ORAL ARGUMENT NOT YET SCHEDULED

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

No. 11-1141 (and consolidated cases)

AMERICAN CHEMISTRY COUNCIL,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

FINAL REPLY BRIEF FOR ENVIRONMENTAL PETITIONERS

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

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

EPA	Respondents U.S. Environmental Protection Agency and Gina McCarthy, Administrator
ESP	Electrostatic Precipitator
GACT	Generally Available Control Technology
MACT	Maximum Achievable Control Technology
mmBTU	Million British Thermal Units
PFPI	Partnership for Policy Integrity

STATUTES AND REGULATIONS

Newly cited statutes and regulations appear in the addendum.

SUMMARY OF ARGUMENT

EPA does not dispute that the standards under review will barely reduce the toxic pollution that area-source boilers emit. EPA's brief confirms that the agency achieved this disappointing result by failing to heed the plain language of the Clean Air Act and failing in its obligation to engage in reasoned decisionmaking. First, EPA ran afoul of the plain language of §7412(c)(6) when it refused to set §7412(c)(6)-compliant standards for boilers listed under that provision. Second, EPA violated §7412(h)(1) by setting weak work practice standards that are not consistent with the stringency provisions of §7412(d)(2)-(3), a statutory requirement that EPA now concedes. Third, EPA failed even to consider exercising its undisputed discretion to set "maximum achievable control technology (MACT)" standards—instead of weaker "generally available control technology (GACT)" standards—for emissions of dangerous metals and carcinogens. Fourth, EPA acted unlawfully and arbitrarily by failing to base the GACT standards on generally available technology.

Finally, EPA arbitrarily concluded that controlled synthetic area-source boilers—boilers that would be major sources but for their installed control

technology—are "equivalent" for purposes of Title V to the smaller boilers that are area sources even without controls.

ARGUMENT

I. EPA'S FAILURE TO SET §7412(C)(6)-COMPLIANT STANDARDS FOR BOILERS LISTED UNDER §7412(C)(6) IS UNLAWFUL.

A. EPA's Failure To Set §7412(c)(6)-Compliant Standards For Oil- And Biomass-Fired Boilers Is Unlawful.

EPA's lawyers argue there is "no basis" for claiming that oil- and biomass-fired area-source boilers are currently listed for regulation under §7412(c)(6). EPA Br. 61. The "basis" is EPA's own admission in the rule:

> The CAA section 112(c)(6) list of source categories currently includes industrial coal combustion, industrial oil combustion, industrial wood combustion, commercial coal combustion, commercial oil combustion, and commercial wood combustion…. In the documentation for the CAA section 112(c)(6) listing, the commercial fuel combustion categories included institutional fuel combustion.

75 Fed. Reg. 31,896, 31,898/3 (June 4, 2010) (emphasis added), JA0003. EPA also made clear at the time of listing that area sources were included. 63 Fed. Reg. 17,838, 17,841/1-2 (Apr. 10, 1998), JA0163. EPA predicted that the emissions from some area-source categories might be "negligible" and stated it would remove them from the list in that event. *Id.* But EPA concedes it has not removed oil- and biomass-fired area-source boilers from the §7412(c)(6) list. 76 Fed. Reg. 15,554, 15,566/1 (Mar. 21, 2011), JA0053 ("we have not removed or 'delisted' oil-

fired and biomass-fired area source boilers"). Thus there can be no dispute that these sources are currently listed for regulation under §7412(c)(6).[1]

Instead of explaining how its refusal to set §7412(c)(6)-compliant standards for these sources is consistent with the statute, EPA argues that a requirement to issue §7412(c)(6)-compliant standards for each category listed under §7412(c)(6) would "make[] no sense." EPA Br. 65. EPA asserts that Congress would not have required it to promulgate §7412(c)(6)-compliant standards for sources listed under §7412(c)(6) which EPA later concludes were not necessary to satisfy the provision's minimum listing requirement. *Id*. 62-65.

