ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1146

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

STATE OF WEST VIRGINIA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review

FINAL BRIEF FOR RESPONDENT EPA

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

Of Counsel:

Elliott Zenick
Scott Jordan
United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

March 4, 2015

Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rules 28(a)(1)(A) and 21(d), Respondent the United States Environmental Protection Agency states as follows:

Parties and Amici:

All parties appearing in this Court are listed by Petitioners, except:

Amici for Petitioners: The American Chemistry Council; the American Coatings Ass'n; the American Fuel and Petrochemical Manufacturers; the American Iron and Steel Institute; the Chamber of Commerce; the Council of Industrial Boiler Owners; the Independent Petroleum Ass'n of America; the Metals Service Center Institute; and the Pacific Legal Foundation.

Amicus for Respondent: The Institute for Policy Integrity at New York University School of Law.

Rulings under Review:

Petitioners purport to challenge a settlement agreement executed in 2010 and finalized by EPA on March 2, 2011, but ask the Court enjoin EPA from finalizing the following proposed rule: *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34, 380 (June 18, 2014).

Related Cases:

This case is related to, and has been designated by the Court for argument on the same day as, the following two consolidated cases:

(1) Murray Energy Corp. v. EPA, No. 14-1112 (D.C. Cir. filed June 18, 2014) (petition for extraordinary writ to "prohibit" ongoing rulemaking); and

(2) Murray Energy Corp. v. EPA, No. 14-1151 (D.C. Cir. filed Aug. 15, 2014) (challenging proposed rule *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,380 (June 18, 2014)).

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GLOSSARY

CO_2	Carbon dioxide
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards

Jurisdiction and Standing

As explained in Arguments I through V below, Petitioners lack standing and the Court lacks jurisdiction over this challenge to a 2010 settlement agreement.

Statement of Issues

1. Whether Petitioners lack Article III standing to seek declaratory and injunctive relief in connection with a settlement agreement that sets rulemaking deadlines but does not limit EPA's discretion over the final rulemaking action;

2. Whether the Court also lacks jurisdiction because the settlement itself is not a final action, because the challenge to the settlement is both moot and untimely, and because the pendency of an ongoing rulemaking that will consider the same legal questions renders the asserted dispute unripe for review; and

3. Whether Petitioners' interpretation of 42 U.S.C. § 7411(d) as barring EPA from addressing harmful carbon dioxide ("CO_2") emissions from existing power plants because EPA previously regulated, under 42 U.S.C. § 7412, different pollutants emitted by these plants is the only permissible interpretation of that text.

Statutes and Regulations

All relevant statutes and regulations are set forth in Respondent's Statutory Addendum.

Statement of the Case

Greenhouse gas pollution threatens Americans' welfare by causing "damaging and long-lasting changes in our climate that can have a range of severe negative effects on human health and the environment." 79 Fed. Reg. 34,830, 34,833 (June 18, 2014) ("Proposed Rule"). Fossil fuel-fired power plants are "by far, the largest emitters" of greenhouse gases – primarily CO_2 – among U.S. stationary sources. Id. Last year, EPA took a historic step towards addressing those emissions, proposing that states submit plans for achieving CO_2 emissions goals under section 111(d) of the Clean Air Act ("Act"), 42 U.S.C. § 7411(d). Id. at 34,832-35.

Petitioners seek to stop this ongoing rulemaking. To avoid the requirement that a rule be final before judicial review occurs, they purport to challenge an obsolete 2010 settlement agreement wherein EPA agreed to propose a rule addressing power plant greenhouse gas emissions by mid-2011, arguing that EPA's regulation of power plants' *hazardous* pollutant emissions in 2012 rendered that prior agreement unlawful.

The premise of Petitioners' suit is wrong; the Proposed Rule is not the result of that settlement agreement, but rather part of an Administration initiative to address the most critical environmental problem of our time. Petitioners are also wrong on the merits; section 7411(d) need not be read to have the illogical result of barring regulation of CO_2 because power plants' emissions of *other* pollutants have been regulated under section 7412. Above all, Petitioners are wrong to think that they can preempt a rulemaking. This Court has never so allowed, and it should not do so now.

Background

I. THE CLEAN AIR ACT

The Act was enacted in 1970 to "[r]espond[] to the growing perception of air pollution as a serious national problem." Ala. Power Co. v. Costle, 636 F.2d 323, 346 (D.C. Cir. 1979). It sets out a comprehensive scheme for air pollution control, "address[ing] three general categories of pollutants emitted from stationary sources": (1) criteria pollutants; (2) hazardous pollutants; and (3) "pollutants that are (or may be) harmful to public health or welfare but are not" hazardous or criteria pollutants "or cannot be controlled under" those programs. 40 Fed. Reg. 53,340 (Nov. 17, 1975).

Pollutants in the first category (criteria pollutants) are regulated under the National Ambient Air Quality Standards (NAAQS) program. See 42 U.S.C. §§ 7408 & 7410. Pollutants in the second category (hazardous pollutants) are regulated under 42 U.S.C. § 7412. Other harmful pollutants not regulated under the NAAQS or hazardous pollutant programs fall into the third category, and are subject to regulation under 42 U.S.C. § 7411. Together, these three programs establish a comprehensive scheme for protecting the nation's air quality and public health and welfare.

The section 7411 program has two main components. First, section 7411(b) requires EPA to promulgate federal "standards of performance" addressing *new* stationary sources that cause or contribute significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Once EPA has set new source standards addressing emissions of a

particular pollutant under section 7411(b), section 7411(d) obligates EPA to promulgate regulations requiring *states* to establish standards of performance for existing stationary sources of the same pollutant. 42 U.S.C. § 7411(d)(1). If a state fails to submit a satisfactory plan, EPA is authorized to prescribe a plan for the state, and also to enforce plans where states fail to do so. Id. § 7411(d)(2).

II. THE 1990 AMENDMENTS

The Act was amended extensively in 1990. Among other things, Congress wanted to address EPA's slow progress in regulating hazardous air pollutants under section 7412. See New Jersey v. EPA, 517 F.3d 574, 578 (D.C. Cir. 2008) (prior to 1990, "EPA listed only eight [hazardous pollutants]" and "addressed only a limited selection of possible pollution sources"). To that end, Congress established a comprehensive list of hazardous air pollutants; set criteria for listing different "source categories" of such pollutants; and required EPA to "establish[] emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation." 42 U.S.C. § 7412(a), (b)(1) & (2), & (d)(1). These changes were intended to "eliminate[] much of EPA's discretion" in regulating hazardous pollutant emissions. 517 F.3d at 578.

In the course of overhauling the regulation of hazardous air pollutants under section 7412, Congress also edited section 7411(d), which cross-referenced a provision of old section 7412 that was to be eliminated. Specifically, the pre-1990 version of section 7411(d) obligated EPA to require standards of performance:

> for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section [7408(a)] or [7412(b)(1)(A)] . . . .

42 U.S.C. § 7411(d)(1) (1988); Pub. L. No. 91-604, 84 Stat. 1676, 1684 (1970).

To address the obsolete cross-reference to section 7412(b)(1)(A), Congress passed two differing amendments – one from the House and one from the Senate – that were never reconciled in conference. The House amendment replaced the cross-reference with the phrase "emitted from a source category which is regulated under section [7412]." Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990). The Senate amendment replaced the same text with a simple cross-reference to new section 7412. Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). Both amendments were included in the Statutes at Large, which supersedes the U.S. Code if there is a conflict. 1 U.S.C. §§ 112 & 204(a); Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1440 (D.C. Cir. 1988).

III. THE 2010 SETTLEMENT AGREEMENT

In New York v. EPA, D.C. Cir. No. 06-1322 (ECF No. 1068502), states and environmental groups petitioned for judicial review of a final rule issued under 42 U.S.C. § 7411, contending that the rule should have included standards of performance for greenhouse gas emissions from power plants. Following Massachusetts v. EPA, 549 U.S. 497, 558 (2007) (holding that greenhouse gases are "air pollutants" as defined in the Act), this Court granted EPA's requested remand for

further consideration of the issues related to greenhouse gas emissions in light of that decision. ECF No. 1068502, September 24, 2007 Order (Case No. 06-1322).

After the remand, EPA executed a settlement agreement in December 2010 with the New York v. EPA petitioners ("Settlement Agreement" or "Agreement"). EPA agreed, *inter alia*, to sign "a proposed rule under [Clean Air Act] section 111(d) that includes emissions guidelines" for greenhouse gases for existing electric utility steam generating units ("power plants") by July 26, 2011. Agreement ¶ 2 (JA 3). EPA further agreed that, *if* it separately elected to finalize standards of performance for new and modified sources, and after considering any comments, it would take final action with respect to the proposed rule by May 26, 2012. Id. ¶ 4 (JA 4). The Agreement was modified in June 2011, changing the date by which EPA was to sign a proposed rule addressing greenhouse gas emissions from existing power plants to September 30, 2011. JA 24-26 ("Modification Agreement").

In the Settlement Agreement, EPA preserved all discretion accorded to it by the Act and general principles of administrative law, see Agreement ¶ 11 (JA 6), including the discretion to withdraw the proposed guidelines for existing power plants. The deadlines set forth in the Agreement were not strictly enforceable. The sole remedy provided in the event EPA did not take action by the deadlines was for the other settling parties to file a motion or petition, or initiate a new action, seeking to compel EPA to take action in response to this Court's remand order in New York v. EPA, No. 06-1322 (ECF No. 1068502). Agreement ¶ 7 (JA 4-5).

Prior to finalizing its entry into the Settlement Agreement, EPA published the Agreement in the Federal Register for public comment, as required by 42 U.S.C. § 7413(g). See 75 Fed. Reg. 82,392 (Dec. 30, 2010) (notice soliciting comments). EPA did not receive any comments questioning its authority to conduct a section 7411(d) rulemaking for power plants as a consequence of having listed them as a source category regulated under section 7412 (infra Section IV). Petitioners submitted no comments at all. After considering the comments it did receive, EPA finalized the Agreement on March 2, 2011. See Modification Agreement at 1 (JA 24) (noting date Agreement was finalized); 77 Fed. Reg. 22,392, 22,404 (Apr. 13, 2012) (publicly announcing finalization).

EPA did *not* issue a proposed or final rule under section 7411(d) concerning greenhouse gas emissions from existing power plants by the deadlines in the Settlement Agreement. The other parties to the Agreement did not seek relief.

IV. THE MATS RULE

In 2000, EPA found, under 42 U.S.C. § 7412(n)(1)(A), "that regulation of [hazardous pollutant] emissions from coal- and oil-fired [power plants] under section 112 of the [Act] is appropriate and necessary," and added those power plants to the section 7412(c) list of source categories. 65 Fed. Reg. 79,825, 79,826-30 (Dec. 20, 2000). EPA promulgated a final rule regulating power plants' emissions of mercury and other hazardous pollutants in 2012. 77 Fed. Reg. 9304 (Feb. 16, 2012) ("MATS Rule"). This Court upheld the MATS Rule in White Stallion Energy Center, LLC v.

EPA, 748 F.3d 1222 (D.C. Cir. 2014). The Supreme Court has granted certiorari to address one issue raised by that decision. See Michigan v. EPA, 135 S. Ct. 702 (U.S. Nov. 25, 2014) (No. 14-46).

The MATS Rule regulates only coal and oil-fired plants; thus, it does not cover all of the power plants addressed by the Proposed Rule, which covers natural gas-fired plants as well. Compare 77 Fed. Reg. 9304 with 79 Fed. Reg. at 34,855.

V. THE PROPOSED RULE

Independent of the Settlement Agreement, and over a year after EPA was supposed to have taken any *final* action under that Agreement, the President announced his "Climate Action Plan," wherein he directed EPA to work expeditiously to promulgate CO_2 emission standards for fossil fuel-fired power plants. In accordance with the President's directive, EPA proposed performance standards for new power plants on January 8, 2014.[1] 79 Fed. Reg. 1430. On June 18, 2014, EPA proposed rate-based emissions guidelines for states to follow in developing state plans to address CO_2 emissions from existing power plants under 42 U.S.C. § 7411(d).[2] 79 Fed. Reg. at 34,830-34. Petitioners challenge the latter proposal.

[1] EPA proposed CO_2 standards for new power plants in 2012, but withdrew the proposal after taking comment. 77 Fed. Reg. 22,392 (Apr. 13, 2012); 79 Fed. Reg. 1352 (Jan. 8, 2014).

[2] EPA also proposed standards for modified and reconstructed sources. 79 Fed. Reg. 34,959 (June 18, 2014).

The Proposed Rule has two main elements: (1) state-specific emission rate-based CO_2 goals, to be achieved collectively by all of a state's regulated coal- and natural gas-fired sources; and (2) guidelines for the development, submission, and implementation of state plans. 79 Fed. Reg. at 34,833. While the proposal lays out individualized CO_2 goals for each state, it does not prescribe how a state should meet its goal. Id. Rather, each state would have the flexibility to design a program that reflects its circumstances and energy and environmental policy objectives. Id.

EPA solicited comments on all aspects of the Proposed Rule. 79 Fed. Reg. at 34,830. The comment period closed on December 1, 2014. See 79 Fed. Reg. 57,492 (Sept. 25, 2014). More than two million comments were submitted, and EPA is currently reviewing those comments. EPA intends to take final action later this year.[3]

Summary of Argument

No matter how urgent Petitioners believe their concerns regarding EPA's legal authority to be, they have chosen both the wrong context and the wrong time in which to raise them. First, their challenge to the Settlement Agreement is not justiciable because the Agreement does not "injure" Petitioners in any way that could give rise to Article III standing. The Agreement sets dates for rulemaking, but does not limit EPA's discretion concerning what final action to take, alter any applicable

[3] EPA Fact Sheet: Clean Power Plan and Carbon Pollution Standards Key Dates, at http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-carbon-pollution-standards-key-dates (JA 535-36).

rulemaking procedures, or purport to make any change in a regulatory program. Nor does the Agreement, standing alone, impose obligations on Petitioners or any other entity. This Court has long held that non-settlors lack Article III standing to seek judicial review for the purpose of blocking or setting aside such settlements.

Second, for related reasons, the Settlement Agreement cannot be considered a "final agency action." It does not determine the rights or obligations of, or impose legal consequences on, any non-party to the Agreement. Rather, legal consequences could be imposed only if EPA promulgates a final regulation following notice and comment, which would then be reviewable in this Court.

Third, any challenge concerning the Settlement Agreement has become moot. EPA already has published the "proposed" rule that was due under the Agreement, and the Agreement does not require final *promulgated* standards because EPA retains its discretion to decide what final action to take.

Fourth, the Act requires that petitions for review be brought within sixty days after the relevant Federal Register publication, which in this case occurred on April 23, 2012. Petitioners waited more than two years after that date to file this case, and that time limit is jurisdictional.

Finally, because EPA is currently in the midst of a notice-and-comment rulemaking process in which it will evaluate and respond to comments on the very issue Petitioners would have this Court prematurely decide, this petition is not "fit" for a judicial decision and must be dismissed as unripe.

If this Court reaches the merits, it should conclude that Petitioners' interpretation of section 7411(d) as barring regulation of all pollutants under that section once a source category has been regulated in regard to hazardous pollutants under section 7412 is not the only way to read the convoluted text at issue. That text – which includes both the House's and Senate's 1990 amendments – is ambiguous and can be read multiple ways, allowing for reasonable Agency interpretation. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984). One reasonable interpretation is that EPA may regulate, under section 7411(d), any pollutant that is not a "hazardous" or "criteria" pollutant regulated elsewhere under the Act. Unlike Petitioners' contrary reading, such an interpretation of section 7411(d) would be consistent with the statutory context and legislative history. Thus, the Court cannot conclude at this preliminary stage of the rulemaking process that Petitioners' reading of section 7411(d) is the only permissible reading.

Argument

I. PETITIONERS LACK ARTICLE III STANDING.

A. EPA's Entry Into the Settlement Agreement Caused No Injury.

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013). "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent [referred to as "injury-in-fact"]; fairly traceable to the

challenged action; and redressable by a favorable ruling." Id. at 1147 (internal quotation and citations omitted). "[A]llegations of *possible* future injury are not sufficient." Id. (emphasis in original; internal quotation omitted).

