Act except as provided in subsection (b).

Restriction.

"(b) The Administrator may withhold, condition, or restrict the making of any grant for construction referred to in subsection (a) only if he determines that—

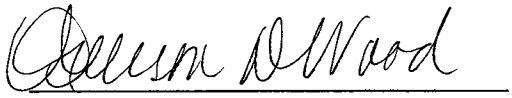
"(1) such treatment works will not comply with applicable standards under section 111 or 112, *Ante*, pp. 697, 699-701, 703; *Post*, p. 791.

"(2) the State does not have in effect, or is not carrying out, a State implementation plan approved by the Administrator which expressly quantifies and provides for the increase in emissions of each air pollutant (from stationary and mobile sources in any area to which either part C or part D of title I applies for such pollutant) which increase may reasonably be anticipated to result directly or indirectly from the new sewage treatment capacity which would be created by such construction. *Ante*, pp. 701, 703; *Post*, p. 796. Emissions, increase. *Ante*, pp. 731, 746.

"(3) the construction of such treatment works would create new sewage treatment capacity which—

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32(a)(3)(C), that the foregoing Joint Brief of Fine PM Industry Intervenor-Respondents contains 3,492 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the 3,500 word-limit set by the Court.



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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2008, two copies of the foregoing Joint Brief of Fine PM Industry Intervenor-Respondents were served by first-class mail, postage prepaid, on each of the following counsel.

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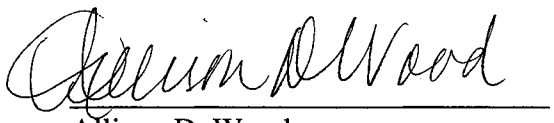

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