EPA's policy argument is barred by the plain language of the statute. Sections 7412(c)(2) and (d)(1) provide—expressly and without exception—that EPA must set standards for all listed categories. 42 U.S.C. §7412(c)(2), (d)(1). Section 7412(c)(6) further specifies that, for the categories listed thereunder, EPA must set standards under §7412(d)(2) or (d)(4)—precluding the agency from isuing less-protective standards under §7412(d)(5). *Id.* §7412(c)(6), (d)(2), (d)(4)-(d)(5). And Congress made clear that EPA's listing decision determines which sources must be regulated under (d)(2) or (d)(4) by expressly providing that the listing

[1] For this reason, EPA's claim (EPA Br. 63 n.13) that it would be lawful to remove listed sources without following the procedures of 42 U.S.C. §7412(c)(9) is irrelevant, as is its claim that it has done so in the past. EPA Br. 62.

decision must "assur[e]" that sufficient sources are subject to those standards. *Id.* §7412(c)(6).[2]

Congress did not authorize EPA to decline to set standards for sources it lists under §7412(c)(6) or to revise its listing decision at the standard-setting stage. *Id.*; *see N. Carolina v. EPA*, 531 F.3d 896, 922 (D.C. Cir. 2008) ("EPA has 'only those authorities conferred upon it by Congress.'") (citation omitted).

Congress provided only one route for EPA to avoid the regulatory requirements triggered by its listing decisions—§7412(c)(9). 42 U.S.C. §7412(c)(9). Under that provision EPA is authorized to de-list source categories it determines do not present a threat to public health or the environment. *Id.* That Congress provided this carefully circumscribed mechanism for EPA to alter its listing decisions makes plain it did not intend for EPA to create others. *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008); *Am. Methyl Corp. v. EPA*, 749 F.2d

[2] The legislative history of the Clean Air Act amendments confirms that the minimum level of control required for a source is determined by how it is listed. The Senate explained that "MACT standards must be promulgated for all source categories listed pursuant to section 112(c)(1)," S. Rep. No. 101-228, at 167 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3552, whereas "[f]or those categories of area sources which have been listed pursuant to section 112(c)(2), … the Administrator has" discretion to set either MACT or GACT standards. *Id.* 3556. Moreover, the Senate observed that "source categories will not get listed if the only regulatory regime which meets statutory requirements is considered too costly," *id.* 3556-57, which would not be the case if EPA had discretion to alter or disregard its listing decisions *post hoc*.

826, 836 (D.C. Cir. 1984) (quoting *Nat'l Railroad Passenger Corp. v. Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974)) ("'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'").

EPA argues that the Court should approve its alternative approach—simply declining to set the required standards, without delisting—because delisting under §7412(c)(9) "requires EPA to make specific health-based findings." EPA Br. 65. But Congress included that health-protective requirement for a reason. It intended for EPA to regulate all listed categories in conformity with the statute, except for categories that "present no significant public health risk." S. Rep. No. 101-228, at 175, 1990 U.S.C.C.A.N. 3560. EPA's argument that this "makes no sense," EPA Br. 65, is no different than its "disbelief" that it cannot avoid §7412(c)(9) and simply undo its listing decisions if it comes to view them as erroneous. *New Jersey*, 517 F.3d at 582-83. That argument was squarely rejected. *Id*.

EPA's approach would disrupt the regulatory schedule set by Congress. Section 7412 requires EPA to list source categories for regulation and then issue standards for the listed categories according to the "prioritized schedule" dictated by the statute. *Id.* 578; *accord* 42 U.S.C. §7412(c)(2) ("For categories and subcategories the Administrator lists, the Administrator shall establish emission standards … according to the schedule in [§7412(c)] and [§7412](e)."). Congress intended that "[o]nce the Administrator has applied [the statutory] criteria to listed

source categories and set a schedule, it may not be modified at will to reflect other concerns or information which come to the Administrator's attention at a later time." S. Rep. No. 101-228, at 174, 1990 U.S.C.C.A.N. 3559 (emphasis added). By claiming it may retroactively negate the requirements of §7412(c)(6) for listed sources, EPA claims authority to do what Congress prohibited.

Unlike EPA, Industry Intervenors attempt to reconcile EPA's approach with the text of §7412(c)(6). They claim that Congress' use of the word "assuring" shows EPA must re-examine the §7412(c)(6) list at the standard-setting stage, and that any other reading renders the word "surplus." Industry Br. 11-12. Intervenors' argument ignores that Congress used the statutory term "assuring" to modify the action that precedes it in the sentence—the listing of sources. 42 U.S.C. §7412(c)(6) (EPA "shall … list … sources assuring …"). The language on which Industry relies actually compels the conclusion that the listing decision must assure that sufficient sources will be regulated, not some subsequent reexamination of the inventory.