The Settlement Agreement contains no provision that could credibly be deemed to cause "concrete, particularized, and actual or imminent" injury to Petitioners or any other entity. To begin with, although the Agreement set a schedule for EPA to conduct rulemakings pursuant to section 7411, it does not limit EPA's administrative discretion in deciding, at the end of that rulemaking process: (1) whether to promulgate final standards; and (2) if EPA does so promulgate, what the form or content of the final standards should be.

For example, while Paragraphs 1 and 2 of the Settlement Agreement established deadlines for "*proposed* rule[s] [under sections 7411(b) and (d), respectively] that include[] standards of performance for GHGs," Paragraphs 3 and 4 do *not* similarly state that EPA "shall promulgate" such standards by the identified dates. Agreement ¶¶ 1-4 (JA 3-4). Instead, the latter paragraphs provide only that EPA "will sign . . . a final rule [by each respective date] that *takes final action with respect to* the proposed rule[s] described in [Paragraphs 1 and 2, respectively]." Id. ¶¶ 3, 4 (JA 3-4) (emphasis added).[4] Paragraph 11 further states that, "[e]xcept as expressly provided

[4] The Act distinguishes "proposed rules" from "promulgated" regulations in its general rulemaking provision, 42 U.S.C. § 7607(d), which expressly applies to rules issued under section 7411. Compare id. § 7607(d)(3), with id. § 7607(d)(6)(A)(ii), (B). Judicial review, in turn, is authorized (in relevant part) for action "*promulgating* . . . any

herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the [Act] or by general principles of administrative law." Agreement ¶ 11 (JA 6). Thus, the Agreement sets rulemaking deadlines but does not limit EPA's discretion, after considering the comments on a proposed rule, to make a final decision *not* to promulgate it.

Additionally, EPA's obligation under Paragraph 4 to "take final action" under section 7411(d) is conditional – it only arises "*if* EPA finalizes standards of performance for GHGs [for new and modified sources] pursuant to Paragraph 3." Agreement ¶ 4 (JA 4) (emphasis added). Thus, not only does EPA retain its discretion regarding what final action to take, it need not take final action under section 7411(d) *at all* unless it promulgates standards under section 7411(b).

The Agreement, moreover, contains no provision that purports to alter notice and comment requirements or any other procedures applicable to EPA rulemaking under the Act or other authority. Nor does it prescribe any other change in any regulatory program. Rather, it does nothing more than set deadlines for the rulemakings referred to in Paragraphs 1 through 4, with EPA retaining its administrative discretion regarding the substance of final action as shown above.

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standard of performance or requirement under [42 U.S.C. § 7411]." Id. § 7607(b)(1) (emphasis added).

Under both longstanding and recent decisions of this Court, non-settling parties lack standing to seek judicial review of settlements that set schedules for federal agency rulemaking without limiting the agency's administrative discretion concerning the substance of final action. Just two years ago, the Court considered this question in Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013), where non-settlors asserted standing to oppose a consent decree establishing a schedule for rulemaking "pertaining to revisions to . . . Effluent Guidelines under the Clean Water Act." Id. at 1321. Using language essentially identical to that employed by the Settlement Agreement here, the consent decree in Perciasepe established a deadline for "a notice of proposed rulemaking pertaining to [such] revisions," followed by a second deadline for "a decision *taking final action* following notice and comment rulemaking pertaining to [such] revisions." Id. (emphasis added). The consent decree also mirrored this Agreement by expressly providing that it did not "limit or modify the discretion accorded EPA by the Clean Water Act or by general principles of administrative law." Id. at 1322. This Court concluded that the non-settlors lacked standing. Id. at 1323-26. In particular, the Court observed that the consent decree "merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule – the content of which is not in any way dictated by the consent decree – using a specific timeline." Id. at 1324. The Court explained that such an agreement cannot "injure" any third party, because "Article III standing requires more than the *possibility* of potentially adverse regulation." Id. at 1324-25

(emphasis added) (citing Nat'l Ass'n of Home Builders ("NAHB") v. EPA, 667 F.3d 6, 13 (D.C. Cir. 2011)) (other citations omitted).

Perciasepe is consistent with earlier cases likewise holding that third parties lacked standing to bring suits attempting to prevent federal agencies from agreeing to negotiated rulemaking schedules. See Alternative Research & Dev. Found. v. Veneman, 262 F.3d 406, 411 (D.C. Cir. 2001) (non-settling party's rights not impaired by stipulation of dismissal requiring U.S. Department of Agriculture to conduct rulemaking, because it "will not be precluded from participating in the rulemaking and, if USDA decides to issue a final rule, [it] is not precluded from challenging that rule"); In re Endangered Species Act Section 4 Deadline Litig. – MDL No. 2165, 704 F.3d 972, 976-79 (D.C. Cir. 2013) (no standing to oppose consent decree); Envt'l Defense v. EPA, 329 F. Supp. 2d 55, 67-69 (D.D.C. 2004) (same); cf. Ctr. for Biological Diversity v. EPA, 274 F.R.D. 305, 309-12 (D.D.C. 2011) (aircraft engine manufacturers lacked standing to intervene in lawsuit to compel agency action relating to regulation of greenhouse gas air emissions). Indeed, "[i]t has never been supposed that one party . . . could preclude other parties from settling their own disputes and thereby withdrawing from litigation." Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501, 528-29 (1986).

This Court has found it appropriate, however, to reach the merits of such a claim in the highly unusual circumstance – not present here – of a proposed settlement that expressly purported to limit EPA's discretion to decide *not* to regulate.

See Natural Res. Def. Council ("NRDC") v. Costle, 561 F.2d 904, 908-10 (D.C. Cir. 1977). In Perciasepe, the Court found Costle distinguishable because the settlement agreement in Costle, unlike the consent decree in Perciasepe, "permitted EPA to decline to issue any new rule . . . only if it met certain requirements set forth in the agreement and 'promptly submit[ted] a statement under oath to the parties explaining and justifying the exclusion,'" which was then subject to district court enforcement proceedings if NRDC disagreed with EPA's explanation. Perciasepe, 714 F.3d at 1325 (quoting Costle, 561 F.2d at 909); see also 714 F.3d at 1326 (stipulated dismissal in Alternative Research did not resemble Costle settlement because the stipulated dismissal "d[id] not bind the agency in its rulemaking"). Because of these distinctions, the Court in Perciasepe concluded that Costle "does not dictate the outcome here." Id. at 1325. The Court further observed that Costle did not address standing "and therefore has no precedential effect on th[at] jurisdictional question." Id.

As shown above, the Settlement Agreement here mirrors the provisions of the consent decree in Perciasepe and the stipulated dismissal in Alternative Research by referring only to deadlines to "take final action" at the conclusion of the rulemaking schedules, thus preserving EPA's administrative discretion. Agreement ¶¶ 3-4 (JA 3-4). Such language "does not *require* EPA to promulgate" standards under section 7411, but instead merely requires EPA to meet a rulemaking schedule "and then *decide* whether to promulgate a new rule." Perciasepe, 714 F.3d at 1324 (emphasis added). Moreover, the Agreement does not even require a "final action" under section

7411(d) unless EPA, in its discretion, "finalizes standards" under section 7411(b). Agreement ¶ 4 (JA 4). That the Agreement "prescribes a date by which regulation *could* occur does not establish Article III standing." Perciasepe, 714 F.3d at 1325 (emphasis added); accord Alternative Research, 262 F.3d at 411. Finally, because the Settlement Agreement contains no provision purporting to limit notice and comment requirements or otherwise alter any statutory procedures governing rulemaking, Petitioners "[are] not . . . precluded from participating in the rulemaking and, if [EPA] decides to issue a final rule, . . . [are] not precluded from challenging that rule." Alternative Research, 262 F.3d at 411; Envt'l Defense, 329 F. Supp. 2d at 68 (same).[5]

Petitioners cite cases from other circuits where courts considered the merits of objections to a settlement or affirmed an order preliminarily enjoining implementation of a settlement. E.g., Pet.Br. 25, 27 n.4. But each of those settlements included provisions that immediately altered existing regulatory programs, unlike here.[6] Petitioners identify *no* authority recognizing a non-settlor's standing to attempt to block a settlement that merely establishes a rulemaking schedule.

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[5] In contrast, granting the declaratory and injunctive relief Petitioners seek *would* impair the procedural rights of other stakeholders by preventing EPA from considering their comments and making a final decision that takes their comments into account.

[6] See Conserv. Nw. v. Sherman, 715 F.3d 1181, 1185-88 (9th Cir. 2013) (consent decree altered the "Survey and Manage Standard" of the Northwest Forest Plan without prior notice and comment); Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 245-46 (3d Cir. 2011) (settlement imposed immediately effective moratorium on oil and gas drilling in the Allegheny National Forest until completion of forest-wide environmental impact statement).

B. Petitioners' Claims Of Injury From Publication Of The Proposed Rule Are Insufficient.

Petitioners do not identify any "injury" that allegedly resulted directly from EPA's entry into the Settlement Agreement. Rather, Petitioners assert that they were injured by EPA's publication of the Proposed Rule because they "expended substantial state resources as a direct result of the proposal, including thousands of hours of employee time." Pet.Br. 26. Petitioners then assert that the Settlement Agreement was at least a "substantial factor" that "motivated" EPA to issue the proposal and that this alleged injury therefore is traceable to the Agreement. Pet.Br. 26-27. Petitioners also claim a second injury resulting from the "obligation to submit a State Plan after the [Proposed Rule] is final." Pet.Br. 28.[7] Neither of these claims establishes Article III standing.

Addressing Petitioners' second asserted injury first, the "obligation" to submit a State Plan after final standards are promulgated is only hypothetical. As even Petitioners acknowledge, it could only arise "*after* the Section 111(d) rule is final," Pet.Br. 28 (emphasis added) – in other words, it will only become an "obligation" if and when EPA *promulgates* a final rule. Speculation about possible future government action cannot meet the requirement of "concrete, particularized, and actual or imminent" injury. See Clapper, 133 S. Ct. at 1147-50; NAHB, 667 F.3d at 13. Moreover, despite Petitioners' belief that promulgation of the Proposed Rule is

[7] Petitioners do not allege any "procedural injury." See Perciasepe, 714 F.3d at 1323.

inevitable, recent experience demonstrates that EPA does not always finalize its rulemaking proposals. See, e.g., 79 Fed. Reg. 1352 and 79 Fed. Reg. 1430 (Jan. 8, 2014) (withdrawing proposed rule addressing CO_2 emissions from new power plants and publishing a new proposal based on a different legal theory).

Petitioners' other asserted injury – the staff time and resources expended in advance preparation for meeting possible future state planning requirements – cannot be considered "traceable" to any EPA action because neither the Settlement Agreement nor the Proposed Rule *requires* any state to conduct such efforts. Rather, only a final rule promulgating the proposal could require such action by states.[8] To the extent Petitioners have voluntarily undertaken such efforts, their asserted injury is "self-inflicted" and, as such, "not fairly traceable to the challenged government conduct." Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 177 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 2880 (2013) (where final rule permitted but did not "force" or "require" manufacturers to use new alternative fuel, majority held that petroleum refiners and importers did not have Article III standing based on the alleged costs and liabilities associated with that fuel); cf. NAHB, 667 F.3d at 12 (organizational staff

[8] The Administrator's statements *encouraging* advance planning (Pet.Br. 20) are not the same as a promulgated regulation imposing a binding deadline for submitting state plans, and no provision of the Agreement imposes such a deadline. See Perciasepe, 714 F.3d at 1325 n.7 (claimant "has the burden to establish that the consent decree – not EPA's throat-clearing – will cause the injury of which it complains").

time and money expended in response to Clean Water Act jurisdictional determination did not constitute injury-in-fact).[9]

This Court has acknowledged that *promulgated* air rules may cause an Article III "injury" by increasing a state's burden of developing an approvable plan or otherwise meeting implementation requirements; but, consistent with separation-of-powers principles, the Court has never suggested that a "proposed" rule could do so. E.g., West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004) (states had standing to seek review of EPA's promulgated "NO_X SIP Call" rule, which "direct[ed] each state to revise its SIP in accordance with EPA's NO_X emissions budget"); Nat'l Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1226-28 (D.C. Cir. 2007) (recognizing standing to challenge promulgated rule); Oklahoma Dep't of Envtl. Quality ("ODEQ") v. EPA, 740 F.3d 185, 189-90 (D.C. Cir. 2014) (same)[10]; compare with Alternative Research, 262 F.3d at 411 ("the initiation of a rulemaking" pursuant to settlement did not cause injury); Las Brisas Energy Ctr., LLC v. EPA, No. 12-1248 &

[9] Petitioners explain at length their concern that the Proposed Rule, if promulgated, would require planning efforts that a number of states believe cannot be achieved within the deadlines EPA has proposed. Pet.Br. 16-22. EPA sought rulemaking comments regarding, *inter alia*, the adequacy of the proposed planning deadlines, and many of the comments expressed that same concern. Thus, in addition to deciding as a threshold matter whether to promulgate the Proposed Rule, EPA will have to decide whether to make any changes to the planning deadlines in light of these comments.

[10] Tozzi v. U.S. Dep't of Health & Human Servs., 271 F.3d 301 (D.C. Cir. 2001) (Pet.Br. 27, 29), also involved a genuinely final agency action taken after notice and comment, not a proposal. 271 F.3d at 306-07.

consolidated cases (Order dated Dec. 13, 2012) (dismissing challenges to April 2012 proposed section 7411(b) rule on jurisdictional grounds) (Attach. A).

In Massachusetts, the Supreme Court likewise recognized a state's standing to challenge EPA's *final* action denying a rulemaking petition. See 549 U.S. at 526. The Court acknowledged a "special solicitude" in its standing analysis for a challenge brought by a state; it reasoned that Congress had "ordered EPA to protect [states] by prescribing standards applicable to the emission of any air pollutant . . . which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," and, importantly, that Congress also "recognized a concomitant procedural right to challenge the rejection of [the state's] rulemaking petition as arbitrary and capricious." Id. at 519-20 (citing 42 U.S.C. §§ 7521(a)(1), 7607(b)(1)) (internal quotation omitted). The petition here, in contrast to Massachusetts, was filed in the midst of an *ongoing* rulemaking process, and essentially asks the judiciary to assume the administrative function Congress delegated to EPA by deciding issues that are the ongoing subject of public comments when EPA has yet to respond to those comments and has neither denied a rulemaking petition, nor promulgated a regulation. Unlike in Massachusetts, the Act supports no "procedural right" to a judicial order thwarting this statutory process. Such a claim, whether brought by states, regulated entities or other stakeholders, is not justiciable.

C. Petitioners Fail to Show Redressability.

Petitioners also fail to explain how their alleged injuries would be redressed

if the Court "h[e]ld 'unlawful' and 'set aside' the settlement agreement's Section [74]11(d) provisions." Pet.Br. 59 (quoting 5 U.S.C. § 706(2)(A)). The Agreement contains no provisions that purport to "determine" whether power plants should be subject to promulgated standards of performance for CO_2 emissions, and EPA's schedule for completing the rulemaking process was not derived from the Agreement. Indeed, the Proposed Rule was issued as part of the "Climate Action Plan," a major initiative by the current administration to address climate change. See 79 Fed. Reg. at 34,833/3 (identifying Climate Action Plan as impetus for Proposed Rule). EPA would have taken the step of proposing a section 7411(d) rule for power plants pursuant to the Act and the Climate Action Plan whether or not this Agreement existed, or were vacated.

II. THE SETTLEMENT AGREEMENT IS NOT A "FINAL ACTION."

Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), governs judicial review of EPA's nationally applicable air regulations and is an exclusive remedy. See id. § 7607(e); ODEQ, 740 F.3d at 191. It lists specific, nationally applicable actions that are subject to judicial review – including action "*promulgating* . . . any standard of performance or requirement under [42 U.S.C. § 7411]" – along with "any other nationally applicable regulations *promulgated*, or *final action* taken, by the Administrator under this chapter." 42 U.S.C. § 7607(b)(1) (emphasis added).

"[T]he phrase 'final action' . . . bears the same meaning in [section 7607(b)(1)] that it does under the Administrative Procedure Act" and, accordingly, is subject to

the familiar standard articulated in Bennett v. Spear, 520 U.S. 154 (1997), to determine whether EPA actions taken under the Act are "final." Whitman v. American Trucking Ass'ns, 531 U.S. 457, 478 (2001); see, e.g., Nat'l Envtl. Dev. Ass'n's Clean Air Project ("NEDA-CAP") v. EPA, 686 F.3d 803, 808-09 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 983 (2013). "As a general matter, two conditions must be satisfied for action to be considered 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process . . . it must not be of a merely tentative or interlocutive nature." Bennett, 520 U.S. at 177-78 (internal citation omitted). "And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Id. (internal citation omitted); see also Devon Energy Corp. v. Kempthorne, 551 F.3d 1030, 1040-41 (D.C. Cir. 2008) (action must impose "legal," not just "practical" consequences, and the change in legal rights must be "certain") (internal quotations and citations omitted).

