ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 06-1410

(consolidated with Nos. 06-1411, 06-1415, 06-1416, and 06-1417)

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

AMERICAN FARM BUREAU FEDERATION, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

AMICUS BRIEF FOR NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF RESPONDENT

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INITIAL BRIEF: January 29, 2008

RULE 26.1 DISCLOSURE STATEMENT

The National Association of Home Builders, Inc. ("NAHB") is a non-profit national trade association incorporated in the State of Nevada with its headquarters located in Washington, D.C. The NAHB has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

NAHB is the voice of the housing industry in the United States, with its members responsible for building approximately 80% of the homes constructed each year in the United States. NAHB consists of more than 235,000 builder and associate members organized into approximately 850 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. Its members include individuals and firms that construct single- and multi-family homes, apartments, condominiums, and commercial and industrial projects, as well as land developers and remodelers. The overwhelming majority of NAHB's members are small businesses.

NAHB's members are subject to the Environmental Protection Agency's national ambient air quality standards ("NAAQS") for both fine ($PM_{2.5}$) and coarse (PM_{10}) particulate matter. The on- and off-road construction equipment used by NAHB's members must comply with EPA's fine particulate matter emission standards. Moreover, during the land development and construction

process, crustal coarse particulate matter is sometime released, subjecting NAHB members to EPA's coarse particulate matter standard.

NAHB brings a unique industry perspective to these proceedings. NAHB is the only representative of the land development and construction industry participating in these consolidated cases, and represents one of the few industries subject to both the fine and coarse particulate matter standards. NAHB has been involved with EPA's NAAQS program for a number of years, consistent with established organizational policies that guide and direct NAHB's legislative, regulatory, and legal activities with regard to Clean Air Act initiatives affecting NAHB members, including the NAAQS. NAHB has invested substantial resources in educating its members about EPA's administration of the Clean Air Act, the NAAQS program, and the regulation of coarse and fine particulate matter. NAHB actively participated in EPA's rulemaking proceedings below, submitting extensive comments in response to EPA's proposed rule. *See* NAHB Comments (Apr. 17, 2006) (JA __).

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INTRODUCTION

EPA's initial proposal that one set of coarse particulate NAAQS apply only in "urban" geographic areas and to combustion sources – as opposed to "non-urban" areas and "crustal" or "friction" sources – was doomed from its inception. In its final rule, EPA wisely abandoned this unworkable proposal. On review, however, the government's brief is less forceful than it might have been in explaining EPA's decision. The government omits to mention, for example, that standards promulgated to apply only to certain geographic areas (such as "urban" centers) or certain emissions sources (such as "combustion" sources) would violate the Clean Air Act. (*See* Section I, below.) Moreover, while the government does mention the difficulty of crafting technically workable distinctions between different sources of coarse particulates, here again the government might have better explained the relative paucity and tenuousness of the scientific evidence purportedly establishing that "combustion" particulates have significantly different health effects than "crustal" or "friction" particulates. (*See* Section II, below.) This brief is offered, in support of EPA's standards, to provide these additional perspectives.

ARGUMENT

Industry Petitioners argue EPA should have adopted a standard that excludes agricultural and mining sources from emissions regulation and assigns "different limits" to "urban" and "non-urban" areas. Indus. Pet. 18 & n.5, 26-27. In response, EPA rightly notes that it is not feasible to distinguish between "urban" and "non-urban" coarse particulates. EPA Br. 109. EPA fails to mention, however, that the Clean Air Act grants the agency no authority to promulgate a NAAQS that makes distinctions in permissible emissions according to source or geographic location. Any purported differences in health effects stemming from these different varieties of coarse particulates are small, uncertain, and greatly exaggerated by Industry Petitioners.

I. EPA Would Have Violated The Clean Air Act If It Had Established Different NAAQS For Urban Geographic Areas Or Emission Sources.

EPA initially proposed setting a NAAQS that would have singled out certain sources of coarse particulates — such as construction and traffic sources, as opposed to agriculture and mining sources. Under this proposal, two sources of coarse particulates with similar composition that produce presumably similar health impacts would receive different regulatory treatment. But defining a NAAQS based on source and geographic location would have unlawfully contradicted the legal limits on EPA's authority.

The case law is clear that setting NAAQS using source-based characteristics – as opposed to a substance's physical, biological, or chemical characteristics – would impermissibly invade state prerogatives. Although EPA has authority to implement general pollution controls, it cannot regulate the manner in which NAAQS are achieved and maintained within geographic regions within each State. *Virginia v. EPA*, 108 F.3d 1397, 1407-08 (D.C. Cir. 1997); *Train v. NRDC*, 421 U.S. 60, 79 (1975). The Clean Air Act leaves to the States "the power to determine which sources would be burdened by regulations and to what extent." *Virginia*, 108 F.3d at 1408 (citation omitted). As courts have recognized, although EPA sets the "standards of air quality," Congress has "given the States the initiative and a broad responsibility regarding the means to achieve those ends through state implementation plans and timetables of compliance." *Id.* at 1408 (quotation omitted).