B. EPA's Failure To Set Any Standards For Temporary Oil-Fired Boilers Is Unlawful.

EPA does not dispute that it listed oil-fired boilers for regulation and now must set standards for them. EPA Br. 66-67. Yet EPA claims its standard-setting

obligation does not encompass "temporary" oil-fired boilers, because "temporary" boilers are not listed. *Id*. 67.

EPA incorrectly asserts that Environmental Petitioners' argument is that "temporary boilers are included in the source category because the source category did not specifically exclude them." *Id.* In fact, Environmental Petitioners' argument is that the category of "boilers" plainly includes temporary boilers, just as the category of "courts" includes federal courts, or the category of "dogs" includes brown dogs. Temporary boilers are simply, and indisputably, a type of boiler. They therefore were included when EPA listed boilers for regulation.

It is actually EPA's lawyers that utilize the "conclusory" mode of argument of which they accuse Environmental Petitioners, *id.*, reasoning that temporary boilers are not included in the source category because the source category did not specifically include them. That argument is untenable because it lacks any limiting principle, and would allow EPA to decline to set standards for any subgroup of boilers it wishes. EPA's failure to enumerate temporary boilers specifically is no more significant than its failure to enumerate "boilers in Pennsylvania" or any other subgroup.

Each of EPA's remaining arguments simply assumes the conclusion that temporary boilers are not boilers. When EPA claims that temporary boilers are different from "boilers included in the source category," EPA is simply assuming

the conclusion that the "boilers included in the source category" exclude temporary boilers. *Id.* Likewise, when EPA claims that the emission inventory developed under §7412(c)(3) "did not include emissions from temporary boilers," *id.*, EPA simply assumes the conclusion that the categories in that inventory—"industrial boilers" and "institutional/commercial boilers," 64 Fed. Reg. 38,706, 38,720/2-21/3 & tbl.2 (July 19, 1999), JA0192-93—exclude "boilers" that are "temporary."

The same is true of the §7412(c)(6) inventory. EPA's claim that the §7412(c)(6) inventory does not include emissions from temporary boilers simply assumes the conclusion that the relevant categories in that inventory—"industrial coal combustion, industrial oil combustion, industrial wood combustion, commercial coal combustion, commercial oil combustion, and commercial wood combustion," 76 Fed. Reg. 15,556/1-2, JA0043—do not encompass combustion of these fuels at boilers that are "temporary." EPA offers no "analysis or evidence," EPA Br. 67, to support the curious claim that oil combustion is not oil combustion if it occurs at a boiler that is "capable of … being … moved." 40 C.F.R. §63.11237 (definition of temporary boiler).

EPA's invocation of the emission inventory is curious for another reason also: if temporary boilers are not boilers, where in the inventory do they appear? The inventory lists source categories accounting for "100%" of the emissions of the persistent bioaccumulative toxics specified in §7412(c)(6), EPA-HQ-OAR-

2006-0790-2312 at 19, JA0491, including both categories needed to reach 90% and categories that make up the remaining 10%. *Id.* 15, 17, JA0487, 0489. The absence from the inventory of any other source category that could plausibly include them compels the conclusion that temporary boilers are boilers.

II. EPA'S WORK PRACTICE STANDARDS FOR COAL-FIRED BOILERS VIOLATE §7412(H)(1) BECAUSE THEY ARE NOT CONSISTENT WITH §7412(D).

EPA concedes that work practice standards must be consistent with the maximum achievable control technology (MACT) requirements of §7412(d)(2)-(3). EPA Br. 70-71 (work practice standards must be "consistent with the requirements of … MACT[]"); *id.* 17; 42 U.S.C. §7412(h)(1). But EPA's work practice standards for coal-fired boilers are not "consistent" with §7412(d)(2)-(3), and EPA's brief confirms that EPA never even claimed they are.

EPA's lawyers assert without citation that EPA determined that a tune-up achieves the maximum achievable emission reduction. EPA Br. 71 (bottom of page). If this were correct, EPA's lawyers would be able to provide a citation to the place in the record where this determination appears. They have not. Because it appears nowhere in the record, the claim that a tune-up achieves the maximum achievable emission reduction is a *post hoc* rationale that this Court "may not accept." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

EPA's lawyers also claim that EPA made this determination "by identifying the tune-up and startup/shutdown requirements as 'work practices.'" EPA Br. 71. That EPA correctly classified these requirements as work practice standards, however, says nothing about whether the standards are "consistent" with §7412(d)—a question on which the statute expressly requires EPA to form a "judgment" when establishing work practice standards. 42 U.S.C. §7412(h)(1).