The Settlement Agreement does not meet either of Bennett's criteria because, as shown above, it does not resolve what the final outcome of the rulemaking process will be and does not "determine" any "rights or obligations" of or impose any "legal consequences" on Petitioners or any other non-settling entity.[11] In short, the Agreement has no legally binding effect on any non-settlor that could render it a

[11] Petitioners here do not argue that the Proposed Rule is a separate "final action." See Pet.Br. 52-54.

"final action." See Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1034 (D.C. Cir. 2007) (consent agreement was not a "rule" subject to judicial review, as it did not "bind" EPA to a "substantive interpretation of the statute"); see also NEDA-CAP, 686 F.3d at 809 (preamble statements describing anticipated future implementation plans for revised NAAQS did not "impose[] definite requirements upon states or regulated industries" and thus were not final action).

That the Settlement Agreement went through notice and comment under 42 U.S.C. § 7413(g) does not, by itself, establish finality. Pet.Br. 52-53 (citing Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162 (1967)).[12] In NEDA-CAP, for example, this Court held that a preamble statement concerning future implementation of a NAAQS was not reviewable although EPA had published the statement in the Federal Register following notice and comment. 686 F.3d at 808-09. Here, even if the Agreement represented the "consummation of EPA's decisionmaking" concerning whether and how to settle the threatened litigation regarding the timing of its response to the remand in New York v. EPA, Pet.Br. 53, that is not the *relevant* decisionmaking process in this case,[13] because Petitioners' claim is focused exclusively

[12] Toilet Goods did not address whether a settlement agreement is judicially reviewable after going through notice and comment. Rather, the Court found that when a *regulation* is published following notice and comment, it represents the culmination of the rulemaking process – a point no one here contests. Id. at 162.

[13] If Petitioners' view were correct, then *every* rulemaking settlement could constitute "final agency action," potentially subjecting the federal courts to a flood of collateral litigation challenging such settlements and leaving the United States with no effective

on the scope of EPA's regulatory authority, not on the timeframe in which the rulemaking will be conducted. EPA has *not* concluded its process for deciding questions concerning its regulatory authority, as its solicitation of public comments on that very issue clearly demonstrates.

Petitioners' other cases are readily distinguishable. Pet.Br. 52-53. Makins v. District of Columbia, 277 F.3d 544 (D.C. Cir. 2002), was a suit brought to *enforce* a settlement agreement against a *settling* party. Id. at 545-47. The remaining cases involved settlements that imposed *immediate* legal consequences (not just hypothetical future legal consequences) on non-settlors. See United States v. Carpenter, 526 F.3d 1237, 1238-42 (9th Cir. 2008) (settlement authorized road repairs near federal wilderness area, thus allegedly impairing nearby residents' interest in preserving that area); Exec. Business Media, Inc. v. U.S. Dept. of Def., 3 F.3d 759, 761-64 (4th Cir. 1993) (business competitor challenged settlement that authorized contract award without going through competitive bidding).

III. PETITIONERS' CHALLENGE TO THE AGREEMENT IS MOOT.

For several reasons, this petition should be considered moot. See generally Daimler Trucks North Am. LLC v. EPA, 745 F.3d 1212, 1216 (D.C. Cir. 2013) (A case is moot "if events have so transpired that the decision will neither presently

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means of settling suits alleging that it has failed to respond to a judicial remand or meet a statutory deadline for final regulatory action. Such an outcome is untenable and would be contrary to Firefighters. See 478 U.S. at 428-29.

affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.") (internal quotation and citation omitted); Util. Air Reg. Group ("UARG") v. EPA, 744 F.3d 741, 749-50 (D.C. Cir. 2014). First, the deadlines in the Settlement Agreement have long since passed. The Agreement called for EPA to take final action with respect to its proposal under section 7411(d) – only if it elected to promulgate standards for power plants under section 7411(b) – by May 2012. Agreement ¶ 4 (JA 4); Modification Agreement ¶ 2 (JA 26). EPA took no such action by that deadline, and the settling parties have not pursued the limited remedy that the Agreement authorizes in the event of breach, which is to "file an appropriate motion or petition . . . seeking to compel EPA to take action responding to the Remand Order" in New York v. EPA, No. 06-1322. Agreement ¶ 7 (JA 4-5).[14]

Second, EPA has *already* published the section 7411(d) proposal, which is the only step EPA was *required* to take under the Settlement Agreement, since (1) the obligation to take final action under section 7411(d) was conditional on whether EPA promulgated section 7411(b) standards; and (2) EPA retained its discretion to make a

[14] The Agreement contains no specific performance remedy, and it is not enforceable in Court. Id. ¶ 7. Petitioners' contrary arguments concerning the Agreement's "enforceability" (Pet.Br. 27 & n.4, 57-58) fail to address its language limiting the remedy for breach and rely on cases that did not involve similar contractual language. See, e.g., Am. Sec. Vanlines, Inc. v. Gallagher, 782 F.2d 1056, 1059 (D.C. Cir. 1986); Vill. of Kaktovik v. Watt, 689 F.2d 222, 228-30 (D.C. Cir. 1982); Minard Run, 670 F.3d at 247 n.4; see also Marks v. United States, 24 Cl. Ct. 310, 319 (Cl. Ct. 1991) ("[P]arties to a contract are free to limit remedies in accordance with their desire . . . at the time the contract is executed . . . .").

final decision *not* to promulgate section 7411(d) standards. Granting judicial relief now would not "un-do" EPA's publication of the proposal.

IV. THIS PETITION IS UNTIMELY.

A petition under 42 U.S.C. § 7607(b)(1) "shall be filed within sixty days from the date notice of [a final] 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 it "shall be filed within sixty days after such grounds arise." Id.; see Utah v. EPA, 750 F.3d 1182, 1184 (10th Cir. 2014) ("grounds" means "a sufficient legal basis for granting the relief sought") (internal quotation and citation omitted). These time limits are jurisdictional. E.g., Med. Waste Inst. & Energy Recovery Council v. EPA, 645 F.3d 420, 427 (D.C. Cir. 2011); ODEQ, 740 F.3d at 191.[15]

Assuming that EPA's entry into the Settlement Agreement on March 2, 2011, did not immediately trigger the sixty-day filing period, as EPA did not publish a Federal Register notice at that time, that period began to run no later than April 3, 2012, when EPA published a Federal Register notice stating that it had "finalized" the Agreement. 77 Fed. Reg. at 22,404. On that date, the claims and arguments that Petitioners seek to assert in this case were available to them, because by then EPA: (1) had promulgated a final rule regulating power plants under section 7412,[16] which

[15] But see Clean Water Action Council of Ne. Wis., Inc. v. EPA, 765 F.3d 749, 751 (7th Cir. 2014).

[16] 77 Fed. Reg. 9304.

according to Petitioners "prohibits EPA from requiring States to regulate [the same source category] under Section [74]11(d)," Pet.Br. 30; and (2) had *subsequently* announced in the Federal Register its finalization of the settlement setting deadlines for a section 7411(d) rulemaking for power plants. Thus, the legal dispute Petitioners wish to raise now already had crystallized, at the latest, by April 3, 2012, making the "arising after" exception inapplicable to this petition.

V. THE PENDENCY OF AN ONGOING RULEMAKING PROCESS RENDERS THIS PETITION UNRIPE FOR JUDICIAL REVIEW.

Petitioners claim that this case became "fit for judicial decision" in June 2014 when EPA published the Proposed Rule and accompanying Legal Memorandum. Pet.Br. 55. EPA published those documents, however, for the specific purpose of obtaining public comments to help inform a rulemaking decision it has *not yet made*.

In assessing the ripeness of a case, this Court "focus[es] on two aspects: the 'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" Am. Petroleum Inst. ("API") v. EPA, 683 F.3d 382, 387 (D.C. Cir. 2012) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). "The fitness requirement is primarily meant to protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting." API, 683 F.3d at 387 (internal quotation omitted).

To uphold these interests, the Court determines fitness by evaluating not just

whether an issue is "purely legal," but also "whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." Id. (internal quotation omitted). "[E]ven purely legal issues may be unfit for review," and "a claim is not ripe . . . if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Atlantic States Legal Found. v. EPA, 325 F.3d 281, 284 (D.C. Cir. 2003) (internal quotation omitted). "Courts decline to review tentative agency positions because," among other consequences, "the integrity of the administrative process is threatened by piecemeal review of the substantive underpinnings of a rule, and judicial economy is disserved because judicial review might prove unnecessary if persons seeking such review are able to convince the agency to alter a tentative position." API, 683 F.3d at 387 (quotation omitted).

Reviewing the merits of this case, at this time, would lead the Court into the very pitfalls against which it warned in API. The legal analyses EPA set forth in the Legal Memorandum accompanying its Proposed Rule preamble are quite obviously "tentative," notwithstanding Petitioners' characterization of that document. Pet.Br. 55-56. The preamble made clear that EPA "solicits comment on all aspects of its legal interpretations, *including the discussion in the Legal Memorandum*." 79 Fed. Reg. at 34,853/2 (emphasis added). EPA also sought "public comment on all aspects of this proposal" including technical as well as legal issues. Id. at 34,835/2. The legal positions presented to this Court in Petitioners' brief have also been presented to EPA in the rulemaking; and many other stakeholders – often expressing *different*, and

in some cases diametrically opposed legal interpretations – have presented their comments as well. EPA had not yet had the opportunity, however, to complete its evaluation of these comments and determine what final action to take.

Importantly, the Act *requires* EPA to evaluate and respond to any significant written or oral comments on the proposal when taking final action. 42 U.S.C. § 7607(d)(6)(A)(ii). Indeed, if EPA attempted to treat the Legal Memorandum as a document that conclusively decided the legal issues of concern to Petitioners for purposes of this rulemaking, it would be subject to reversal for failure to respond to comments. See Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 950 (D.C. Cir. 2004). Thus, to say that EPA's legal interpretations are currently "tentative" is not an exercise in self-serving labelling; it is an accurate description of a rulemaking process that the Act *mandates* EPA follow before it decides whether to promulgate standards.

Furthermore, even if Petitioners' showing of "hardship" were sufficient to meet the second element of the ripeness test,[17] it could not overcome the demonstrable unfitness of the case for review at this time. "Although both the fitness and hardship prongs encompass a number of considerations, a dispute is not ripe if it is not fit . . . and . . . it is not fit if it does not involve final agency action." Holistic

[17] As discussed above, Petitioners have not demonstrated an "injury-in-fact" sufficient to establish Article III standing. Supra Argument I.A, B.

Candlers and Consumers Ass'n v. Food & Drug Admin., 664 F.3d 940, 943 n.4 (D.C. Cir. 2012) (internal citations omitted).

Because fitness is so plainly lacking when a claimant seeks judicial review of a legal dispute that may be mooted by the outcome of a pending notice and comment rulemaking process, this Court historically has found such claims unripe. See, e.g., API, 683 F.3d at 386; Atlantic States, 325 F.3d at 284; UARG v. EPA, 320 F.3d 272, 278-79 (D.C. Cir. 2003); Action on Smoking & Health v. Dep't of Labor, 28 F.3d 162, 165 (D.C. Cir. 1994). More recently, when confronted with petitions seeking review of the April 2012 proposed section 7411(b) rule, the Court summarily dismissed the petitions because the "proposed rule [was] not final agency action subject to judicial review." Las Brisas (Order dated Dec. 13, 2012) (Attach. A). EPA then withdrew the proposal, which only confirms that further judicial review at that time would have been a wasteful use of the Court's resources. See 79 Fed. Reg. at 1352.

Petitioners ask the Court to ignore the lessons of Las Brisas and exacerbate the premature intrusion of judicial review into the administrative rulemaking process by hearing this case now, when it would be more prudent to wait until EPA makes a final rulemaking decision. The Court should decline their request, and dismiss the petition.

VI. PETITIONERS' CHALLENGE FAILS ON THE MERITS.

Petitioners argue that, in 1990, Congress impaled EPA on the horns of a dilemma: EPA can regulate a source category's "hazardous" pollutant emissions under section 7412 of the Act, *or* it can regulate other dangerous emissions from the source category under section 7411(d), but not both. If correct, EPA would have to pick one set of health and environmental issues to address, while ignoring another.

Petitioners believe this pick-your-poison approach to regulation is mandated by a "literal reading" of section 7411(d) as set forth in the U.S. Code. Pet.Br. 23. But that convoluted text can be read "literally" multiple ways, leading to opposite conclusions regarding the scope of EPA's authority, and is replete with ambiguous terms. The textual ambiguity is compounded by the fact that two amendments to the relevant text were enacted into law in 1990, at least one of which would unquestionably allow EPA to regulate CO_2 emissions from existing power plants.

To prevail here, Petitioners must show that *no* reading of section 7411(d) other than the one they advance could possibly be reasonable. See Chevron, 467 U.S. at 837. They cannot. Given the many ambiguities in the text, along with supporting legislative history and statutory context, EPA could reasonably conclude that it has the authority to address power plant emissions of CO_2 under section 7411(d) so long as it has not regulated power plants' emissions of CO_2 under section 7412. Thus, if it reaches the merits, the Court's inquiry should end with the conclusion that Petitioners have not cornered the market on the meaning of section 7411(d).

A. The Text of § 7411(d) Does not Mandate Petitioners' Reading.

Section 7411(d) is a grammatical mess. Overburdened with dependent clauses and lacking in punctuation, the relevant *sentence* from the U.S. Code reads as follows:

> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source . . .

42 U.S.C. § 7411(d)(1).

Petitioners argue that this text (reflecting the House Amendment alone) is only capable of a single interpretation and *must* be read as barring regulation of any source category previously regulated under 42 U.S.C. § 7412, even if in regard to *different* pollutants. Because EPA regulated emissions of certain hazardous pollutants from certain coal- and oil-fired power plants in its 2012 MATS Rule,[18] the argument continues, EPA cannot now promulgate a section 7411(d) rule addressing power plant emissions of CO_2 – or any other nonhazardous pollutant from any fossil-fuel fired power plants (including natural gas-fired plants not regulated under MATS). This reading of section 7411(d) would largely eviscerate EPA's authority under that

[18] Most of the State Petitioners are also challenging the legality of MATS, and that case is pending in the Supreme Court. Michigan v. EPA, S. Ct. No. 14-46 (cert. granted Nov. 25, 2014).

provision, as 146 source categories have been regulated in regard to their hazardous emissions under section 7412.

Even if Petitioner's convoluted take on section 7411(d) is *a* possible interpretation of that text, it is hardly the *only* possible interpretation.[19] Rather, the text of 42 U.S.C. § 7411(d) lends itself to multiple "literal" readings and is rife with ambiguous terms. The existence of two different amendments to section 7411(d) in the Statutes at Large further complicates the task of interpreting that provision. Thus,

[19] Petitioners and amici claim that the Supreme Court has read the text as they do. Pet.Br. 23; Br. of Amici Trade Ass'ns et al. ("Trade Amici") at 8, 13. It has not. In a footnote in Am. Elec. Power Co. ("AEP") v. Connecticut, the Court stated: "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program," essentially paraphrasing section 7411(d) as set forth in the U.S. Code. 131 S. Ct. 2527, 2537 n.7 (2011). But Petitioners' argument here was not raised or briefed in AEP. The actual holding in AEP – issued *after* EPA had already proposed the MATS Rule – was that section 7411 "speaks directly to emissions of [CO_2] from the defendants' plants," and therefore preempts state law nuisance claims. Id. at 2537. That holding undercuts Petitioners' position. Indeed, at oral argument in AEP – a month *after* the MATS proposal – counsel for industry petitioners (now counsel for Trade Amici) assured the Court that EPA could regulate greenhouse gas emissions under section 7411(d). Transcript, 2011 WL 1480855, at *16-17 ("We believe that the EPA can consider, as it's undertaking to do, regulating existing . . . sources under section 111 of the Clean Air Act, and that's the process that's engaged in now. . . . Obviously, at the close of that process there could be APA challenges on a variety of grounds, but we do believe that they have the authority to consider standards under section 111."). Likewise, industry petitioners averred in their brief that "EPA may . . . require States to submit plans to control" greenhouse gases under 42 U.S.C. § 7411(d). Brief for Pet's, No. 10-174, 2011 WL 334707, at *6-7. All of this demonstrates that Petitioners' reliance on the AEP footnote is misplaced.