Just as EPA lacks authority to implement source-based regulation, it also may not establish NAAQS that hinge on whether particulates are found in "urban" as opposed to "non-urban" areas. The Clean Air Act's standard-setting process has a national, not an urban-area, focus. For example, section 109 of the Act, which governs the establishment of NAAQS, is entitled "*National* Primary and Secondary Ambient Air Quality Standards." Section 109 and related

provisions thus speak in terms of "national" standards, not regional ones. *See* 42 U.S.C. § 7409(a)(1)(A), (B), (C); *id.* § 7410(a)(1).

Because the Act has a national focus, its standard-setting process does not permit EPA to distinguish between health effects in specific regions or geographic areas. The statute instead applies to all geographic areas and contains no language that contemplates EPA limiting its non-attainment designations to urban centers. Section 107 of the Act, for instance, affirms that States have "the primary responsibility for assuring air quality within the entire geographic area comprising such State" and must achieve and maintain the air-quality standards "within each air quality control region in such State." *Id.* § 7407(a); *see id.* § 7401(a)(3). Similarly, state Governors are directed to submit for EPA approval their non-attainment designations for "any area" within their State. *Id.* § 7407(d).

The Act's related provisions further underscore that EPA's authority is limited to adopting national standards, as opposed to regulating regional air quality or regulating particular pollution sources based on population density or other demographic characteristics. *See Doe v. Chao*, 540 U.S. 614, 630 (2004) (statutory language "must be read ... with a view" to its "place in the overall statutory scheme"). For example, section 112 directs EPA to promulgate standards providing for the maximum achievable reduction in emissions of

certain hazardous air pollutants. 42 U.S.C. § 7412. Similarly, section 112(k) provides that "[c]onsidering ... the risks of ... adverse health effects from hazardous air pollutants, ambient concentrations characteristic of large urban areas should be reduced to levels substantially below those currently experienced." *Id.* § 7412(k). These specific provisions demonstrate that when Congress wanted to direct policymaking attention to specific issues of urban air pollution, it addressed the problem directly and expressly, not through section 109's general NAAQS provisions. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("where 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").

Because the statute contains no language plausibly interpreted as conferring authority for EPA to set standards that apply only to urban or other discrete geographic regions of the country, the statute cannot be interpreted to infer a delegation of power from Congress. *See Port Auth. of N.Y. v. DOT*, 479 F.3d 21, 31 (D.C. Cir. 2007) (courts may not "aggrandize an agency's power in contravention" of Congress's intent). Mere ambiguity or silence provides no evidence that Congress delegated authority. A statute must provide an affirmative indication of Congress's intent to delegate such authority before EPA may exercise discretion to fill gaps in the statute. *See American Bar Ass'n v. FTC*,

430 F.3d 457, 468-70 (D.C. Cir. 2005) (mere ambiguity is not evidence of a congressional delegation of authority). Indeed, in over 30 years of applying the Act, EPA's consistent practice has been to establish standards that apply nationally and to let the attainment or non-attainment chips fall as they may. *See Doris Day Animal League v. Veneman,* 315 F.3d 297, 300 (D.C. Cir. 2003) (longstanding agency interpretation not revised by Congress is persuasive).

II. No Adequate Technical Means Are Available For Distinguishing "Urban" From "Non-Urban" Air Pollution, And There Is No Scientific Evidence Certain Enough To Warrant Such A Distinction.

Even if EPA enjoyed authority to establish NAAQS based on source or geographic location (which it does not), EPA rightly concluded that there is no scientifically reliable way to determine the "relative toxicity of ambient mixes in different locations." EPA Br. 109. The technical uncertainties are so great that no standards for differentiating between "urban" and "non-urban" particulates can be defined consistent with the Supreme Court's *Whitman* decision.

Industry Petitioners nonetheless complain that EPA should have undertaken the "technically difficult task" of distinguishing between "urban" and "non-urban" coarse particulates. But, tellingly, even the petitioners themselves have been unable to draw any meaningful distinction based on physical, chemical, or biological characteristics – either in the agency rulemaking or before this Court. This failure is not surprising because little is

known about what determines coarse particle composition at any given moment in urban (or rural) areas, and even less is understood about the health effects associated with individual components of coarse particulates. In fact, at present, no measurement methods are capable of differentiating between coarse "urban" and coarse "rural" particles. *See* NAHB Comments, at 2-7 (Apr. 17, 2006) (surveying scientific evidence) (JA __); Alliance of Automobile Manufacturers Comments, at 11-18 (Apr. 17, 2006) (same) (JA __).