EPA's argument, moreover, proves too much. EPA asks this Court to assume that the agency heeded §7412(h)'s "consistent" requirement, notwithstanding EPA's failure to acknowledge and apply that requirement in the record. Under that approach, there would be nothing left of EPA's "affirmative burden" to explain how its decision is consistent with statutory requirements. *Natural Res. Def. Council v. EPA*, 755 F.3d 1010, 1023 (D.C. Cir. 2014); *see also Mountain Commc'ns, Inc. v. FCC*, 355 F.3d 644, 648-49 (D.C. Cir. 2004).

EPA's lawyers also claim EPA determined that the use of fabric filters and electrostatic precipitators is only achievable for boilers larger than 10 mmBTU. EPA Br. 71 (citing EPA-HQ-OAR-2006-0790-2515, JA0643). In fact, although EPA found that the use of these technologies is achievable for larger boilers, EPA did not address this question either way for boilers smaller than 10 mmBTU. EPA certainly never suggested the converse, that their use is not achievable for those smaller boilers. Nor did EPA claim that a coal-fired boiler of 9 mmBTU cannot

utilize the same control technologies as a coal-fired boiler of 10 mmBTU, or give any reason why that would be so.

The only claim EPA made in the record is that tune-ups are the most effective control option that coal-fired boilers smaller than 10 mmBTU are currently using, not that tune-ups yield the maximum reduction "achievable." EPA Br. 71 (citing 75 Fed. Reg. 31,906/3, JA0011). Even that irrelevant claim is unsupported by the record, because EPA has virtually no data on coal-fired boilers smaller than 10 mmBTU. EPA's summary of the 2008 combustion survey results states that EPA could identify the control technology (or absence of control technology) for "0 boilers" smaller than 10 mmBTU firing coal. EPA-HQ-OAR-2006-0790-2333, app.D-3, tbl.1, JA0523 (MACT/GACT Memo).[3] Although EPA does state that the handful of coal-fired boilers between 10 and 30 mmBTU for which it has emissions data have no control technologies installed, EPA Br. 71; MACT/GACT Memo 15, JA0515, EPA did not claim this shows that a tune-up yields the maximum reduction achievable. To the contrary, EPA calculated MACT for these sources based on use of a fabric filter. EPA-HQ-OAR-2006-0790-2515 at 1-2, JA0643-44. Thus EPA did not make, and the record does not support, the

[3] The same appendix identifies one coal-fired boiler smaller than 10 mmBTU, but does not say what control technology it uses. *Id.* app.D-2, JA0521-22 ("PA Dept of Military").

conclusion that the tune-up work practice yields the "maximum" reduction "achievable" for coal-fired boilers smaller than 10 mmBTU. 42 U.S.C. §7412(d)(2), (h)(1).

Respecting the startup/shutdown work practice standard, EPA does not even claim it is consistent with §7412(d)(2)-(3). *Id.* §7412(h)(1). Instead, EPA attempts to shift the burden onto Environmental Petitioners to "identify [] alternative work practices." EPA Br. at 73. By failing to ensure that its work practice standards are consistent with §7412(d), EPA violated a clear statutory obligation. Contrary to EPA's lawyers' claims, that obligation is not contingent on commenters telling the agency which work practices it should establish.

Finally, EPA's lawyers argue irrelevantly, for both the tune-up and the startup/shutdown work practice, that Environmental Petioners have not presented evidence to undermine EPA's determination that it is impractical to monitor emissions. *Id.* 72-73. Environmental Petitioners have not done so because the impracticability of monitoring emissions is a separate requirement that goes to whether EPA may set work practice standards in lieu of numeric emission standards at all, not whether those work practice standards are consistent with §7412(d). 42 U.S.C. §7412(h)(1).