42 U.S.C. § 7411(d) can be interpreted a number of ways, and Petitioner's way is the *least* consistent with legislative history and statutory context.

1. There are multiple "literal" readings of 42 U.S.C. § 7411(d).

In addition to Petitioners' proposed reading of section 7411(d), which emphasizes certain portions of the text in order to reach a certain conclusion, there are at least two other "literal"[20] readings of that text that would compel an opposite conclusion. The existence of multiple contradictory ways to read the same text shows that the text is neither plain nor unambiguous.

First, because Congress used the conjunction "or" rather than "and," the string of qualifying clauses set forth in subsection (d)(1)(A)(i) could be read as alternatives, rather than requirements to be imposed simultaneously. Numbering these clauses and highlighting the conjunctive term "or," the provision reads:

> The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source for any air pollutant **[1]** for which air quality criteria have not been issued **or [2]** which is not included on a list published under section 7408(a) of this title **or [3]** emitted from a source category which is regulated under section 7412 of this title . . . .

[20] Petitioners conflate "literal" with "unambiguous." But "literal" means "involving the ordinary or usual meaning of a word," or "giving the meaning of each individual word," while "unambiguous" means "clearly expressed or understood." Merriam-Webster Dictionary, available at http://www.merriam-webster.com/. A text can be read so as to give ordinary meaning to each word, but that does not mean it is clear.

42 U.S.C. § 7411(d)(1). Giving the term "or" its ordinary meaning,[21] section 7411(d) literally provides that the Administrator may require states to establish standards for an air pollutant so long as *either* air quality criteria have not been established for that pollutant, *or* one of the other remaining criteria is met. See Reiter v. Sonotone Corp., 442 U.S. 330, 338 (1979) (rejecting a "construction [that] would have us ignore the disjunctive 'or'"). No air quality criteria have been issued for CO_2, and CO_2 is not listed under Section 7408(a). Thus, under this "literal" reading, section 7411(d)(1) poses no bar to regulation of CO_2 emissions.[22]

Petitioners argue that "'when an exclusion clause contains multiple disjunctive subsections, the exclusion applies if any one of the multiple conditions is met." Pet.Br. 37-38 (internal quotation omitted). As discussed below, it is debatable whether the relevant text should be considered an "exclusion clause." And unlike Petitioners' example of a landlord seeking a tenant "who is not a smoker or a pet

[21] Merriam Webster defines "or" as "a function word [used] to indicate an alternative <coffee *or* tea> <sink *or* swim>". At http://www.merriam-webster.com/dictionary/or.

[22] Trade Amici criticize this as a "new position" concocted by "litigation counsel," and argue that EPA must be tied to the "reasoning supplied by the [agency] itself in its rulemaking." Trade Amici at 12-13. But the rulemaking is ongoing; there is no final "agency reasoning" until EPA issues a final rule supplying such. Trade Amici are simply wrong to suggest that EPA may not revisit its interpretation of section 7411(d) in the context of an *ongoing* rulemaking.

owner or married" (id. at 38),[23] the text at issue is not one clause with three direct objects, but rather a string of three clauses, each with its own internal grammatical structure. The disjunctive "or" plays a different role in that context.

Next, although Petitioners want to read 42 U.S.C. 7411(d) "literally," they ignore that the third clause differs from the first two in that it does not contain a negative. Rather, Petitioners presume that the negative from the second clause was intended to carry over, and would implicitly rewrite the statute as follows:

> [EPA must require states to submit plans establishing standards for] for any existing source for any air pollutant (i) for which air quality criteria *have not* been issued or *which is not* included on a list published under section 7408(a) of this title or [*which is not*] emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source . . . . . .

42 U.S.C. § 7411(d)(1) (emphasis added). Without the addition of the bracketed language, the text can be read to say that, once EPA has regulated a source category under section 7411(b), it must require states to establish standards for that source category under section 7411(d) if that source category *is* regulated under section 7412 – the exact opposite of what Petitioners argue. See 42 U.S.C. § 7411(d)(1) (EPA must

[23] In fact, Petitioners' example would be more correctly written as: The landlord advertised for a tenant who is not a smoker, a pet owner, or married. See Strunk & White, The Elements of Style, p.3 (The Penguin Press, 2003).

require state standards for "any air pollutant . . . emitted from a source category which is regulated under section 7412").[24]

All of these "literal" readings (including Petitioners') must be considered in light of the structure, history, and purpose of the Act, as well as common sense, and EPA may conclude that none of them are reasonable in light thereof. The point here is simply that there is more than one way to read the convoluted – and ambiguous – text of section 7411(d), and EPA must have the opportunity to consider all of them.

2. 42 U.S.C. § 7411(d) is replete with ambiguous terminology.

In addition to being subject to multiple literal readings, section 7411(d) contains ambiguous terminology, which EPA must have the opportunity to interpret.

For example, the clause "emitted from a source category which is regulated under section 7412" modifies the phrase "any air pollutant." 42 U.S.C. § 7411(d). As the Supreme Court recently noted, the phrase "any air pollutant" is routinely given a "context-appropriate meaning." Util. Air Regulatory Group v. EPA ("UARG"), 134 S. Ct. 2427, 2439 (2014). Here, context suggests that the phrase "any air pollutant" "emitted from a source category which is regulated under section 7412" should be

[24] Petitioners argue that this reading would render third clause superfluous. Pet.Br. 37. But that clause would then reinforce that EPA must comprehensively address all harmful pollutants a regulated source category emits, regulating hazardous pollutants under section 7412 and other dangerous pollutants under section 7411. This would be consistent with 42 U.S.C. § 7412 (c)(1), which instructs EPA to list source categories consistently as between sections 7411 and 7412.

understood as referring only to any *hazardous* air pollutants, since hazardous pollutants are what the section 7412 program addresses.

Furthermore, the phrase "which is regulated under section 7412" could be reasonably interpreted as modifying both the immediately-preceding term "source category" *and* the further antecedent term "air pollutant." "As enemies of the dangling participle well know, the English language does not always force a writer to specify [to what] . . . a modifying phrase relates." Young v. Cmty. Nutrition Inst., 476 U.S. 974, 980-81 (1986) (concluding that FDA's interpretation of a complex provision therefore gets Chevron deference). So interpreted, regulation under section 7411(d) would be barred only where the subject source category is already regulated under section 7412 *for the same pollutant EPA seeks to regulate under section 7411(d).*

Moreover, as pointed out by commenters,[25] the ambiguous term "regulated" can, on its own, be reasonably interpreted as hazardous-pollutant specific. As the Supreme Court has explained, when interpreting that term, an agency must consider *what* is being regulated. See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 366 (2002) (It is necessary to "pars[e] . . . the 'what'" of the term "regulates."); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 363 (1999) (the term "'regulates insurance' . . . requires interpretation, for [its] meaning is not plain.") Here, the

[25] See, e.g., Environmental Defense Fund's Comments at 88 (JA 504) ("A source category is 'regulated' under section 112 not in the abstract, but with respect to particular pollutants.").

"what" being "regulated under section 7412" is a source category's emission of one or more specific hazardous pollutants. Thus, EPA could reasonably conclude that it is only precluded from regulating sources in regard to a particular pollutant under section 7411(d) if those sources are already "regulated under section 7412" *with respect to that same (hazardous) pollutant*. This is again precisely the sort of "reasonable, context-appropriate meaning" that the Supreme Court has directed EPA to give such ambiguous statutory terms. UARG, 134 S. Ct. at 2440.

3. The Senate Amendment compounds the ambiguity.

Contrary to Petitioners' argument, it is also appropriate to consider that two competing amendments to section 7411(d) were enacted into law in 1990 in the same public law. Unlike the ambiguous House text, the Senate's amendment is straightforward. If implemented alone, it authorizes regulation:

> for any existing source for any air pollutant for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) or section 7412(b) . . .

See Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). This text would undisputedly allow regulation of a source category under section 7411(d) so long as *the same pollutant* is not regulated under section 7412. The Senate's clear intent in this regard must be considered when interpreting section 7411(d).

Petitioners' primary argument for ignoring the Senate amendment is that it was placed under the heading "Conforming Amendments." Pet.Br. 41-44. But the Supreme Court has cautioned that parties should not "place[] more weight on the

'Conforming Amendments' caption than it can bear," as that heading does not mean that the provision is not "substantive." Burgess v. United States, 553 U.S. 124, 135 (2008). This Court has acted accordingly.[26] Washington Hosp. Ctr. v. Bowen, 795 F.2d 139, 149 (D.C. Cir. 1986) (giving full effect to a "conforming" amendment, intended to conform one part of the statute to significant structural changes in another part, because "Congress has directly expressed its intentions").

Moreover, Petitioners' premise that the House amendment is "substantive" while the Senate amendment is "conforming" is a fallacy. As noted in Burgess, "conforming" amendments may be "substantive" in nature. 553 U.S. at 135. And based on the Petitioners' own definition of "conforming amendments" as "amendments . . . necessitated by the substantive amendments of provisions of the bill," see Pet.Br. 42 (citing Senate Legislative Drafting Manual § 126(b)(2)), the House amendment also qualifies as "conforming." Section 7411(d) was amended because it cross-referenced a soon-to-be nonexistent provision of section 7412, and the text replaced by both houses was that cross-reference alone. Thus, like the Senate

[26] Petitioners cite Am. Petroleum Inst. v. SEC, 714 F.3d 1329, 1336 (D.C. Cir. 2013), as suggesting otherwise. Pet.Br. 44. It does not. In that case, the Court rejected the assertion that Congress' failure to update a statutory cross-reference when enacting the 2010 Dodd-Frank Wall Street Reform Act suggested that Congress might have also forgotten to add a cross-reference into another provision. 714 F.d at 1336-37. Thus, the Court did not ignore a conforming amendment; rather, it refused to act based on a non-existent conforming amendment. Further, it reminded the petitioners of the "basic interpretive canon that a statute should be construed so that effect is given to all its provisions." Id. at 1334 (internal quotation omitted).

amendment, the House amendment was also "necessitated by the substantive amendments of provisions of the bill." Id. Moreover, the heading under which the House amendment was enacted – "Miscellaneous Guidance" – no more indicates substantive import than the Senate's "Conforming Amendments" heading.

Petitioners also assert that the Senate amendment was a mere "clerical error." Pet.Br. 41. The legislative history indicates otherwise. First, a Senate bill introduced in mid-1989 contained the same text to replace the obsolete cross-reference as the House bill. S. 1490 § 108 (July 27, 1989). But that text was removed in late 1989, and the new bill provided that "112(b)(1)(A)" should be changed to "112(b)." S.1630, as reported (Dec. 20, 1989). Later in the process, the House deleted the Senate amendment, but it was added back into the final bill in conference. Compare S. 1630, 101st Cong. (passed by the House on May 23, 1990) with Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). This history strongly indicates that the Senate consciously chose not to adopt the House's language.

Petitioner's suggestion that the Court should give weight to the fact that the House's Office of Law Revision Counsel did not execute the Senate amendment when publishing the U.S. Code (Pet.Br. 46) is also misguided. That office does not make law. On its website, the Office describes its job as simply to "prepare[] and publish[] the United States Code."[27] It has no authority to decide between competing

[27] At http://uscode.house.gov/about/info.shtml.

amendments to a provision that may have significantly different implications for the meaning of the text, and its mechanical decisions not to execute one amendment where it is functionally impossible to incorporate both into the U.S. Code are entitled to "no weight." United States v. Weldon, 377 U.S. 95, 98 n.4 (1964).[28]

Rather, if dueling amendments to a bill may have meaningfully different results, they should be interpreted – first by the agency to which administration of the statute has been delegated, subject to judicial review – to reconcile them if possible. See Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844, 872 (D.C. 1979) (where Congress "drew upon two bills originating in different Houses and containing provisions that, when combined, were inconsistent in respects never reconciled in conference . . . it was the greater wisdom for [EPA] to devise a middle course."); see also Scialabba v. Cuellar de Osorio. 134 S. Ct. 2191, 2203 (2014) (where "internal

[28] Petitioners claim to have identified twelve instances where the Office addressed competing amendments to the same bill. Pet.Br. 43 & n.10. In eleven of those examples, the amendments were either duplicative (e.g., Revisor's Note, 11 U.S.C. § 101 (amendment substituting a period for a semicolon could not be executed because another amendment had already done so)); very different in scope (e.g., Revisor's Note, 26 U.S.C. § 1201 (one amendment replaced a cross-reference but the other deleted the subparagraph)); or there was an obvious error (e.g., Revisor's Note, 21 U.S.C. § 355 (language amended did not exist)). The remaining instance is distinguishable because while two amendments deleted the same text, only one of those amendments replaced the deleted text, so there was no conflict. See Revisor's Note, 42 U.S.C. § 9874. Indeed, instances in which competing amendments have meaningfully different implications that require reconciliation will necessarily be rare, and courts can address the question of how to interpret the statute in such rare instances without creating "disruptive result[s]." Pet.Br. 48.

tension" in provision "makes possible alternative reasonable constructions, . . . Chevron dictates that a court defer to the agency's . . . expert judgment about which interpretation fits best with, and makes the most sense of, the statutory scheme.") (Kagan, J, plurality); id. at 2228 ("before concluding that Congress has legislated in conflicting and unintelligible terms," "traditional tools of statutory construction" should be used to "allow [the provision] to function as a coherent whole") (Sotomayor, J. dissenting).

Petitioners argue that, if the Senate amendment is given effect, the two amendments should be interpreted "additively," so as to exclude from regulation under section 7411(d) all source categories previously regulated under section 7412 (per Petitioners' reading of the House amendment), *and* all hazardous pollutants (per the Senate amendment). See Pet.Br. 48-50. This even more restrictive interpretation of section 7411(d) is no reasonable "middle course" (Spencer Cnty., 600 F.2d at 872), and it does not "fit[] best with, and make[] the most sense of, the statutory scheme" (Scialabba, 134 S. Ct. at 2203), as it would leave a huge gap in the Act's coverage of harmful pollutants. Furthermore, it belies Petitioners' assertion that section 7411(d) can only be read one way.

Here, EPA is still in the middle of the rulemaking process; it has not yet determined how best to reconcile the House and Senate amendments and otherwise interpret the ambiguous language in section 7411(d). But it is at least plausible that EPA could reach a reasonable final conclusion that the statute allows it to regulate

CO_2 emissions from power plants, whether because the House amendment should be interpreted as having the same effect as the Senate amendment, or because the two amendments can be reconciled, or for some other reason. Separation of powers principles require that EPA be given that chance.

B. The Legislative History Does Not Support Petitioners' Reading.

As discussed above,[29] in 1970 Congress provided comprehensive coverage of three groups of harmful pollutants (criteria, hazardous, and other) under three different programs (the NAAQS program, the section 7412 program, and the section 7411(d) program). There is not a scintilla of evidence in the legislative history supporting Petitioners' proposition that, in 1990, Congress intended to strip EPA of most of its authority to regulate under the third of those programs. To the contrary, Congress consistently expressed its desire to expand EPA's authority under the Act.

1. Congress sought to broaden EPA's authority in 1990, not narrow it.

The legislative history of the 1990 Amendments is replete with language indicating that Congress sought to expand EPA's regulatory authority, compelling the Agency to regulate more pollutants, under more programs, more quickly

Expediting the regulation of hazardous pollutants under section 7412 was a key focus. See S. Rep. No. 101-228 at 133 ("There is now a broad consensus that the program to regulate hazardous air pollutants . . . should be restructured to provide

[29] *Supra* p. 3.