As comments submitted to EPA make clear, there is "no chemical difference between urban and non-urban coarse" particulates. Veranth Comments, at 2 (Apr. 15, 2006) (JA __). Numerous studies have observed the inability to distinguish conclusively between "urban" and "non-urban" coarse particulates, *see id.* 2-3 (citing studies), and there is "broad consensus among experts" that there is "no definitive chemical difference between urban and rural dust." *Id.* at 3.

Because no scientifically sound definition exists, it is impossible to make a meaningful scientific distinction between coarse particles emitted in urban and non-urban areas. It is therefore hard to fathom how EPA might – using science as opposed to regulatory policy – legitimately sort geographic regions into areas "dominated" by urban as opposed to non-urban coarse particulates. To the contrary, as commentators have noted, any attempt to regulate coarse

particulates based on geographic location or source "would be incredibly difficult to implement in practice and would result in unequal and unfair treatment of similar sources based on meaningless distinctions." Veranth Comments, at 7-8 (JA __).

The Industry Petitioners' assertions of sharp distinctions between the health effects associated with "urban" versus "non-urban" coarse particulates are belied by the scientific evidence. As EPA correctly explains, all coarse materials — whether classified as "urban" or "non-urban" — can contain toxic materials, such as naturally occurring fungi, pollen, endotoxins, and glucans, as well as animal debris and pesticides from agricultural lands. *See* EPA Br. 91. Whether the differences between "urban" and "non-urban" coarse particulates cause a significant difference in health effects is not known. As EPA's Staff recognized, there are "substantial uncertainties associated with the limited available epidemiological evidence," which present "inherent difficulties in interpreting the evidence for setting appropriate standards" 2005 Staff Paper 5-52, 5-53 (noting that the "available epidemiologic evidence for effects of $PM_{10-2.5}$ exposure is quite limited" and "inherently characterized by large uncertainties") (JA __). The science supporting the unqualified $PM_{10-2.5}$ standard proposed by the Industry Petitioners is unusually weak.

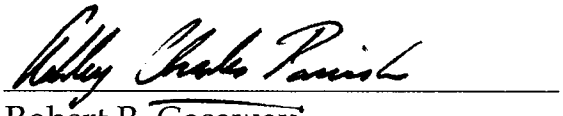
Numerous studies addressed in the administrative record support the view that all components of coarse particulates should be subject to further detailed study, and it is premature for EPA to set a coarse standard based on presumed differences in health effects depending on geographic area or emitting source. For example, a 2006 paper, which reported on a study that treated lung epithelial cells in-vitro with dust from soils and road surfaces, addressed potential health effects relating to soil samples collected from both urban and rural sources. *See* John M. Vernath, et al., *Correlation of In-Vitro Cytokine Responses with the Chemical Composition of Soil-Derived Particulate Matter*, 114 Envt'l Health Perspectives 341 (2006). This study found that, although there was a wide range of potential health effects, there was no statistically significant difference between urban and rural samples, or between samples collected from road surfaces as compared to open land. The authors emphasized: "existing data are still inadequate to identify the pollution sources that are most relevant to health effects in sensitive populations." *Id.* at 341. Other studies have likewise shown that, although ambient dusts may potentially affect human health, it is not clear what specific components of the ambient dusts are responsible for those effects. *See* Alliance Comments, at 13-14 (citing studies) (JA __); NAHB Comments, at 3-9 (same) (JA __).

Of course, epidemiological evidence from rural populations is sparse because population density is low in these areas, and it is more difficult to identify communities that can be used to produce statistically meaningful studies of health effects. In contrast, laboratory toxicological studies have identified both anthropogenic-urban and agricultural-mining-rural particles as potentially inducing responses in airway tissues and cells. In sum, based on the current state of the science, EPA would have erred by assuming that urban coarse particulate matter entails radically different or more severe health effects as compared with non-urban coarse particulate matter.

CONCLUSION

For these reasons, EPA's decision to retain the PM_{10} standard should be affirmed.

Respectfully submitted,



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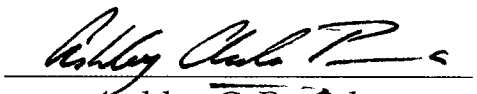
INITIAL BRIEF: January 29, 2008

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure And Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 1,990 words as determined by the word-counting feature of Microsoft Word 2000.



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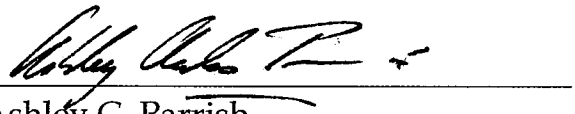

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