III. EPA ARBITRARILY REFUSED TO SET MACT STANDARDS FOR EMISSIONS OF HAZARDOUS METALS AND CARCINOGENS.

EPA's brief confirms that EPA did not even consider exercising its discretion to set MACT standards for emissions of non-mercury metals and carcinogens. These are the pollutants EPA has identified as most dangerous to human health under §7412(k). *Id.* §7412(k)(1). Congress set EPA the goal of reducing these emissions "subtantial[ly]" and reducing associated cancer risk by 75 percent. *Id.* EPA does not dispute that its GACT standards for these pollutants are ineffectual and fall far short of the objectives defined by Congress. *See* Env. Br. 20 (showing area-source boilers' emissions will continue virtually unchanged after imposition of standards).

Environmental Petitioners pointed out that EPA has discretion to set MACT standards for these pollutants and an obligation to rationally exercise this discretion, and that EPA failed to do so. *Id.* 31. Yet EPA fails to respond to this claim. Instead EPA recapitulates the reasons for choosing between possible GACT standards. EPA Br. 68-69 (arguing that EPA "considered the full range of potentially applicable control measures"). EPA's reasons for choosing between possible GACT standards say nothing about its rationale for refusing to set MACT standards instead. EPA does not disagree that it might have reached a different result had it exercised its discretion to require the maximum achievable reduction rather than merely the degree of reduction that results from the application of

generally available control technologies. Indeed, EPA's own analysis shows that a large proportion of existing area-source boilers already use fabric filters or electrostatic precipitators, achieving emissions reductions that are 75-99 times greater than the one-percent reduction expected from a tune-up. Env. Br. 7-8, 17.

EPA does not dispute that it had an obligation to "provide[] some reasonable explanation as to why it cannot or will not exercise its discretion." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); *see also Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (reviewing decision not to initiate rulemaking to ensure the agency "'adequately explained the facts and policy concerns it relied on and … that those facts have some basis in the record.'"); *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 994 (D.C. Cir. 2001); Env. Br. 32 (citing cases).

Because EPA's brief confirms the agency gave no reasons for selecting GACT standards over MACT standards for the metals and carcinogens identified as presenting the greatest risk to human health, EPA's decision to set GACT standards is arbitrary.

IV. EPA'S GACT STANDARDS ARE UNLAWFUL AND ARBITRARY.

A. EPA's GACT Standards Are Unlawful Because They Do Not Provide For The Use Of Generally Available Control Technology.

EPA does not respond to Environmental Petitioners' claim (Env. Br. 18, 35) that setting the standard for new coal-fired boilers between 10 and 30 mmBTUs

equal to the emissions of a boiler with no controls contravenes the statutory requirement to "provide for the use of generally available control technologies." 42 U.S.C. §7412(d)(5). It is undisputed that the GACT standards for all new coal-fired boilers larger than 10 mmBTU must reflect the use of fabric filters and electrostatic precipitators. EPA Br. 73. It therefore violates the plain language of §7412(d)(5) to base this standard on an uncontrolled boiler, especially one whose emissions exceed the fabric filter-based limit by a factor of fourteen. Env. Br. 18.

With respect to existing boilers, EPA confirms that it rejected control technologies on the ground that they are not widely used.[4] EPA Br. 75. EPA does not explain how this is consistent with the statutory command to base the standard on technology that is "available." Env. Br. 36. EPA lacks authority to rewrite the statute, *id.*, and the objective of the area-source air toxics regime was not to lock in a status quo of no control. 42 U.S.C. §7412(k)(1) ("It is the purpose of this subsection to achieve a substantial reduction in emissions").

EPA also asserts, variously, that a control technology is not "available" if it is "not practical," not "appropriate," or not "technically feasible to install." EPA Br. 74. None of these statutory interpretations correspond to the reasons the agency gave for rejecting fabric filters. 75 Fed. Reg. 31,908/2, JA0013. "[A]n agency's

[4] The record actually shows fabric filters are installed on 30 percent of coal-fired boilers. MACT/GACT Memo app.D-3, tbl.2, JA0523.

action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50.

B. EPA Arbitrarily Rejected Electrostatic Precipitators and Multiclones.

EPA's brief confirms that the agency gave no reason for rejecting electrostatic precipitators (ESPs) as the generally available control technology for existing coal- and biomass-fired boilers. It is true that EPA's concession that ESPs are "generally available" can be read to refer to new sources only; the rule preamble is ambiguous. 76 Fed Reg. 15,566/3, JA0053 ("[ESPs] are generally available and cost effective for new area source boilers"). But EPA never claimed ESPs are not generally available for existing sources. In fact the agency gave no reason at all for rejecting this "commonly required" device, *id.*, already used on a large percentage of existing boilers, MACT/GACT Memo app.D-3, tbl.2, JA0523, as GACT.