EPA with authority to regulate industrial and area sources of air pollution . . . in the near term"), reprinted in 5 A Legislative History of the Clean Air Act Amendments of 1990 ("Legis. Hist.") 8338, 8473 (Comm. Print 1993). But Congress also enhanced EPA's authority under other programs, such as the NAAQS, Title V, and mobile source programs, and established new programs, such as the stratospheric ozone, chemical accident prevention, and acid rain programs. See H.R. Rep. No. 101-952 at 335, reprinted in 5 Legis. Hist. at 1785 (summarizing bill as "includ[ing] provisions addressing attainment and maintenance of ambient air quality standards, mobile sources of air pollution, toxic air pollution, acid rain, permits, enforcement, stratospheric ozone protection, miscellaneous provisions, and clean air research.").[30]

In contrast, the standards of performance program was *not* a focal point of the 1990 Amendments. There is no mention of it in the Conference Committee's summary of the bill. See id. And Petitioners have not identified a single statement in the legislative history showing Congressional intent to change – let alone dramatically reduce – the scope of section 7411(d). Petitioners would have the Court conclude that Congress made a major change to the existing source performance standards program *sub silentio*. But Congressional silence merits an opposite conclusion. See United States v. Neville, 82 F.3d 1101, 1105 (D.C. Cir. 1996).

[30] See also S. Rep. No. 101-228 at 14 & 123, reprinted in 5 Legis. Hist. at 8354, 8463; H.R. Rep. No. 101-952 at 336, 340, 345 & 347, reprinted in 5 Legis. Hist. at 1786, 1790, 1795, & 1997.

2. The legislative history is far more consistent with an intent to preserve the scope of section 7411(d) – or to broaden it.

Given Congress' pervasive expression of its desire to have EPA address the emission of *more* pollutants, through *more* programs, than ever before, coupled with the absence of any evidence of an intent to reduce the scope of section 7411(d), the legislative history of the 1990 Amendments strongly suggests that both houses simply sought to edit section 7411(d) to reflect the structural changes made to section 7412; i.e., EPA's new mandate to list and regulate *source categories* of hazardous pollutants Congress itself had identified. See S. Rep. No. 101-228 at 133 (under restructured hazardous pollutant program, EPA should regulate "source categories of air pollutants (rather than the pollutants)"), reprinted at 5 Legis. Hist. at 8473.

Viewed in this context, the House's insertion of the phrase "or emitted from a source category which is regulated under section 7412" in lieu of a bare cross-reference to new section 7412 makes sense -- not because the House was trying to bar regulation of entire source categories in regard to all pollutants under section 7411(d), but because it was trying to reflect the fact that regulation under section 7412 would no longer proceed on a pollutant-by-pollutant basis, but instead on a source category-by-source category basis. Indeed, analyzing the 1990 Amendments shortly after enactment, the Congressional Research Service characterized the House and Senate's dueling edits to section 7411(d) as "duplicative" amendments that simply "change the reference to section 112" using "different language." 1 Legis. Hist. at 46 n.1.

Moreover, even if the Senate Amendment were considered subsidiary to the House Amendment as Petitioners argue, it is nonetheless "the most telling evidence of congressional intent." CBS, Inc. v. FCC, 453 U.S. 367, 381 (1981) (discussing import of contemporaneous conforming amendment). It is affirmative evidence supporting the conclusion that the 101st Congress, as a whole, did not intend to dramatically reduce the scope of section 7411(d). Petitioners, in contrast, have no such affirmative evidence supporting their contrary view of Congress' intent.

3. Congress was not seeking to avoid "double regulation," and none results from regulating different pollutants under different programs.

Lacking historical evidence of – let alone explanation for – Congress' supposed desire to scale back section 7411(d), Petitioners theorize that Congress sought to avoid "double regulation." Pet.Br. 33. But no "double regulation" results from authorizing EPA to address *hazardous pollutants* emitted from a source under section 7412, and *non-hazardous pollutants* emitted from the source under section 7411(d).

Nor is there any evidence that Congress was preoccupied with eliminating any "double regulation" of source categories regulated under section 7412. To the contrary, Congress authorized states to require sources already regulated under section 7412 or other national standards to impose additional, *more stringent* state controls. 42 U.S.C. § 7416. Congress also expressly addressed the potential burdens on power plants from being subject to regulation under section 7412 *and* under other programs by prescribing a higher standard for regulation under section 7412. See 42 U.S.C. §

7412(n)(1)(A) (EPA must conclude that regulation of power plants is "appropriate and necessary" after studying the hazards remaining *despite* the imposition of other programs). See also 42 U.S.C. § 7412(d)(7) ("[n]o emission standard or other requirement promulgated under [section 7412] shall be interpreted . . . to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title"). Thus, Congress knew and intended that power plants might be subject to multiple regulatory programs.

Instead of avoiding "double regulation,"[31] Petitioners' interpretation of section 7411(d) would open a yawning gap up in the Act's regulatory regime, leaving pollutants that are undisputedly dangerous, but not "hazardous" as defined in section 7412, outside of EPA's reach. That result is entirely inconsistent with the legislative history and goals of both the Act and the 1990 Amendments.

C. The Statutory Context Does Not Support Petitioners' Theory.

As the Supreme Court recently reminded EPA, a "reasonable statutory interpretation must account for both the specific context in which . . . language is used, and the broader context of the statute as a whole." UARG, 134 S. Ct. at 2442 (quotation omitted). Petitioners' reading of section 7411(d) accounts for neither.

[31] Even under Petitioners' reading, double regulation is permissible under sections 7411(d) and 7412 so long as EPA regulates under section 7411(d) first.

First, Petitioners' interpretation is inconsistent with 42 U.S.C. § 7412(d)(7), which provides that "no emission standard or other requirement promulgated under this section shall be interpreted . . . to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 . . . ." This language reflects a clear intent that the section 7411 and 7412 programs are to operate additively, so as to address the full spectrum of dangerous emissions from a source. Under Petitioner's reading, section 7412 standards for hazardous pollutants would, in fact, effectively "diminish" (by eliminating) regulation of non-hazardous emissions from the subject source category under 7411(d). That result cannot be squared with the text of section 7412(d)(7).

Furthermore, Petitioners' interpretation of section 7411(d) is inconsistent with the broader scheme of the Act. As discussed above, supra p. 3, section 7411(d) was designed to work in tandem with the NAAQS and hazardous pollutant programs such that, together, the three programs comprehensively cover the full range of dangerous emissions from stationary sources. But under Petitioner's reading, there would be a gaping hole in that coverage, which would leave sources' emissions of certain dangerous pollutants outside the Act's scope. Such a result is entirely inconsistent with the comprehensive scheme designed by Congress in 1970 as well as the Act's purpose: to protect "public health and welfare." 42 U.S.C. § 7401(b)(1).

D. EPA Has Never Adopted Petitioner's Interpretation of § 7411(d).

Petitioners argue that EPA has previously read section 7411(d) as they do, and is doing an "about face." Pet.Br. 36. As proof, Petitioners point to statements made by EPA in the context of a 2005 Rule ("the Mercury Rule"), Pet.Br. 8-9, that was vacated by this Court in New Jersey v. EPA, 517 F.3d 574 (2008).[32] But Petitioners are attempting to spin hay into gold, ignoring context and mischaracterizing EPA's statements while omitting mention of their own inconsistent position in that litigation.

To be clear, EPA has never reached the conclusion that Petitioners advance here: that 7411(d) should be read as barring regulation of *all* pollutants under that subsection where a source category has previously been regulated in regard to *hazardous* pollutants under section 7412. Rather, EPA's conclusion regarding how to interpret section 7411(d) in the Mercury Rule was the same as the interpretation EPA proposed in the Legal Memorandum accompanying the Proposed Rule at issue here: i.e., that section 7411(d) only bars regulation in regard to a source category's emissions

[32] Petitioners incorrectly characterize New Jersey as vacating the section 7411(d) portion of the Mercury Rule "because it violated the Section 112 Exclusion." Pet.Br. 37. The Court only stated that, having concluded that EPA improperly de-listed power plants under section 7412, "under EPA's own interpretation" EPA could not regulate under 7411. 517 F.3d at 583. As explained above, EPA's conclusion in the Mercury Rule was only that it could not regulate a source category's *hazardous pollutant emissions* under both sections, and only hazardous air pollutants were at issue in New Jersey. See id. at 137 ("Before the court are petitions for review of two final rules . . . regarding the emission of hazardous air pollutants.")

of *hazardous pollutants* regulated under section 7412. *Compare* 70 Fed. Reg. 15,994, 16,029-32 (Mar. 29, 2005), *with* Mem. at 21-27 (JA 136-139, *with* JA 392-398).

Critically, the question raised in the Mercury Rule, and addressed in briefing in New Jersey v. EPA, was a different one: whether section 7411(d) bars regulation of emissions of a pollutant only *listed* as hazardous under section 7412, as opposed to actually *regulated* under that section. EPA concluded that Congress intended the latter. 70 Fed. Reg. at 16,032. On the path to reaching that conclusion, EPA "note[d]" that "*a* literal reading"[33] of the House Amendment "is that a standard of performance under section 111(d) cannot be established for any air pollutant – [hazardous] and non-[hazardous] – emitted from a source category regulated under section 112." 70 Fed. Reg. at 16,031 (emphasis added). But it concluded that such an interpretation of section 7411(d) was not the best interpretation, not only because of the Senate amendment, but also because:

> Such a reading would be inconsistent with the general thrust of the 1990 amendments which, on balance, reflects Congress' desire to require EPA to regulate more substances, not to eliminate EPA's ability to regulate large categories of pollutants like non-[hazardous pollutants]. . . . We do not believe that Congress sought to eliminate regulation for a large category of sources in the 1990 Amendments and our proposed interpretation of the two amendments to section 111(d) avoids this result.

70 Fed. Reg. at 16,032.

[33] "Literal" does not mean unambiguous, supra n.20, and thus EPA's use of "literal" does not mean that EPA believed that this was the only possible way to read the House amendment. To the contrary, EPA stated that it was "interpret[ing]" that amendment. 70 Fed. Reg. at 16,031.

EPA may or may not reaffirm the conclusion it reached in the context of the Mercury Rule, and even if it does, EPA may refine its thinking about how the House and Senate amendments should be interpreted. Contrary to Petitioners' suggestion, there is nothing inappropriate about that. Indeed, that is exactly what an agency is supposed to do through the rulemaking process.

While condemning EPA for revisiting its prior analysis of the House and Senate amendments, Petitioners fail to mention that, in their own brief in the Mercury Rule litigation, they *agreed* with EPA that section 7411(d) is ambiguous and that EPA can reasonably read it as barring regulation only in regard to hazardous pollutants actually regulated under section 7412. Joint Brief of State Respondent-Intervenors, New Jersey v. EPA, No. 05-1097, 2007 WL 3231261, at *25 (D.C. Cir. Aug. 3, 2007) (JA 230) ("EPA developed a reasoned way to reconcile the conflicting language and the Court should defer to EPA's interpretation.").[34] That position is obviously inconsistent with Petitioners' argument here.

Petitioners – like EPA – may reasonably reconsider an issue when it is presented in a different context. But the fact that some of them previously adopted an opposite interpretation of the relevant text undermines their claim that the *only possible reading* of section 7411(d) is the one they currently advance, and therefore EPA

[34] The parties that filed this brief included Petitioners Alabama, Nebraska, West Virginia, and Wyoming.

should be prohibited from considering alternatives. Rather, EPA must be left to "develop a reasonable interpretation [of the statutory] provisions" (Whitman, 531 U.S. at 486) in regard to the question posed here: whether regulation of a source category's hazardous pollutant emission under section 7412 bars regulation of that source category's non-hazardous emissions under section 7411(d). Only then can EPA's interpretation be fairly subjected to judicial scrutiny, in accordance with the principles set forth in Chevron, to determine whether that interpretation is reasonable.

Conclusion

The Court should dismiss or deny the Petition for Review.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

March 4, 2015

Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, as counted by the word count feature of Microsoft Office Word, it contains 13,950 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1); and

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) because it was prepared using Microsoft Office Word 2013 in a proportionally spaced typeface, Garamond, in 14 pt. font.

/s/ Amanda Shafer Berman
Amanda Shafer Berman
Counsel for Respondent EPA

Dated: March 4, 2015

Certificate of Service

I certify that the Brief of Respondent EPA was electronically filed today with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, and that, pursuant to Circuit Rule 31(b), five paper copies of the brief were delivered to the Court by hand.

I further certify that a copy of the foregoing Brief of Respondent EPA was today served electronically through the court's CM/ECF system on all registered counsel for Petitioners, Intervenors and Amici.

/s/ Amanda Shafer Berman
Counsel for Respondent

Dated: March 4, 2015

Attachment A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1248 **September Term, 2012**

EPA-77FR22392

Filed On: December 13, 2012

Las Brisas Energy Center, LLC,

Petitioner

v.

Environmental Protection Agency and Lisa Perez Jackson,

Respondents

Conservation Law Foundation, et al.,
Intervenors

Consolidated with 12-1251, 12-1252, 12-1253, 12-1254, 12-1257

BEFORE: Rogers, Garland, and Brown, Circuit Judges

O R D E R

Upon consideration of the motions to dismiss, the oppositions thereto, and the replies; and the motion for declaratory relief, the oppositions thereto, and the replies, it is

ORDERED that the motions to dismiss be granted. The challenged proposed rule is not final agency action subject to judicial review. See 42 U.S.C. § 7607(b)(1); Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (holding that final agency action "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow") (internal quotations omitted). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1248 **September Term, 2012**

FURTHER ORDERED that the motion for declaratory relief be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1146

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

STATE OF WEST VIRGINIA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review

RESPONDENT'S STATUTORY ADDENDUM

JOHN C. CRUDEN
Assistant Attorney General

s/ Amanda Shafer Berman
AMANDA SHAFER BERMAN
BRIAN H. LYNK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1950 (phone)
E mail: amanda.berman@usdoj.gov

Of Counsel:

Elliott Zenick
Scott Jordan
United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

March 4, 2015

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Public Law 101-549
101st Congress

An Act

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

Nov. 15, 1990
[S. 1630]

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

Air pollution control.

TITLE I—PROVISIONS FOR ATTAINMENT AND MAINTENANCE OF NATIONAL AMBIENT AIR QUALITY STANDARDS

SEC. 101. GENERAL PLANNING REQUIREMENTS.

Inter-governmental relations.

(a) AREA DESIGNATIONS.—Section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)) is amended to read as follows:

"(d) DESIGNATIONS.—

"(1) DESIGNATIONS GENERALLY.—

"(A) SUBMISSION BY GOVERNORS OF INITIAL DESIGNATIONS FOLLOWING PROMULGATION OF NEW OR REVISED STANDARDS.—By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 109, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

"(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

"(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

"(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not

49-139 O - 90 - 1 (549)

exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

"(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and all applicable regulations.

"(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

"(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

"(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 105.".

SEC. 108. MISCELLANEOUS GUIDANCE.

(a) TRANSPORTATION PLANNING GUIDANCE.—Section 108(e) of the Clean Air Act is amended by deleting the first sentence and inserting in lieu thereof the following: "The Administrator shall, after consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, and with State and local officials, within nine months after enactment of the Clean Air Act Amendments of 1989 and periodically thereafter as necessary to maintain a continuous transportation-air quality planning process, update the June 1978 Transportation-Air Quality Planning Guidelines and publish guidance on the development and implementation of transportation and other measures necessary to demonstrate and maintain attainment of national ambient air quality standards.". 42 USC 7408.

(b) TRANSPORTATION CONTROL MEASURES.—Section 108(f)(1) of the Clean Air Act is amended by deleting all after "(f)" through the end of subparagraph (A) and inserting in lieu thereof the following:

"(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transportation agencies not later than one year after enactment of the Clean Air Act Amendments of 1990, and from time to time thereafter— Public information.

"(A) information prepared, as appropriate, in consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, regarding the formulation and emission reduction potential of transportation control measures related to criteria pollutants and their precursors, including, but not limited to—

"(i) programs for improved public transit;

"(ii) restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high occupancy vehicles;

"(iii) employer-based transportation management plans, including incentives;

"(iv) trip-reduction ordinances;

"(v) traffic flow improvement programs that achieve emission reductions;

need for revision, or implementation of any plan or plan revision required under this Act.".

(e) NEW SOURCE STANDARDS OF PERFORMANCE.—(1) Section 111(b)(1)(B) of the Clean Air Act (42 U.S.C. 7411(b)(1)(B)) is amended as follows:

(A) Strike "120 days" and insert "one year".

(B) Strike "90 days" and insert "one year".

(C) Strike "four years" and insert "8 years".

(D) Immediately before the sentence beginning "Standards of performance or revisions thereof" insert "Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard.".

(E) Add the following at the end: "When implementation and enforcement of any requirement of this Act indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.".