EPA's lawyers claim the agency "specifically found" that ESPs are "not practical," citing the GACT discussion at 75 Fed. Reg. 31,908, JA0013. EPA Br. 73-74. In fact, ESPs are not even mentioned there. They also cite pages 13 and 14 of the MACT/GACT Memo. *Id.* Again, ESPs are not mentioned. Next, EPA's lawyers claim that EPA found that "the only add-on control technology in use" at existing coal and biomass boilers is a multiclone, citing page 14 of the MACT/GACT Memo. *Id.* 75. But the cited page summarizes control device usage

in only two states—Pennsylvania and Wisconsin. EPA's overall summary, which appears later in the same memo, shows that ESPs are installed on 29% of existing area-source biomass boilers and 21% of existing area-source coal boilers, MACT/GACT Memo app.D-3, tbl.2, JA0523, as one would expect for a control device that EPA concedes is "commonly required." 76 Fed. Reg. 15,566/3, JA0053. Running EPA's lawyers' claims about ESPs to ground leaves EPA "with *no* reason" for rejecting this control technology; EPA's decision, therefore, is arbitrary and capricious. *S. Co. Services, Inc. v. FERC*, 416 F.3d 39, 47-48 (D.C. Cir. 2005) (emphasis in original).

EPA also arbitrarily rejected multiclones. EPA's lawyers assert that the agency determined multiclones are "not practical, and thus are not generally available." EPA Br. 74. In fact, the record shows that "GACT for existing units was determined to be a multiclone." MACT/GACT Memo 14, JA0514. But having determined that multiclones are "generally available," EPA refused to require them, reasoning that the reduction in emissions of hazardous metals from a multiclone is "comparable" to or "the same" as the reduction from a tune-up, *id.*; 75 Fed. Reg. 31,908/2, JA0013, even though the agency's own calculations show this to be false. Env. Br. 7-8, 17. EPA makes no attempt to explain this contradiction. Instead, EPA's lawyers seek now to substitute a different rationale: that multiclones "did not warrant the the cost." EPA Br. 77. But they provide no

record citation to support this claim. Once again, the Court should reject "appellate counsel's *post hoc* rationalizations for agency action." *State Farm*, 463 U.S. at 50.[5]

V. EPA ARBITRARILY EXEMPTED CONTROLLED SYNTHETIC AREA-SOURCE BOILERS FROM TITLE V.

A. EPA Arbitrarily Concluded That Controlled Synthetic Area-Source Boilers Are Equivalent To Natural Area-Source Boilers.

EPA abandons its prior claim that a lack of information about controlled synthetic area-source boilers can sustain the conclusion that Title V is unnecessarily burdensome for those boilers. EPA Br. 81. EPA now defends the Title V exemption for the controlled synthetic boilers solely on the ground that they are "equivalent to natural area sources." *Id.*; *see also id.* 83 (invoking the four-part balancing done for natural area-source boilers to defend the exemption for the controlled synthetics).

Area-source boilers vary enormously in size, Env. Br. 3, and the controlled synthetic area sources are the largest by definition: they are the estimated 48 facilities that would emit at major-source levels but for their pollution-control equipment. 75 Fed. Reg. 31,911/1, JA0016. By contrast, the many tens of

[5] EPA's lawyers also claim, with respect to multiclones but not ESPs, that EPA determined they are "cost-prohibitive and impractical to retrofit." EPA Br. 68 (citing 75 Fed. Reg. 31,908/1, JA0013). EPA's lawyers are putting words in the agency's mouth. EPA estimated the cost of multiclones, but did not claim the cost is "prohibitive," or even that the cost is high. 75 Fed. Reg. 31,908/1, JA0013. EPA did not address the practicality of retrofitting. *Id.*

thousands of natural area-source boilers are—again, by definition—boilers that are small enough to be area sources without controls. *Id.*

EPA's conclusion that the 48 controlled synthetic area-source boilers are materially "equivalent" to the many tens of thousands of natural area-source boilers is completely unsupported, inconsistent with EPA's other findings, and refuted by the record. EPA's brief does not even attempt to reconcile the equivalency finding with EPA's other findings or with the record, with the sole exception of record evidence submitted by Partnership for Policy Integrity (PFPI), which the brief rejects based on a *post hoc* rationale.

First, EPA cites nothing in the record—nothing at all—to support the conclusion that controlled synthetic area sources are equivalent to natural area sources. EPA simply cites over and over to the federal register page where EPA made the claim. EPA Br. 80-81 (citing six times to 76 Fed. Reg. 80,532, 80,538/3 (Dec. 23, 2011), JA0100). Without record support, EPA's equivalency conclusion cannot survive arbitrary and capricious review. *United Techs. Corp. v. DOD*, 601 F.3d 557, 562-63 (D.C. Cir. 2010) ("We do not defer to the agency's conclusory or unsupported suppositions.").

Second, EPA makes no attempt to reconcile its conclusion with the agency's own inconsistent statements. EPA found that the vast majority of natural area-source boilers (169,403 of them) are smaller than 10 mmBTU, and that 97 percent

are located at "small entities" like schools, not-for-profits, and local and tribal government offices. Env. Br. 21, 42. It found that the controlled synthetic area sources, by contrast, are "large facilities with comprehensive compliance programs in place," "much more like the major sources." *Id.* 21. EPA found that major-source boilers are predominantly located at industrial facilities like refineries, chemical plants, and factories, *id.* 42, and that the controlled synthetic area sources would be major sources but for their pollution controls. 75 Fed. Reg. 31,911/1, JA0016. EPA does not explain how these findings are consistent with the conclusion that the natural area sources and the controlled synthetic area sources are equivalent. EPA's conclusion is arbitrary because EPA failed to "address contrary evidence in more than a cursory fashion," *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 543-44 (D.C. Cir. 2010), and because "the only evidence in the record available to this Court actually supports the *opposite* conclusion[]." *Clark Cnty. v. FAA*, 522 F.3d 437, 441-42 (D.C. Cir. 2008) (emphasis in original).

EPA's brief ignores these arguments, pretending that Environmental Petitioners' claim rests solely on comments submitted by PFPI. EPA Br. 81-82. In fact, the contrary findings discussed above are EPA's own, and the PFPI comments are not necessary.

Nevertheless, the PFPI comments furnish additional evidence inconsistent with EPA's conclusion, which EPA ignored. EPA's lawyers now reject the PFPI

comments on the ground that the synthetic area-source boilers discussed in the comments may possibly be major sources "as defined by EPA." *Id.* 82 (citing no authority). The Court should not consider this *post hoc* argument, *State Farm*, 463 U.S. at 50, but the argument is meritless anyway. Each one of the 32 synthetic area sources identified in the PFPI comments is a biomass boiler with a fabric filter or ESP installed. EPA-HQ-OAR-2006-0790-2480 at 2, 4, JA0628, 0630. Each one has applied for or been granted an area-source permit based on its claim that its emissions with controls will fall just below the major-source threshold. *Id.* 2, JA0628. Thus the PFPI data shows, consistent with EPA's own data, that controlled synthetic area-source boilers are "large, standalone electricity-producing plants" that "overlap considerably in size with … major sources." *Id.* 3, JA0629. EPA's failure to consider or address this record evidence provides an additional reason why its equivalency conclusion is arbitrary. *Transmission Agency*, 628 F.3d at 543-44.

Finally, EPA never explained, and still has not explained, how the two classes of boilers can be "equivalent" in the relevant sense given that EPA relied on the overwhelming numbers of natural area-source boilers to justify exempting them. 75 Fed Reg. 31,912/1, JA0017 ("given the estimated 91,300 [natural] area source facilities … it would likely be difficult for them to obtain sufficient assistance from the permitting authority"). EPA has no basis to assume that the 48

controlled synthetic sources will overwhelm permitting authorities. EPA's conclusion "def[ies] good reason." *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 543 (D.C. Cir. 1999).

B. EPA Arbitrarily Concluded That The Benefits Of Title V Are Minimal Or Non-Existent For Controlled Synthetic Area-Source Boilers.

EPA does not defend its conclusion that the benefits of the Title V program are "minimal or non-existent" for the controlled synthetics. EPA-HQ-OAR-2006-0790-2330 vol.2 at 19, JA0556. EPA's brief does not even acknowledge the agency's finding that Title V is particularly "important" "to ensure [these sources] are maintaining their emissions at the area source level," Env. Br. 22, let alone explain how that finding is consistent with the conclusion that the benefits of Title V are minimal or non-existent. The brief thus confirms that the agency's reasoning was "internally inconsistent and therefore arbitrary." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011).