(2) Section 111(f)(1) of the Clean Air Act (42 U.S.C. 7411(f)(1)) is amended to read as follows:

"(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) before the date of the enactment of the Clean Air Act Amendments of 1990 and for which regulations had not been proposed by the Administrator by such date, the Administrator shall— Regulations.

"(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after the date of the enactment of the Clean Air Act Amendments of 1990;

"(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after the date of the enactment of the Clean Air Act Amendments of 1990; and

"(C) propose regulations for the remaining categories of sources within 6 years after the date of the enactment of the Clean Air Act Amendments of 1990.".

(f) SAVINGS CLAUSE.—Section 111(a)(3) of the Clean Air Act (42 U.S.C. 7411(f)(1)) is amended by adding at the end: "Nothing in title II of this Act relating to nonroad engines shall be construed to apply to stationary internal combustion engines.".

(g) REGULATION OF EXISTING SOURCES.—Section 111(d)(1)(A)(i) of the Clean Air Act (42 U.S.C. 7411(d)(1)(A)(i)) is amended by striking "or 112(b)(1)(A)" and inserting "or emitted from a source category which is regulated under section 112".

(h) CONSULTATION.—The penultimate sentence of section 121 of the Clean Air Act (42 U.S.C. 7421) is amended to read as follows: "The Administrator shall update as necessary the original regulations required and promulgated under this section (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) to ensure adequate consultation.". Regulations.

(i) DELEGATION.—The second sentence of section 301(a)(1) of the Clean Air Act (42 U.S.C. 7601(a)(1)) is amended by inserting "subject to section 307(d)" immediately following "regulations".

Public Law 101-549
101st Congress

An Act

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

Nov. 15, 1990
[S. 1630]

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

Air pollution control.

TITLE I—PROVISIONS FOR ATTAINMENT AND MAINTENANCE OF NATIONAL AMBIENT AIR QUALITY STANDARDS

SEC. 101. GENERAL PLANNING REQUIREMENTS.

Inter-governmental relations.

(a) AREA DESIGNATIONS.—Section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)) is amended to read as follows:

"(d) DESIGNATIONS.—

"(1) DESIGNATIONS GENERALLY.—

"(A) SUBMISSION BY GOVERNORS OF INITIAL DESIGNATIONS FOLLOWING PROMULGATION OF NEW OR REVISED STANDARDS.—By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 109, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

"(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

"(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

"(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not

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and sources subject to the provisions of this section and shall include aggregate information from the database in each annual report. The report shall include, but not be limited to—

"(1) a status report on standard-setting under subsections (d) and (f);

"(2) information with respect to compliance with such standards including the costs of compliance experienced by sources in various categories and subcategories;

"(3) development and implementation of the national urban air toxics program; and

"(4) recommendations of the Chemical Safety and Hazard Investigation Board with respect to the prevention and mitigation of accidental releases.".

SEC. 302. CONFORMING AMENDMENTS.

42 USC 7411.

(a) Section 111(d)(1) of the Clean Air Act is amended by striking "112(b)(1)(A)" and inserting in lieu thereof "112(b)".

(b) Section 111 of the Clean Air Act is amended by striking paragraphs (g)(5) and (g)(6) and redesignating the succeeding paragraphs accordingly. Such section is further amended by striking "or section 112" in paragraph (g)(5) as redesignated in the preceding sentence.

42 USC 7414.

(c) Section 114(a) of the Clean Air Act is amended by striking "or" after "section 111," and by inserting ", or any regulation of solid waste combustion under section 129," after "section 112".

42 USC 7418.

(d) Section 118(b) of the Clean Air Act is amended by striking "112(c)" and inserting in lieu thereof "112(i)(4)".

42 USC 7602.

(e) Section 302(k) of the Clean Air Act is amended by adding before the period at the end thereof ", and any design, equipment, work practice or operational standard promulgated under this Act.".

42 USC 7604.

(f) Section 304(b) of the Clean Air Act is amended by striking "112(c)(1)(B)" and inserting in lieu thereof "112(i)(3)(A) or (f)(4)".

42 USC 7607.

(g) Section 307(b)(1) is amended by striking "112(c)" and inserting in lieu thereof "112".

(h) Section 307(d)(1) is amended by inserting—

"(D) the promulgation of any requirement for solid waste combustion under section 129,"

after subparagraph (C) and redesignating the succeeding subparagraphs accordingly.

42 USC 7412 note.

SEC. 303. RISK ASSESSMENT AND MANAGEMENT COMMISSION.

(a) ESTABLISHMENT.—There is hereby established a Risk Assessment and Management Commission (hereafter referred to in this section as the "Commission"), which shall commence proceedings not later than 18 months after the date of enactment of the Clean Air Act Amendments of 1990 and which shall make a full investigation of the policy implications and appropriate uses of risk assessment and risk management in regulatory programs under various Federal laws to prevent cancer and other chronic human health effects which may result from exposure to hazardous substances.

(b) CHARGE.—The Commission shall consider—

(1) the report of the National Academy of Sciences authorized by section 112(o) of the Clean Air Act, the use and limitations of risk assessment in establishing emission or effluent standards, ambient standards, exposure standards, acceptable concentration levels, tolerances or other environmental criteria for hazardous substances that present a risk of carcinogenic effects

1 U.S.C. § 112. Statutes at Large; contents; admissibility in evidence

The Archivist of the United States shall cause to be compiled, edited, indexed, and published, the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress; all proclamations by the President in the numbered series issued since the date of the adjournment of the regular session of Congress next preceding; and also any amendments to the Constitution of the United States proposed or ratified pursuant to article V thereof since that date, together with the certificate of the Archivist of the United States issued in compliance with the provision contained in section 106b of this title. In the event of an extra session of Congress, the Archivist of the United States shall cause all the laws and concurrent resolutions enacted during said extra session to be consolidated with, and published as part of, the contents of the volume for the next regular session. The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

* * *

1 U.S.C. § 204. Codes and Supplements as evidence of the Laws of United States and District of Columbia; citation Codes and Supplements

(a) United States Code.--The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

* * *

42 U.S.C. § 7401. Congressional findings and declaration of purpose

* * *

(b) Declaration. The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

* * *

42 U.S.C. § 7411. Standards of performance for new stationary sources

* * *

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

* * *

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority--

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

* * *

42 U.S.C. § 7411 (1988). Statutes at Large; contents; admissibility in evidence

* * *

(d) Standards of performance for existing sources; remaining useful life of source.

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) or 7412(b)(1)(A) of this title but (ii) to which a standard of performance under this section would apply if such exiting source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

* * *

42 U.S.C. § 7412. Hazardous air pollutants

(a) Definitions
For purposes of this section, except subsection (r) of this section--

(1) Major source
The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

(2) Area source
The term "area source" means any stationary source of hazardous air pollutants that is not a major source. For purposes of this section, the term "area source" shall not include motor vehicles or nonroad vehicles subject to regulation under subchapter II of this chapter.

(3) Stationary source
The term "stationary source" shall have the same meaning as such term has under section 7411(a) of this title.

(4) New source
The term "new source" means a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source.

(5) Modification
The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results

in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

(6) Hazardous air pollutant
The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect
The term "adverse environmental effect" means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

(8) Electric utility steam generating unit
The term "electric utility steam generating unit" means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

(9) Owner or operator
The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(10) Existing source
The term "existing source" means any stationary source other than a new source.

(11) Carcinogenic effect
Unless revised, the term "carcinogenic effect" shall have the meaning provided by the Administrator under Guidelines for Carcinogenic Risk Assessment as of the date of enactment. Any revisions in the existing Guidelines shall be subject to notice and opportunity for comment.

(b) List of pollutants

(1) Initial list

The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

CAS number	Chemical name
75070	Acetaldehyde
60355	Acetamide
75058	Acetonitrile
98862	Acetophenone
53963	2-Acetylaminofluorene
107028	Acrolein
79061	Acrylamide
79107	Acrylic acid
107131	Acrylonitrile
107051	Allyl chloride
92671	4-Aminobiphenyl
62533	Aniline
90040	o-Anisidine
1332214	Asbestos
71432	Benzene (including benzene from gasoline)
92875	Benzidine
98077	Benzotrichloride
100447	Benzyl chloride
92524	Biphenyl
117817	Bis(2-ethylhexyl)phthalate (DEHP)
542881	Bis(chloromethyl)ether
75252	Bromoform
106990	1,3-Butadiene
156627	Calcium cyanamide
105602	Caprolactam
133062	Captan
63252	Carbaryl
75150	Carbon disulfide

56235	Carbon tetrachloride
463581	Carbonyl sulfide
120809	Catechol
133904	Chloramben
57749	Chlordane
7782505	Chlorine
79118	Chloroacetic acid
532274	2-Chloroacetophenone
108907	Chlorobenzene
510156	Chlorobenzilate
67663	Chloroform
107302	Chloromethyl methyl ether
126998	Chloroprene
1319773	Cresols/Cresylic acid (isomers and mixture)
95487	o-Cresol
108394	m-Cresol
106445	p-Cresol
98828	Cumene
94757	2,4-D, salts and esters
3547044	DDE
334883	Diazomethane
132649	Dibenzofurans
96128	1,2-Dibromo-3-chloropropane
84742	Dibutylphthalate
106467	1,4-Dichlorobenzene(p)
91941	3,3-Dichlorobenzidene
111444	Dichloroethyl ether (Bis(2-chloroethyl)ether)
542756	1,3-Dichloropropene
62737	Dichlorvos
111422	Diethanolamine
121697	N,N-Diethyl aniline (N,N-Dimethylaniline)
64675	Diethyl sulfate
119904	3,3-Dimethoxybenzidine
60117	Dimethyl aminoazobenzene

119937	3,3'-Dimethyl benzidine
79447	Dimethyl carbamoyl chloride
68122	Dimethyl formamide
57147	1,1-Dimethyl hydrazine
131113	Dimethyl phthalate
77781	Dimethyl sulfate
534521	4,6-Dinitro-o-cresol, and salts
51285	2,4-Dinitrophenol
121142	2,4-Dinitrotoluene
123911	1,4-Dioxane (1,4-Diethyleneoxide)
122667	1,2-Diphenylhydrazine
106898	Epichlorohydrin (1-Chloro-2,3-epoxypropane)
106887	1,2-Epoxybutane
140885	Ethyl acrylate
100414	Ethyl benzene
51796	Ethyl carbamate (Urethane)
75003	Ethyl chloride (Chloroethane)
106934	Ethylene dibromide (Dibromoethane)
107062	Ethylene dichloride (1,2-Dichloroethane)
107211	Ethylene glycol
151564	Ethylene imine (Aziridine)
75218	Ethylene oxide
96457	Ethylene thiourea
75343	Ethylidene dichloride (1,1-Dichloroethane)
50000	Formaldehyde
76448	Heptachlor
118741	Hexachlorobenzene
87683	Hexachlorobutadiene
77474	Hexachlorocyclopentadiene
67721	Hexachloroethane
822060	Hexamethylene-1,6-diisocyanate
680319	Hexamethylphosphoramide
110543	Hexane
302012	Hydrazine

7647010	Hydrochloric acid
7664393	Hydrogen fluoride (Hydrofluoric acid)
123319	Hydroquinone
78591	Isophorone
58899	Lindane (all isomers)
108316	Maleic anhydride
67561	Methanol
72435	Methoxychlor
74839	Methyl bromide (Bromomethane)
74873	Methyl chloride (Chloromethane)
71556	Methyl chloroform (1,1,1-Trichloroethane)
78933	Methyl ethyl ketone (2-Butanone)
60344	Methyl hydrazine
74884	Methyl iodide (Iodomethane)
108101	Methyl isobutyl ketone (Hexone)
624839	Methyl isocyanate
80626	Methyl methacrylate
1634044	Methyl tert butyl ether
101144	4,4-Methylene bis(2-chloroaniline)
75092	Methylene chloride (Dichloromethane)
101688	Methylene diphenyl diisocyanate (MDI)
101779	4,4'-Methylenedianiline
91203	Naphthalene
98953	Nitrobenzene
92933	4-Nitrobiphenyl
100027	4-Nitrophenol
79469	2-Nitropropane
684935	N-Nitroso-N-methylurea
62759	N-Nitrosodimethylamine
59892	N-Nitrosomorpholine
56382	Parathion
82688	Pentachloronitrobenzene (Quintobenzene)
87865	Pentachlorophenol
108952	Phenol

106503	p-Phenylenediamine
75445	Phosgene
7803512	Phosphine
7723140	Phosphorus
85449	Phthalic anhydride
1336363	Polychlorinated biphenyls (Aroclors)
1120714	1,3-Propane sultone
57578	beta-Propiolactone
123386	Propionaldehyde
114261	Propoxur (Baygon)
78875	Propylene dichloride (1,2-Dichloropropane)
75569	Propylene oxide
75558	1,2-Propylenimine (2-Methyl aziridine)
91225	Quinoline
106514	Quinone
100425	Styrene
96093	Styrene oxide
1746016	2,3,7,8-Tetrachlorodibenzo-p-dioxin
79345	1,1,2,2-Tetrachloroethane
127184	Tetrachloroethylene (Perchloroethylene)
7550450	Titanium tetrachloride
108883	Toluene
95807	2,4-Toluene diamine
584849	2,4-Toluene diisocyanate
95534	o-Toluidine
8001352	Toxaphene (chlorinated camphene)
120821	1,2,4-Trichlorobenzene
79005	1,1,2-Trichloroethane
79016	Trichloroethylene
95954	2,4,5-Trichlorophenol
88062	2,4,6-Trichlorophenol
121448	Triethylamine
1582098	Trifluralin
540841	2,2,4-Trimethylpentane

108054	Vinyl acetate
593602	Vinyl bromide
75014	Vinyl chloride
75354	Vinylidene chloride (1,1-Dichloroethylene)
1330207	Xylenes (isomers and mixture)
95476	o-Xylenes
108383	m-Xylenes
106423	p-Xylenes
0	Antimony Compounds
0	Arsenic Compounds (inorganic including arsine)
0	Beryllium Compounds
0	Cadmium Compounds
0	Chromium Compounds
0	Cobalt Compounds
0	Coke Oven Emissions
0	Cyanide Compounds[1]
0	Glycol ethers[2]
0	Lead Compounds
0	Manganese Compounds
0	Mercury Compounds
0	Fine mineral fibers[3]
0	Nickel Compounds
0	Polycylic Organic Matter[4]
0	Radionuclides (including radon)[5]
0	Selenium Compounds

NOTE: For all listings above which contain the word "compounds" and for glycol ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chemical (i.e., antimony, arsenic, etc.) as part of that chemical's infrastructure.

[1] X'CN where X = H' or any other group where a formal dissociation may occur. For example KCN or $Ca(CN)_2$

[2] Includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol $R-(OCH_2CH_2)_n-OR'$ where

n = 1, 2, or 3

R = alkyl or aryl groups

R' = R, H, or groups which, when removed, yield glycol ethers with the structure: R-(OCH$_2$CH)$_n$-OH. Polymers are excluded from the glycol category.

[3] Includes mineral fiber emissions from facilities manufacturing or processing glass, rock, or slag fibers (or other mineral derived fibers) of average diameter 1 micrometer or less.

[4] Includes organic compounds with more than one benzene ring, and which have a boiling point greater than or equal to 100°C.

[5] A type of atom which spontaneously undergoes radioactive decay.

(2) Revision of the list

The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

(3) Petitions to modify the list

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance or, in case of listed pollutants without CAS numbers (other than coke oven emissions, mineral fibers, or polycyclic organic matter) removing certain unique substances. Within 18 months after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a

written explanation of the reasons for the Administrator's decision. Any such petition shall include a showing by the petitioner that there is adequate data on the health or environmental defects[1] of the pollutant or other evidence adequate to support the petition. The Administrator may not deny a petition solely on the basis of inadequate resources or time for review.

(B) The Administrator shall add a substance to the list upon a showing by the petitioner or on the Administrator's own determination that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.

(C) The Administrator shall delete a substance from the list upon a showing by the petitioner or on the Administrator's own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

(D) The Administrator shall delete one or more unique chemical substances that contain a listed hazardous air pollutant not having a CAS number (other than coke oven emissions, mineral fibers, or polycyclic organic matter) upon a showing by the petitioner or on the Administrator's own determination that such unique chemical substances that contain the named chemical of such listed hazardous air pollutant meet the deletion requirements of subparagraph (C). The Administrator must grant or deny a deletion petition prior to promulgating any emission standards pursuant to subsection (d) of this section applicable to any source category or subcategory of a listed hazardous air pollutant without a CAS number listed under subsection (b) of this section for which a deletion petition has been filed within 12 months of November 15, 1990.