Nor does EPA's brief deny that the agency found Title V is "needed" for the controlled area sources. Env. Br. 22. The agency declares in a footnote that there is "no inconsistency" because a subsequent response to comments is consistent with the final determination. EPA Br. 81 n.20 (citing EPA-HQ-OAR-2006-0790-2514

at 390-91, JA0641-42).[6] By invoking the second response and ignoring the first, EPA shows—at best—that some of its findings are consistent with each other.

Unlike EPA, Industry Intervenors attempt to marshall support for the agency's dismissal of Title V's benefits, presenting a chart that purports to show that the requirements that govern state-issued area-source permits are "materially identical" to Title V. Industry Br. 4-7. This argument, which EPA has not made, is wrong for several reasons.

Intervenors first invoke the general Part 63 definition of "federally enforceable." *Id.* 6. But they cite nothing to show that the requirements applicable to controlled synthetic area sources actually must be federally enforceable as that term is defined in Part 63, and they neglect to mention that a previous attempt to require that potential-to-emit limits be "federally enforceable" was rejected in a petition for review they brought in this Court. *Nat'l Mining Ass'n v. EPA*, 59 F.3d. 1351, 1364-65 (D.C. Cir. 1995). The Industry Intervenors also neglect to mention that the area-source boiler rule adopts a different definition of "federally enforceable." 78 Fed. Reg. 7488, 7515/1 (Feb. 1, 2013), JA0142. The definition in this rule encompasses "all" requirements "enforceable by the EPA Administrator"

[6] The cited response asserts that the agency lacks information on controlled synthetic area sources, but a lack of information cannot support EPA's dismissal of the benefits of Title V, Env. Br. 40-41, and EPA no longer argues it can. EPA Br. 81.

even if they are not enforceable by citizens or in federal court, *id.*, and clearly does not serve Title V's function of enabling enforcement by "the public." Env. Br. 12.

Even if the general Part 63 definition governed here, that still would not support a conclusion that Title V's benefits are minimal or nonexistent. The definition states that some requirements of some permit programs are "enforceable by … citizens," 40 C.F.R. §63.2, but it does not furnish citizens the information needed to enforce those requirements as a practical matter. Another cited provision states that records "collected by the EPA Administrator" are publicly available, *Id.* §63.15(a)(1), but without Title V there is no assurance that relevant records ever would be "collected by" EPA in the first place. Env. Br. 44-45. Moreover, the reports that operators do provide generally do not include emissions data, only the operator's own determination of its compliance status. *Id.* 45-46. Thus even if some requirements applicable to controlled synthetic area source boilers are "enforceable by … citizens" in theory, they are not enforceable in practice without the key information available only through Title V.

Intervenors also cite several requirements under EPA's Part 51 regulations, "Requirements for Preparation, Adoption, and Submittal of Implementation Plans"—namely, 40 C.F.R. §§51.211, 51.212(b), and 51.230(f). Industry Br. 4-7. These are not hazardous air pollution provisions. State implementation plans are developed to implement the national ambient air quality standards under a different

section of the Clean Air Act—§7410. *See* 42 U.S.C. §7410; *see also, e.g.*, 51 Fed. Reg. 40,656, 40,656 (Nov. 7, 1986), JA0150 ("This rulemaking restructures and consolidates the existing regulations for the development of State implementation plans to attain the national ambient air quality standards."). Industry Intervenors cite no authority suggesting that the monitoring and reporting requirements applicable to state implementation plans for criteria pollutants require monitoring and reporting of the hazardous air pollutants at issue in this case.

CONCLUSION

The challenged rules should be remanded with instruction that EPA issue revised rules free of the defects identified in Environmental Petitioners' briefs.

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Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Final Reply Brief for Environmental Petitioners contains 5,588 words, as counted by counsel's word processing system, and thus complies with the applicable word limit established by the Court.

DATED: February 18, 2015

/s/Neil Gormley
Neil Gormley

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2015, I have served the foregoing **Final Reply Brief for Environmental Petitioners** on all registered counsel through the Court's electronic filing system (ECF).

/s/ Neil Gormley
Neil Gormley