(4) Further information

If the Administrator determines that information on the health or environmental effects of a substance is not sufficient to make a determination required by this subsection, the Administrator may use any authority available to the Administrator to acquire such information.

(5) Test methods
The Administrator may establish, by rule, test measures and other analytic procedures for monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants.

(6) Prevention of significant deterioration
The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section.

(7) Lead
The Administrator may not list elemental lead as a hazardous air pollutant under this subsection.

(c) List of source categories

(1) In general
Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. To the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 7411 of this title and part C of this subchapter. Nothing in the preceding sentence limits the Administrator's authority to establish subcategories under this section, as appropriate.

(2) Requirement for emissions standards
For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources
The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate)

warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

(4) Previously regulated categories
The Administrator may, in the Administrator's discretion, list any category or subcategory of sources previously regulated under this section as in effect before November 15, 1990.

(5) Additional categories
In addition to those categories and subcategories of sources listed for regulation pursuant to paragraphs (1) and (3), the Administrator may at any time list additional categories and subcategories of sources of hazardous air pollutants according to the same criteria for listing applicable under such paragraphs. In the case of source categories and subcategories listed after publication of the initial list required under paragraph (1) or (3), emission standards under subsection (d) of this section for the category or subcategory shall be promulgated within 10 years after November 15, 1990, or within 2 years after the date on which such category or subcategory is listed, whichever is later.

(6) Specific pollutants
With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990. This paragraph shall not be construed to require the Administrator to promulgate standards for such pollutants emitted by electric utility steam generating units.

(7) Research facilities

The Administrator shall establish a separate category covering research or laboratory facilities, as necessary to assure the equitable treatment of such facilities. For purposes of this section, "research or laboratory facility" means any stationary source whose primary purpose is to conduct research and development into new processes and products, where such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

(8) Boat manufacturing

When establishing emissions standards for styrene, the Administrator shall list boat manufacturing as a separate subcategory unless the Administrator finds that such listing would be inconsistent with the goals and requirements of this chapter.

(9) Deletions from the list

(A) Where the sole reason for the inclusion of a source category on the list required under this subsection is the emission of a unique chemical substance, the Administrator shall delete the source category from the list if it is appropriate because of action taken under either subparagraphs (C) or (D) of subsection (b)(3) of this section.

(B) The Administrator may delete any source category from the list under this subsection, on petition of any person or on the Administrator's own motion, whenever the Administrator makes the following determination or determinations, as applicable:

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source (or group of sources in the case of area sources).

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source (or from a group of sources in the case of area sources).

The Administrator shall grant or deny a petition under this paragraph within 1 year after the petition is filed.

(d) Emission standards

(1) In general
The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods
Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which--

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources
The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than--

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold
With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources
With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision
The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

(7) Other requirements preserved
No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a standard issued under State authority.

(8) Coke ovens

(A) Not later than December 31, 1992, the Administrator shall promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection for coke oven batteries. In establishing such standards, the Administrator shall evaluate--

(i) the use of sodium silicate (or equivalent) luting compounds to prevent door leaks, and other operating practices and technologies for their effectiveness in reducing coke oven emissions, and their suitability for use on new and existing coke oven batteries, taking into account costs and reasonable commercial door warranties; and

(ii) as a basis for emission standards under this subsection for new coke oven batteries that begin construction after the date of proposal of such standards, the Jewell design Thompson non-recovery coke oven batteries and other non-recovery coke oven technologies, and other appropriate emission control and coke production technologies, as to their effectiveness in reducing coke oven emissions and their capability for production of steel quality coke.

Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries shall be December 31, 1995.

(B) The Administrator shall promulgate work practice regulations under this subsection for coke oven batteries requiring, as appropriate--

(i) the use of sodium silicate (or equivalent) luting compounds, if the Administrator determines that use of sodium silicate is an effective means of emissions control and is achievable, taking into account costs and reasonable commercial warranties for doors and related equipment; and

(ii) door and jam cleaning practices.

Notwithstanding subsection (i) of this section, the compliance date for such work practice regulations for coke oven batteries shall be not later than the date 3 years after November 15, 1990.

(C) For coke oven batteries electing to qualify for an extension of the compliance date for standards promulgated under subsection (f) of this section in accordance with subsection (i)(8) of this section, the emission standards under this subsection for coke

oven batteries shall require that coke oven batteries not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries seeking an extension shall be not later than the date 3 years after November 15, 1990.

(9) Sources licensed by the Nuclear Regulatory Commission
No standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act [42 U.S.C.A. § 2011 et seq.] for such category or subcategory provides an ample margin of safety to protect the public health. Nothing in this subsection shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce any standard or limitation respecting emissions of radionuclides which is more stringent than the standard or limitation in effect under section 7411 of this title or this section.

(10) Effective date
Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation.

* * *

(n) Other provisions

(1) Electric utility steam generating units

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress

alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

(B) The Administrator shall conduct, and transmit to the Congress not later than 4 years after November 15, 1990, a study of mercury emissions from electric utility steam generating units, municipal waste combustion units, and other sources, including area sources. Such study shall consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.

(C) The National Institute of Environmental Health Sciences shall conduct, and transmit to the Congress not later than 3 years after November 15, 1990, a study to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur. Such study shall include a threshold for mercury concentrations in the tissue of fish which may be consumed (including consumption by sensitive populations) without adverse effects to public health.

(2) Coke oven production technology study

(A) The Secretary of the Department of Energy and the Administrator shall jointly undertake a 6-year study to assess coke oven production emission control technologies and to assist in the development and commercialization of technically practicable and economically viable control technologies which have the potential to significantly reduce emissions of hazardous air pollutants from coke oven production facilities. In identifying control technologies, the Secretary and the Administrator shall consider the range of existing coke oven operations and battery design and the availability of sources of materials for such coke ovens as well as alternatives to existing coke oven production design.

(B) The Secretary and the Administrator are authorized to enter into agreements with persons who propose to develop, install and operate coke production emission control technologies which have the potential for significant emissions reductions of hazardous air pollutants provided that Federal funds shall not exceed 50 per centum of the cost of any project assisted pursuant to this paragraph.

(C) On completion of the study, the Secretary shall submit to Congress a report on the results of the study and shall make recommendations to the Administrator identifying practicable and economically viable control technologies for coke oven production facilities to reduce residual risks remaining after implementation of the standard under subsection (d) of this section.

(D) There are authorized to be appropriated $5,000,000 for each of the fiscal years 1992 through 1997 to carry out the program authorized by this paragraph.

(3) Publicly owned treatment works

The Administrator may conduct, in cooperation with the owners and operators of publicly owned treatment works, studies to characterize emissions of hazardous air pollutants emitted by such facilities, to identify industrial, commercial and residential discharges that contribute to such emissions and to demonstrate control measures for such emissions. When promulgating any standard under this section applicable to publicly owned treatment works, the Administrator may provide for control measures that include pretreatment of discharges causing emissions of hazardous air pollutants and process or product substitutions or limitations that may be effective in reducing such emissions. The Administrator may prescribe uniform sampling, modeling and risk assessment methods for use in implementing this subsection.

(4) Oil and gas wells; pipeline facilities

(A) Notwithstanding the provisions of subsection (a) of this section, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources, and in the case of any oil or gas exploration or production well (with its associated equipment), such emissions shall not be aggregated for any purpose under this section.

(B) The Administrator shall not list oil and gas production wells (with its associated equipment) as an area source category under subsection (c) of this section, except that the Administrator may establish an area source category for oil and gas production

wells located in any metropolitan statistical area or consolidated metropolitan statistical area with a population in excess of 1 million, if the Administrator determines that emissions of hazardous air pollutants from such wells present more than a negligible risk of adverse effects to public health.

(5) Hydrogen sulfide

The Administrator is directed to assess the hazards to public health and the environment resulting from the emission of hydrogen sulfide associated with the extraction of oil and natural gas resources. To the extent practicable, the assessment shall build upon and not duplicate work conducted for an assessment pursuant to section 8002(m) of the Solid Waste Disposal Act [42 U.S.C.A. § 6982(m)] and shall reflect consultation with the States. The assessment shall include a review of existing State and industry control standards, techniques and enforcement. The Administrator shall report to the Congress within 24 months after November 15, 1990, with the findings of such assessment, together with any recommendations, and shall, as appropriate, develop and implement a control strategy for emissions of hydrogen sulfide to protect human health and the environment, based on the findings of such assessment, using authorities under this chapter including sections[3] 7411 of this title and this section.

(6) Hydrofluoric acid

Not later than 2 years after November 15, 1990, the Administrator shall, for those regions of the country which do not have comprehensive health and safety regulations with respect to hydrofluoric acid, complete a study of the potential hazards of hydrofluoric acid and the uses of hydrofluoric acid in industrial and commercial applications to public health and the environment considering a range of events including worst-case accidental releases and shall make recommendations to the Congress for the reduction of such hazards, if appropriate.

(7) RCRA facilities

In the case of any category or subcategory of sources the air emissions of which are regulated under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], the Administrator shall take into account any regulations of such emissions which are promulgated under such subtitle and shall, to the maximum extent practicable and consistent with the provisions of this section, ensure that the requirements of such subtitle and this section are consistent.

* * *

42 U.S.C. § 7416. Retention of State authority

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7607. Administrative proceedings and judicial review

* * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,„[2] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. 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. 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. The filing of a petition for

reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * *

(d) Rulemaking

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 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.

(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.

(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, 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--

(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 reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title 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.

(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.

(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.

(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.

(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.

(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).

(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) of this section). 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.

(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) of this section) 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.

(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.

(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 August 7, 1977.

(e) Other methods of judicial review not authorized
Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

Calendar No. 427

101ST CONGRESS *1st Session* | SENATE | REPORT 101-228

CLEAN AIR ACT AMENDMENTS OF 1989

REPORT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

together with

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

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Washington, DC 20402

that does not meet the standard is to be designated nonattainment. An area that meets the standard and does not contribute to another area that exceeds the standard is to be designated attainment. An area that cannot be classified on the basis of available information as meeting the standard is to be designated unclassifiable.

Revised section 107(f)(3) of the Act designated any area that did not meet the primary ambient air quality standard for ozone or carbon monoxide as of the last calendar year before the date of enactment of the bill as nonattainment. Revised section 107(f)(4) designates each area that was identified by EPA as a Group I area in the August 7, 1987, promulgation of the revised particulate standard (PM–10) or which contains a site for which monitoring data shows a violation of the air quality standard for PM–10 before the date of enactment as nonattainment.

Revised section 107(d)(5) of the Act provides that areas may be redesignated by the Administrator upon the request of the Governor of a State or on the Administrator's own motion. The Administrator must act to redesignate an area not currently designated as nonattainment as a nonattainment area within one hundred eighty days of receiving evidence that the area exceeds the national ambient air quality standard for any pollutant. In order to redesignate an area from nonattainment to attainment, the Administrator must promulgate the redesignation by rule, must determine that the area has attained the air quality standard and that attainment is due to permanent reductions in emissions, must have approved a maintenance plan, and determine that the State containing the area has met requirements of the Act applicable to the area. The Administrator may not redesignate an area from nonattainment to unclassified.

New paragraphs (2) and (3) of section 107(d) of the Act provide that the boundaries of an area that is designated nonattainment for ozone and that is located within a metropolitan statistical area (MSA) or a consolidated metropolitan statistical area (CMSA) are the boundaries of the MSA or CMSA, unless the State demonstrates that some portion of the MSA or CMSA does not contribute to violations of the air quality standard and that there is a geographical basis for excluding the portion. With respect to a serious carbon monoxide area, the Administrator may, by rule, include the entire MSA or CMSA in the nonattainment area.

DISCUSSION

This section of the bill restructures and clarifies the process for designating and redesignating areas of the country depending on their emissions and ambient air quality. The bill gives significant authority to the Administrator in order to overcome the deficiencies in current law that have failed to allow the Administrator to respond to new information about pollution levels and control needs.

Existing law, as interpreted by EPA, precludes the Administrator from issuing new designations or revising existing ones when an ambient standard is revised, as occurred with the promulgation in 1987 of the ambient standard for PM–10. Current law is also

of title II recordkeeping or reporting requirements are calculated on a per day basis.

Fourth, new authority is provided to the Administrator to assess administrative penalties for violations of sections 203(a) (motor vehicle and engine provisions), 211(d) (fuel and fuel additive provisions), 216(b) (carbon dioxide emission standards), and 217(e) (nonroad engine and vehicle provisions). The maximum civil penalty that may be assessed by the Administrator under this authority is $200,000. Any such assessment can only be made after an opportunity for a hearing before the Administrator is provided, and the amount of the penalty assessed is to be based on the consideration of statutorily-prescribed factors. The Administrator is also authorized (as at present) to bring a civil action in Federal district court to assess and recover any civil penalty prescribed in title II of the Act, and similar factors are prescribed for consideration by the court in determining the penalty amount.

Fifth, this section revises the section 211(d) penalty provision, which currently provides for a mandatory forfeiture of $10,000 per day for violations of section 211 or fuel or fuel additive regulations issued under that section. The mandatory forfeiture provision is replaced with a provision for a civil penalty of up to $25,000 per day for each violation. In addition, the section clarifies that where violations of fuel standards are based on a multi-day averaging period, each day during the averaging period constitutes a separate day of violation. This section of the bill also provides injunctive authority to restrain violations of fuel statutory provisions and regulation, as is already available in the Act for violations of motor vehicle and stationary source requirements.

DISCUSSION

Experience with the mobile source provisions in title II of the Act has shown that the enforcement authorities in this title need to be strengthen and broadened in several ways. Most of the title II enforcement authorities have not been amended since 1970, and the impacts of inflation and nearly two decades of enforcement experience need to be accounted for by updating these authorities.

Anti-tampering.—Current law prohibits manufacturers, dealers, service station or garage operators, fleet owners or those in the business of leasing vehicles from removing or disabling ("tampering with") components of vehicle emission control systems. Individual owners or operators of vehicles are not currently prohibited from performing the same activities.

In its 1988 Motor Vehicle Tampering Survey, EPA concluded that 23 percent of the passenger cars and light-duty trucks surveyed in areas not covered by inspection/maintenance (I/M) programs and/or anti-tampering programs (ATP) showed evidence of tampering with at least one component. Significant amounts of tampering were also found in ATP-only areas (17 percent) and I/M plus ATP areas (16 percent).

Tampering can cause dramatic increases in emissions of hydrocarbons (HC), carbon monoxide (CO) and nitrogen oxides (NO_x). For example, a missing or damaged catalytic converter can increase HC and CO emissions by an average of 475 percent and 425 percent,

currently recognized within the structure of section 112 and have no other statutory authorization.

There is now a broad consensus that the program to regulate hazardous air pollutants under section 112 of the Clean Air Act should be restructured to provide EPA with authority to regulate industrial and area source categories of air pollution (rather than the pollutants) with technology-based standards in the near term.

In light of these conclusions, the reported legislation makes fundamental changes in the basic provisions of section 112 of the Clean Air Act. The bill establishes a list of 191 air pollutants and a mandatory schedule for issuing emissions standards for the major sources of these pollutants. The standards are to be based on the maximum reduction in emissions which can be achieved by application of best available control technology. These new, technology-based standards will become the principal focus of activity under section 112. Authority to issue health-based standards is preserved in modified form to be used for especially serious pollution problems.

This approach to regulation of toxic pollutants is not without precedent. It follows the general model which has been employed since the mid-1970's to control toxic effluents discharged to surface waters by major industrial point sources.

Under the 1972 amendments to the Clean Water Act, industrial dischargers were given two deadlines to control *conventional* pollutants (biological oxygen demand, suspended solids, and acidity): 1) by July 1, 1977 each facility was required to meet emissions limitations reflecting "best practicable control technology currently available" (so-called BPT limits); and 2) by July 1, 1983 each facility was to meet emissions limitations set according to "best available technology economically achievable" (BAT).

Toxic pollutants under the 1972 Act were to be treated differently. The Administrator was to publish a list of toxic pollutants within 90 days and within a year promulgate effluent standards that would provide an "ample margin of safety" to protect the most affected (aquatic) organisms. Thus, the structure of this authority to regulate toxic discharges to surface waters was very similar to the current structure of section 112 of the Clean Air Act.

During the five-year period following passage of the 1972 Clean Water Act, EPA promulgated standards for only six toxic pollutants. In 1975 the Environmental Defense Fund and the Natural Resources Defense Council brought suit against the Agency for failure to list more toxics and to promulgate standards as mandated by the Act. In June 1976, EPA and the plantiffs entered into a consent decree that established a new formula for the development of effluent standards for toxic water pollutants. This agreement created a list of 120 priority pollutants and required EPA to promulgate effluent guidelines based on best available control technology for each pollutant and each industrial category not later than December 31, 1980. Industrial dischargers were to be in compliance with these standards by July 1, 1983, the same deadline as established by the Act for BAT control of conventional pollutants. There were 14,000 dischargers divided into 21 industrial categories and 399 subcategories potentially subject to these new toxics standards.

101ST CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
101-952

CLEAN AIR ACT AMENDMENTS OF 1990

CONFERENCE REPORT

TO ACCOMPANY

S. 1630

OCTOBER 26, 1990.—Ordered to be printed

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1630) to amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. Certain matters agreed to in conference are noted below.

The Conference agreement on S. 1630, the Clean Air Act Amendments of 1990, includes provisions addressing attainment and maintenance of ambient air quality standards, mobile sources of air pollution, toxic air pollution, acid rain, permits, enforcement, stratospheric ozone protection, miscellaneous provisions, and clean air research. A summary of the conference agreement follows.

TITLE I—NONATTAINMENT PROVISIONS

Title I of the conference agreement, which adopts the House Title I except with respect to transportation related issues and with a change concerning the regulation of oxides of nitrogen, divides areas that fail to meet any one of the pollution standards listed above into categories, depending on the severity of the problem, and sets out requirements of different levels of stringency for each category.

Depending on the severity of the pollution problem, nonattainment areas for any of the pollutants must attain the health standard for ozone within five, ten, fifteen, or seventeen years (twenty years for Los Angeles).

In the case of ozone, areas must reduce emissions of volatile organic compounds (VOCs), a precursor of ozone, by 3 percent per year (with waivers for certain specified conditions) until the standard is attained.

Vehicle inspection and maintenance programs must be upgraded in ozone and carbon monoxide areas that already have such programs and must be instituted in most other areas that do not already have them.

The Environmental Protection Agency (EPA) is required to impose one of the following sanctions in an area that fails to pre-

pare or implement a plan to attain an air quality standard: limited use of Federal highway funds or a requirement that new industry offset emissions at a 2 to 1 ratio.

Under the safety exemption to highway sanctions, the principal purpose of the project must be to improve highway safety, but the project may also have other important benefits.

The definition of major sources in current law is modified so that smaller sources of VOCs are required to control emissions (50 tons in moderate and serious areas; 25 tons in severe areas; 10 tons in extreme areas).

When a State fails to develop a plan that meets the requirements of the law, the EPA is required to promulgate a Federal Implementation Plan.

The EPA is required to issue control requirements for a number of sources of pollution, including commercial and consumer products.

A new program is established to address the interstate transport of ozone air pollution.

The conferees adopt the House language on rocket testing with the agreement that the appropriate Federal agency may find that testing required for a civilian or commercial launch program is essential to the national security.

TITLE II—MOTOR VEHICLE-RELATED PROVISIONS

Title II is based on the House bill with a number of significant modifications.

Reformulated gasoline

Cleaner, reformulated gasoline would be mandated in the nine cities with the most severe ozone pollution beginning in 1995. States could elect to have the requirements apply in other cities with ozone pollution problems. In comparison with conventional gasoline, reformulated gasoline would be required to have 15 percent lower emissions of VOCs and toxic chemicals by 1995, and greater reductions by 2000. The agreement also contains additional standards for oxygen, benzene, and aromatics.

Under section 211(k)(4), a petition for the certification of a fuel formulation or slate of fuel formulations is deemed certified if the Administrator fails to act on the petition within 180 days of its receipt. Such a petition is deemed certified until the Administrator completes action on the petition. In the event that the Administrator subsequently denies such a petition, the conferees intend that the Administrator will take appropriate steps to ensure orderly and prompt compliance.

Section 219 of the bill includes a credit program to provide flexibility in meeting the bill's requirements on the oxygen, aromatic hydrocarbon, and benzene content of reformulated gasoline. A credit program is the mechanism by which persons subject to these requirements will be allowed to pool gasoline sold in a given covered area for purposes of determining compliance with these requirements.

Under this credit program, a person may earn credit for gasoline with a higher oxygen content, lower aromatic hydrocarbon content,

Permits

It is the conferees' intent that EPA not use the permit hammer approach (case-by-case) to avoid or delay meeting MACT requirements.

Routine Emissions From "Area" Sources

Based on the list of pollutants mentioned above, EPA can also list an area source category just as the agency would list a major source category, and can require MACT. EPA must list sufficient source categories to assure that 90% of the emissions of the 30 most serious area source pollutants are regulated.

Five years after enactment, EPA is to propose a national urban air toxics strategy to reduce cancer risks associated with urban air toxics by 75%. EPA is to report on reductions achieved in 8 and 12 years intervals.

Accidental Releases

The agreement contains provisions that are designed to prevent chemical accidents.

EPA is to publish a list of at least 100 regulated substances, of which 16 are listed in the agreement.

EPA is authorized to promulgate accident prevention regulations.

The conferees do not intend the term "stationary source" to apply to transportation, including the storage incident to such transportation, of any regulated substance or other extremely hazardous substance under the provisions of this subsection.

The prohibition on listing substances for the accident prevention program which have been listed under this section 108(a) does not preclude the listing of anhydrous sulfur dioxide which is on the initial list.

The conference agreement establishes a Chemical Safety and Hazard Investigation Board, similar to the National Transportation Safety board, to investigate chemical accidents.

The Board is authorized to investigate accidental releases which cause substantial property damage. Substantial damage would include fires, explosions, and other events which cause damages that are very costly to repair or correct, and would not include incidental damage to equipment or controls.

Hazard assessments required under this section shall include:

(1) basic data on the source, units at the source facility which contain or process regulated substances (including the longitude and latitude of such units), operating procedures, population of nearby communities, and the meteorology of the area where the source is located;

(2) an identification of the potential points of accidental releases from the source of regulated substances;

(3) an identification of any previous accidental releases from the source including the amounts released, frequencies, and durations;

(4) an identification of a range (including worst case events) of potential releases from the source, including an estimate of

The conferees intend that termination of the seasonal or temporary use of a cleaner fuel shall not be considered a modification for purposes of section 111 or part C of Title I.

TITLE V—PERMIT PROVISIONS

The conference agreement includes provisions that require various sources of air pollution to obtain operating permits which would ensure compliance with all applicable requirements of the Clean Air Act.

Permit programs

EPA is required to issue permit program regulations within one year. States are required to develop programs consistent with those regulations. The programs would be in effect within four years, and the requirement to have a permit would be phased-in over the ensuing three years.

Consistent with the general provisions of section 116 of the Clean Air Act, the conferees understand that a State may establish additional, more stringent permitting requirements, but a State may not establish permit requirements that are inconsistent with the national permitting requirements of this Act, including this title.

EPA Oversight of Permit Programs

The conference agreement provides EPA with the authority to review permits proposed to be issued by a State and to object to permits that violate the Clean Air Act. EPA would also have the opportunity to waive review of permits for small sources.

State response to EPA objections

Under the conference agreement, States would be granted 90 days to revise permits to meet any EPA objection. If the State fails to revise the permit, EPA will issue or deny the permit.

Permit shield

The agreement provides that compliance with a permit is deemed compliance with the requirements of the permit program. Permit compliance also may be deemed compliance with other applicable provisions of the Clean Air Act if the permit has been issued in accordance with Title V and includes those provisions, or if the permitting authority includes in the permit a specific determination that such provisions are not applicable.

Operational flexibility

Facilities will be authorized to make changes in operations without the necessity for a permit revision so long as: (i) the changes are not "modifications" under Title I of the Act, (ii) the changes will not result in emissions that exceed emissions allowable under the permit, and (iii) the facility provides EPA and the permitting authority with seven days written notice in advance of the changes.

Processing permit applications

Except for applications submitted within the first year of the permit program (for which a 3-year phased review is allowed),

are subsequently destroyed is too broad and does not include adequate safeguards to preclude abuse. In the course of implementing this Act, however, EPA shall consider whether an exclusion will be allowed on a case-by-case basis for the manufacture of controlled substances that are (1) coincidental, unavoidable byproducts of a manufacturing process and (2) immediately contained and destroyed by the producer using maximum available control technologies.

TITLE VII—FEDERAL ENFORCEMENT

The conference agreement includes a number of provisions that enhance the enforcement authority of the Federal government under the Clean Air Act while at the same time providing substantive procedural safeguards. In general terms, the agreement increases the range of civil and criminal penalties for violations of the Clean Air Act.

SIP and permit violations

The conference agreement revises and strengthens EPA enforcement authority regarding violations of State Implementation Plans and permits, including authority to bring civil actions for injunctive relief and penalties, as well as new authority to issue administrative penalty orders in response to violations. These authorities can also be used by EPA when States fail to enforce SIPs or permit requirements.

Violations of other requirements

EPA is authorized to initiate a range of enforcement actions for a number of violations of specified sections and titles of the Act. Included is authority to issue administrative penalty orders, file civil actions, and initiate criminal proceedings via the Attorney General.

It is the conferees' intention to provide the Administrator with prosecutorial discretion to decide not to seek sanctions under Section 113 for de minimis or technical violations in civil and criminal matters.

Criminal penalties

Criminal fines and penalties are included for a range of violations of the Act, including negligent or knowing violations that result in the endangerment of others, knowing violations of SIPs that occur after the violator is on notice of the violation, knowing violations of certain sections in the permit title, and knowing violations of the acid rain title or the stratospheric ozone protection title. In addition, the agreement provides criminal fines and penalties for the knowing filing of false statements and other similar recordkeeping, monitoring, and reporting violations. Consistent with other recent environmental statutes, criminal violations of the Clean Air Act are upgraded from misdemeanors to felonies.

The amendments add new criminal sanctions for recordkeeping, filing and other omissions. These provisions are not meant to penalize inadvertent errors. For criminal sanctions to apply, a source

II

101ST CONGRESS
1ST SESSION

S. 1490

To amend the Clean Air Act to provide for the attainment and maintenance of the national ambient air quality standards, the control of toxic air pollutants, the prevention of acid deposition, and other improvements in the quality of the Nation's air.

IN THE SENATE OF THE UNITED STATES

AUGUST 3 (legislative day, JANUARY 3), 1989

Mr. CHAFEE (for himself, Mr. SIMPSON, Mr. DURENBERGER, Mr. WARNER, Mr. JEFFORDS, Mr. HUMPHREY, Mr. BOSCHWITZ, Mr. D'AMATO, Mr. DOLE, Mr. DOMENICI, Mr. EXON, Mr. GORTON, Mr. HATCH, Mr. HATFIELD, Mrs. KASSEBAUM, Mr. MCCAIN, Mr. MCCLURE, Mr. MURKOWSKI, Mr. RIEGLE, Mr. RUDMAN, Mr. STEVENS, Mr. THURMOND, Mr. WALLOP, Mr. BREAUX, and Mr. LEVIN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To amend the Clean Air Act to provide for the attainment and maintenance of the national ambient air quality standards, the control of toxic air pollutants, the prevention of acid deposition, and other improvements in the quality of the Nation's air.

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

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

This Act may be cited as the "Clean Air Act Amendments of 1989".

"(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

"(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

"(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 105.".

SEC. 108. MISCELLANEOUS.

(a) TRANSPORTATION PLANNING GUIDANCE.—Section 108 of the Clean Air Act is amended by—

(1) revising the first sentence of subsection (e) to read as follows:

"(e) Within nine months after the date of enactment of the Clean Air Act Amendments of 1989 and periodically thereafter as necessary to maintain a continuous process of transportation and air quality planning, including emissions inventory development, the Administrator shall, after consul-

"(B) propose regulations establishing standards of performance for at least 50 per centum of such categories of sources within four years of the date of enactment of the Clean Air Act Amendments of 1989; and

"(C) propose regulations for the remaining categories of sources within six years of the date of enactment of the Clean Air Act Amendments of 1989;".

(d) REGULATION OF EXISTING SOURCES.—Section 111(d)(1)(A)(i) of the Clean Air Act is amended by striking "or 112(b)(1)(A)" and inserting "or emitted from a source category which is regulated under section 112.".

(e) AUTHORITY TO OBTAIN INFORMATION.—Section 114(a)(1) of the Clean Air Act is amended by—

(1) striking the term "or" and inserting a comma immediately after the phrase "any emission source"; and

(2) inserting "or who manufactures emission control equipment or process equipment, or who the Administrator believes may have information necessary for the purposes set forth in this subsection" immediately after "any person who owns or operates an emission source.".

(f) CONSULTATION.—The second-to-last sentence of section 121 of the Clean Air Act is amended to read as follows: "The Administrator shall update as necessary the origi-

Calendar No. 427

101ST CONGRESS
1ST SESSION

S. 1630

[Report No. 101–228]

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14 (legislative day, SEPTEMBER 6), 1989

Mr. BAUCUS (for himself, Mr. CHAFEE, Mr. BURDICK, Mr. DURENBERGER, Mr. GRAHAM, Mr. JEFFORDS, Mr. LAUTENBERG, Mr. LIEBERMAN, Mr. MITCHELL, Mr. MOYNIHAN, Mr. WARNER, Mr. COHEN, and Mr. CRANSTON) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

DECEMBER 20, 1989

Reported, under authority of the order of the Senate of November 22 (legislative day, November 6, 1989), by Mr. BURDICK, with an amendment

[Strike all after the enacting clause and insert the part printed in italic]

A BILL

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

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

assign release prevention, mitigation, or response authorities otherwise established by law.

"(k) STATE AUTHORITY.—Nothing in this section shall preclude, deny, or limit any right of a State or political subdivision thereof to adopt or enforce any regulation, requirement, or standard (including any procedural requirement) that is more stringent than a regulation, requirement, or standard in effect under this section or that applies to a substance not subject to this section.

"(l) AUTHORIZATION.—There are authorized to be appropriated to the Administrator such sums as may be necessary to carry out the provisions of this section.".

CONFORMING AMENDMENTS

SEC. 305. (a) Section 111(d)(1) of the Clean Air Act is amended by striking "112(b)(1)(A)" and inserting in lieu thereof "112(b)".

(b) Section 111 of the Clean Air Act is amended by striking paragraphs (g)(5) and (g)(6) and redesignating the succeeding paragraphs accordingly. Such section is further amended by striking "or section 112" in paragraph (g)(5) as redesignated in the preceding sentence.

(c) Section 114(a) of the Clean Air Act is amended by striking "or" after "section 111," and by inserting ", or any accident prevention regulation under section 129," after "section 112".

IB

Printed as Passed

May 23, 1990

Ordered to be printed as passed by the

House of Representatives

101ST CONGRESS
2D SESSION

S. 1630

AN ACT

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE, REFERENCE, AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Clean Air Act Amendments of 1990".

(b) REFERENCE.—Whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Clean Air Act.

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of sources within 2 years after the date of the enactment of the Clean Air Act Amendments of 1990;

"(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after the date of the enactment of the Clean Air Act Amendments of 1990; and

"(C) propose regulations for the remaining categories of sources within 6 years after the date of the enactment of the Clean Air Act Amendments of 1990.".

(e) SAVINGS CLAUSE.—Section 111(a)(3) (42 U.S.C. 7411(f)(1)) is amended by adding at the end: "Nothing in title II of this Act relating to nonroad engines shall be construed to apply to stationary internal combustion engines.".

(f) REGULATION OF EXISTING SOURCES.—Section 111(d)(1)(A)(i) (42 U.S.C. 7411(d)(1)(A)(i)) is amended by striking "or 112(b)(1)(A)" and inserting "or emitted from a source category which is regulated under section 112".

(g) CONSULTATION.—The penultimate sentence of section 121 (42 U.S.C. 7421) is amended to read as follows: "The Administrator shall update as necessary the original regulations required and promulgated under this section (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) to ensure adequate consultation.".